

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Ms. Justice Aynun Nahar Siddiqua

FIRST MISCELLANEOUS APPEAL NO. 289 OF 2024.

Most. Afroza Khatun

.....Appellant.

-Versus-

Most. Jahanara Begum and others

.....Respondents.

Mr. Sheikh Mohammad Morshed, Senior Advocate
with

Mr. Masud Hasan Chowdhury with

Mr. Abdul Momin Sheikh and

Mr. Shaheb Ali, Advocates

..... For the appellant

Mr. Md. Nurul Amin, Senior Advocate

..... For Respondent No. 1

Heard on: 27.04.2026, 30.04.2026, 03.05.2026,

10.05.2026 and 12.05.2026.

Judgment on: 17.05.2026.

Md. Badruzzaman, J.

Upon an application filed under section 115(1) of the Code of Civil Procedure initially Rule was issued calling upon the opposite parties to show cause as to why order dated 07.05.2005 passed by learned District Judge, Kushtia allowing Miscellaneous Case No. 106 of 2002 *ex-parte* filed under Order XXI rule 89 of the Code of Civil Procedure and setting-aside auction sale dated 20.06.2002 should not be set aside which was registered as Civil Revision No. 2850 of 2005. Thereafter, said civil revision was converted into first miscellaneous appeal vide order dated 03.12.2024 which was

registered as First Miscellaneous Appeal No. 289 of 2024 and was duly admitted for hearing vide order dated 26.1.2026.

Facts, relevant for the purpose of disposal of this appeal, are that present respondent No. 1 (herein after referred to as the **purchaser** from mortgagor, respondent No. 3) as petitioner filed Miscellaneous Case No. 106 of 2002 under Order XXI rules 89/90 of the Code of Civil Procedure praying for setting-aside an auction sale dated 20.06.2002 held in Miscellaneous Execution Case No. 12 of 2001 by the Court of learned District Judge, Kushtia which was filed to execute *ex-parte* decree dated 18.04.2001 passed in Miscellaneous Case No. 13 of 1999 by learned District Judge, Kushtia. The case of the purchaser, as is made out in the application, is that the property described in the schedule of the application originally belonged to respondent No. 3 (the **mortgagor**) who transferred the same by two registered sale deeds being Nos. 6445 and 6451 dated 30.04.1981 in favour of the purchaser and delivered possession thereof to her. Before transfer, respondent No. 3 mortgaged the suit property to respondent No. 2, Bangladesh House Building Finance Corporation (in short the **HBFC**) against security of loan availed by him from HBFC and to realize the outstanding dues HBFC filed Miscellaneous Case No. 13 of 1999 in the Court of learned District Judge, Kushtia which was decreed *ex-parte* vide judgment and decree dated 18.04.2001. HBFC then filed Miscellaneous Execution Case No. 12 of 2001 in the same Court to execute the decree. In course of execution proceeding, the mortgaged-property was put to auction on 20.06.2002 and the mortgagor (respondent No. 3) purchased the property in auction at a consideration of Tk. 1,14,500/- (Taka One Lac Fourteen Thousand and Five Hundred) only in the *benam* of his

daughter-in-law, the appellant (herein after referred to as the **auction purchaser**). Having learnt about the same from the mortgagor on 17.08.2002, the purchaser filed the miscellaneous case for setting aside the auction sale. It has also stated that the mortgagor had been possessing the suit property as a tenant under the purchaser and in the meantime, she got decree of eviction against him in S.C.C. Suit No. 6 of 1995 but the mortgagor did not vacate the suit premises. Upon suppression of facts about mortgage, the mortgagor sold the suit property to the purchaser. Though the purchaser was a party to the original proceeding as well as execution proceeding but no notice or summons was served upon her. By fraudulent means, the mortgagor purchased the suit property in auction in the *benam* of his daughter-in-law and as such, the auction sale is liable to be set-aside.

The appellant, auction purchaser, filed written objection denying the material averments of the application contending that the case is not maintainable in its present form; that there is no cause of action of the case; that the purchaser has no *locus standi* to file the case and that it is barred by limitation. Her positive case is that the suit property belonged to Abdul Mannan (the mortgagor) who took loan from the HBFC for construction of residential building thereon and as security of loan he mortgaged the suit land vide registered mortgage deed No. 19540 dated 12.12.1995 and constructed two storied residential building in the suit land with the loan money obtained from the HBFC. Since the mortgagor failed to repay the outstanding dues, the HBFC filed Miscellaneous Case No. 13 of 1999 in the Court of learned District Judge, Kushtia against the mortgagor for realization of the outstanding dues which was allowed

ex-parte vide judgment and decree dated 18.04.2001. Thereafter, decree-holder, HBFC, filed Miscellaneous Execution Case No. 12 of 2001 to execute the decree before the learned District Judge, Kushtia and after observing due process, the mortgaged-property was put to auction and the appellant, as the highest bidder, purchased the suit property in auction held on 20.06.2002 at a consideration of Tk. 1,14,500/- (Taka One Lac Fourteen Thousand and Five Hundred) only and deposited said amount before the execution Court. The sale deeds executed by the mortgagor in favour of the purchaser are null and void because of the fact that the mortgagor had no right to transfer the suit mortgaged-property without prior permission of the HBFC and accordingly, the transferee from mortgagor acquired no right, title or interest in the suit property. Moreover, the possession of the suit property was not handed over to the so-called purchaser. After fulfilling all requirements of law, auction was held and there was no irregularity or fraud in conducting the auction sale. In order to frustrate the auction purchaser's right, title and interest in the suit property the purchaser has filed the case which is liable to be dismissed.

In course of hearing, the purchaser adduced herself as Ptr. W 1 but the auction-purchaser did not adduce any witness and the miscellaneous case was heard and disposed of *ex-parte* and vide impugned order dated 07.05.2005, the learned District Judge allowed the miscellaneous case and set-aside the auction sale which has been challenged by the auction-purchaser in this appeal.

Mr. Sheikh Mohammad Morshed, learned Senior Advocate appearing for the appellant submits that admittedly, the mortgaged-property was transferred by the mortgagor to respondent No. 1

without prior permission of the HBFC and as such, those transfers cannot be treated as valid and legal and by those transfers the transferee could acquire any right, title or interest in the mortgaged-property. Learned Advocate further submits, the subsequent transfers without consent of the mortgagee and without repaying the outstanding dues was a fraudulent act and it is by now well settled that fraud vitiates everything. Learned Advocate further submits that respondent No. 1 did not file the miscellaneous case and deposit the required amount within 30 days from the date of auction sale and as such, the case is barred by limitation. Learned Advocate further submits that no irregularity or fraud was committed in holding auction sale and as such, the application cannot be treated as one under Order XXI rule 90 of the Code of Civil Procedure. Learned Advocate further submits that unless the decree is challenged by the mortgagor or the purchaser on the ground of fraud, the auction sale cannot be set aside under Order XXI rule 90 of the Code of Civil Procedure.

On the other hand, Mr. Nurul Amin, learned Senior Advocate appearing for respondent No. 1 submits that the trial Court upon proper appreciation of law and facts allowed the miscellaneous case. Learned Advocate further submits that no summons or process of the miscellaneous case as well as the execution proceeding was served upon respondent No. 1 though she was a party to said proceedings and as such, fraud was committed upon the Court in holding the auction. Learned Advocate further submits that allegations of fraud and material irregularity in publishing and conducting auction were pleaded in the application of the miscellaneous case inasmuch as that though the auction purchaser

filed written objection but thereafter, did not contest the case by adducing evidence and as such, the case has been proved. Learned Advocate further submits that though the miscellaneous case was filed by insertion of rules 89/90 of Order XXI of the Code of Civil Procedure but in fact it was one under Order XXI Rule 90 of the Code of Civil Procedure and it is a settled principle of law that mentioning of wrong section in an application or mistake committed by the Advocate in drafting an application, cannot be taken as a ground for punishing the litigant and such mistake or wrong mentioning of section cannot in any way deprive of a litigant of his legal entitlement under the law. In this connection learned Advocate has referred to the case of *Quamrul Huda vs. Mohammad Nazrul Islam Alam*, 27 BLC 218. Learned Advocate further submits that the interest of respondent No. 1 was affected by auction sale and as such, she is entitled to apply to the Court to set aside the auction sale under Order XXI rule 90 of the Code of Civil Procedure on the ground of material irregularity or fraud in publishing and conducting it. In support of this contention learned Advocate has referred to the case of *Kamal Hossain vs. Sub-ordinate Judge and Artha Rin Adalat & Ors*, 15 BLC (AD) 177. Learned Advocate further submits that the learned District Judge rightly allowed the miscellaneous case and set-aside the auction sale and as such, interference is not called for by this Court.

In reply to the submissions of learned Advocate for the respondent, Mr. Sheikh Mohammad Morshed submits that respondent No.1 purchased the mortgaged-property with her full knowledge about the mortgage because she paid some instalments against the loan before the HBFC and she was also a party to the

original proceeding as well as execution proceeding and as such, the decree is binding upon her inasmuch as no notice is required to be served upon her in the execution proceeding.

We have heard the learned Advocates, perused the application filed under Order XXI rules 89/90 of Code of Civil Procedure, written objection filed by the appellant, the impugned order passed by the Court below and other materials available on record. It has been contended by respondent No. 1 in the application filed under Order XXI rules 89/90 of the Code of Civil Procedure that respondent No 3, Abdul Mannan was owner of the suit property who transferred the same by two registered sale deeds on 30.04.1991 in her favour and that before such transfer Abdul Mannan mortgaged his property to the HBFC against the loan obtained by him and the HBFC got *ex-parte* decree on 18.04.2001 in Miscellaneous Case No. 13 of 1999.

Admittedly, the suit property was mortgaged by the real owner Abdul Mannan to HBFC against security of loan obtained by him and he executed and registered mortgage deed on 12.12.1975 in favour of the HBFC. Purchaser, Jahanara Begum claimed that said Abdul Mannan transferred said property by two registered sale deeds in her favour in 1981. It is also admitted that the HBFC filed Miscellaneous Case No. 13 of 99 before the District Judge, Kushtia in which respondent No. 1 (subsequent purchaser) was a party and the HBFC got *ex-parte* decree vide judgment and decree dated 18.04.2001. The mortgagor or transferee from him did not challenge the *ex-parte* decree before any forum as per law. When the execution case was started and the suit property was sold in auction to the appellant, one of the judgment debtors namely the subsequent transferee filed Miscellaneous Case under Order XXI

rules 89/90 of the Code of Civil Procedure for setting-aside the auction sale.

Now we have to consider whether the application was competent in view of the provisions under rule 89 or rule 90 of Order XXI of the Code of Civil Procedure for setting-aside the auction sale.

For ready reference rule 89 of Order XXI of the Code of Civil Procedure is reproduced below:

“89. (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to the Court to have the sale set aside on depositing in Court,-

(a) for payment to the purchaser, a sum equal to five percent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not unless he withdraws his application, be entitled to make or prosecute an application under this rule.

Rule 89 of Order XXI of the Code aims at putting an end to all kinds of contentions and disputes. The rule affords a last chance to the judgment-debtor to save his property and it is an indulgence to him. Deposit under clauses (a) and (b) of sub-rule (1) of rule 89 is a

condition precedent or a sine qua non to the making an application for setting aside the auction sale under this rule and such amount must be deposited within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed.

Rule 92(2) of Order XXI of the Code stipulates that where an application under rule 89 is made and the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale. In other words, if an application under rule 89 of Order XXI of the Code is filed for setting aside the auction sale but the deposit required by rule 89 is not made within thirty days from the date of sale, the Court shall not make an order setting aside the sale.

According to Article 166 of the Limitation Act, 1908 period of limitation for filing an application to set aside a sale in execution of a decree is 30 days from the date of sale.

A combined reading of Article 166 of the Limitation Act, sub-rule (1) of rule 89 and sub-rule (2) of rule 92 of Order XXI of the Code of Civil Procedure clearly suggests that an application for setting aside auction sale under rule 89 is to be made within 30 days from the date of sale, deposit of requisite amount as per clauses (a) and (b) of sub-rule (1) is a condition precedent to such application which is to made within thirty days from the date of sale and if the application is not filed and deposit is not made within the specified period, the application must be dismissed.

In the instant case, the suit property was sold in auction on 20.6.2002, judgment-debtor-respondent No. 1 filed the application for setting aside the auction sale on 21.8.2002 and deposited the

required amount by Treasury Challan on 3.9.2002. Even if it is taken that the application was one under Order XXI rule 89 of the Code but it was not filed within 30 days from the date of auction sale as per provision under Article 166 of the Limitation Act, 1908 and as such, it was barred by limitation. Moreover, respondent No. 1 did not deposit the required amount as per rule 89(1) within thirty days from the date of auction sale as per rule 92(2) and as such, there was no scope on the part of the Court to allow the application and making an order setting aside the sale.

Moreover, according to sub-rule (2) of rule 89 a person cannot be allowed to prosecute two applications under rule 89 and rule 90 of Order XXI of the Code of Civil Procedure simultaneously. Respondent No. 1 filed the application under rules 89/90 of Order XXI of the Code for setting aside the auction sale which means that respondent No. 1 chose two forums simultaneously available under rule 89 or rule 90 of Order XXI of the Code which is not permissible under law. She did not withdraw or delete rule 90 of Order XXI from the application during the trial of the miscellaneous case and as such, she had no right to proceed with the application treating it as one under Order XXI Rule 89 of the Code.

It appears that the learned District Judge while passing the impugned order, treated the application as one under Order XXI rule 89 of the Code of Civil Procedure and by allowing it set aside the auction sale without taking into consideration that in view of the provisions under Article 166 of the Limitation Act, the application was barred by limitation and that since the deposit required by rule 89(1) was not made within thirty days from the date of sale in view of the provisions under rule 92(2), there was no scope to allow the

application and set aside the auction sale. On that score, the impugned order is illegal.

The learned Advocate for respondent No. 1 submitted that misquotation of the provision of rule 89 instead of rule 90 of Order XXI of the Code of Civil Procedure cannot affect the legal entitlement of the respondent in view of the decision of *Quamrul Huda vs. Mohammad Nazrul Islam Alam*, 27 BLC 218. In said case a Division Bench held that '*mentioning of wrong section in an application, or mistake committed by the Advocate in drafting an application, cannot be taken as a ground for punishing the litigant and such mistake or wrong mentioning of section cannot in any way deprive of a litigant of his legal entitlement under the law*'. We are in respectful agreement with the view taken by the Division Bench. Accordingly, we would examine whether respondent No. 1 was entitled to any remedy under Order XXI rule 90 of the Code of Civil Procedure.

Rule 90 Order XXI of the Code provides that where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing and conducting it. Provided that no sale shall be set aside on the ground of irregularity or fraud unless, upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Rule 90 of Order XXI of the Code empowers the court to set aside a sale of immovable property held in execution of a decree on the application of decree-holder or other persons whose interest

have been affected by the sale, on the ground of irregularity or fraud in publishing or conducting the sale, provided the applicant has sustained substantial injury by such irregularity or fraud.

It is contended by respondent No. 1 that no notice was served upon her about the execution process and fraud was committed upon the court in proceeding with the execution case as well as holding auction and as such, she is entitled to the relief provided under Rule 90 of Order XXI of the CPC.

In respect of service of process in an execution proceeding rule 22 of Order XXI is applicable which runs as follows:

“22. Notice of show cause against execution in certain cases.

(1) Where an application for execution is made-

(a) more than two years after the date of the decree, or

(b) against the legal representative of party to the decree, or where an application is made for execution of a decree filed under the provisions of section 44A, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

(2).....

(3) No order of execution of the decree shall be invalid by reason of the omission to issue a notice under sub-rule (1) or to record reasons in a case where a notice is dispensed with under sub-rule (2) unless the judgment-debtor has sustained substantial injury by reason of such omission.” (underlined to give emphasis)

The object of rule 22(1) of Order XXI of the Code is to afford an opportunity to the person against whom execution is applied for to urge any objection that he may have to the maintainability of the execution application, and to prevent his being taken by surprise when the execution is taken after the lapse of the period prescribed and to enable him to satisfy the decree before execution is issued against him [Ref: Erava v. Sidramappa, ILR 21 Bom. 424]. The notice is imperative and shall be issued where the application is made-

- (i) more than two years after the date of the decree; or
- (ii) against the legal representative of party to the decree;
- or
- (iii) for execution of a decree filed under the provisions of section 44A,

Provisions of rule 22 of Order XXI indicates that where an application for execution is made within two years from the date of passing of the decree, notice upon the judgement-debtor is not required to be served.

According to sub-rule (1) of rule 22 of Order XXI of the Code, if an application for execution of a decree is made more than two years after the date of the decree, issuance of notice against the judgment-debtor is mandatory but according to sub-rule (3) of rule 22, no order of execution of decree shall be invalid by reason of omission to issue a notice under sub-rule (1). So, the provision of sub-rule (1) of rule 22 became redundant after incorporation of sub-rule (3) in Order XXI of the Code which follows that even if an application for execution is made more than two years after the date of the decree, the order of execution of the decree shall not be invalid by reason of the omission to issue a notice against the judgment-debtor.

In the instant case, respondent No. 1 was one of the judgment-debtors. The *ex-parte* decree was passed on 18.4.2001 and the execution case was filed on 3.9.2001 i.e within five months from the date of passing of the decree and as such, no notice was required to be served upon her. Accordingly, we are of the view that even if it is presumed that the notice was suppressed but for that reason no fraud was committed upon the Court in proceeding with execution case.

Now we will consider whether respondent No. 1 sustained any substantial injury by reason of the auction sale.

Admittedly, before purchase by respondent No. 1, the suit property was mortgaged by respondent No. 3 in favour of House Building Finance Corporation against the security of loan availed by him.

An immovable property which is given as a security against a loan is known as mortgaged property. Section 58 of the Transfer of Property Act, 1882 stipulates that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or debt. Where, without delivering possession of the mortgage property, the mortgagor binds himself personally to pay the mortgage-money, and agrees that in the event of his failing to repay the loan according to his contract, the mortgagee shall have the right to cause the mortgage property to be sold and the proceeds of sale to be applied in payment of the mortgage-money, the transaction is called a simple mortgage.

In the instant case, the mortgagor did not deliver possession of the mortgage property to the mortgagee House Building Finance

Corporation (HBFC) but agreed to pay the loan amount and failing which he agreed that the mortgagee shall have the right to sell the property, if he fails to repay the loan amount. Accordingly, this was a simple mortgage.

As per section 60 of the Transfer of Property Act, the right of redemption is available to the mortgagor after the principal loan amount has become due and paid. Section 60A of the Transfer of Property Act allows the mortgagor to require the mortgagee to assign the mortgage debt and transfer mortgagor's property to such third party as the mortgagor may direct and the mortgagee shall be bound to obey such direction of the mortgagor.

Therefore, under section 60A of the Transfer of Property Act a transfer of mortgaged-property by sale in favour of third party can be made because the mortgagor is still the owner. However, when the third party would buy the property from the mortgagor, he will be buying the right to redemption because that is what the mortgagor has with him. He can then redeem the property and enjoy subrogation. He cannot have a better right than the mortgagor. It is the responsibility of the third party to make a proper inquiry before purchasing the property from the mortgagor and ask him to clear the incumbent.

Section 48 of the Transfer of the Property Act deals with the doctrine of priority. It provides protection to the mortgagee from subsequent transactions created by the mortgagor over the same property. If a man creates subsequent interest in the same immovable property which cannot be enjoyed to their full extent or conflicts with each other, such right which is created after the prior one would be subjected to the previously created right unless there

is some contract binding prior transferee. Thus, the mortgagor cannot prejudice the rights of the mortgagee by creating subsequent interests in the same immovable property. The mortgagor is capable of creating subsequent mortgage or sell the property if he has the title deed, but the doctrine of priority would not allow him to refrain the prior mortgagee from enjoying his rights. This is based upon the doctrine "first in time, first in law". Simply saying, the third party-purchaser, after purchase of the mortgage-property, steps into the shoes of the mortgagor.

In *Sayed Jubayer Hossain vs. Aratha Rin Adalat*, 28 BLC (AD) 50, the Hon'ble Appellate Division held that "*after mortgaging the property in question to the Bank, subsequent transfer of the same to others without the consent of mortgagee-bank by the mortgagor without the view of repaying the loan is nothing, but a fraudulent act and it is by now well settled that fraud vitiates everything.*"

The provisions of the Transfer of the Property Act, as discussed above, as well as the law declared by the Hon'ble Appellate Division in *Sayed Jubayer Hossain*, 28 BLC(AD) 50 (*supra*), clearly suggest that if an immovable property is mortgaged against security of loan empowering the mortgagee to sell the mortgaged-property in the event of his failing to repay the loan according to his contract, the mortgagee shall have the right to sell the property and if after mortgaging the property, the mortgagor transfers the same to others without the consent of mortgagee without the view of repaying the loan is nothing, but a fraudulent act and by dint of such transfer, the subsequent transferee will not acquire any right, title or interest in the mortgaged-property.

In the instant case, the mortgagor neither took permission from House Building Finance Corporation (HBFC) before he had transferred the mortgaged-property to Jahanara Begum, respondent No. 1 nor repaid the loan amount before the transfer. As such, in view of the relevant provisions of Transfer of the Property Act, as discussed above, as well as the law declared by the Hon'ble Appellate Division in *Sayed Jubayer Hossain (supra)* the transaction was a fraudulent one and by dint of such transfer, respondent No. 1 could not acquire any right, title or interest in the suit property. Accordingly, no substantial injury was sustained to respondent No.1 for selling the suit property in auction to the appellant in view of the provisions under rule 90 of Order XXI of the Code of Civil Procedure. Moreover, from the record of the execution case, it appears that before holding auction, the proclamation was published in different local newspapers, the appellant and three others participated in the bid and the highest bid offered by the appellant was accepted. Learned Advocate for respondent No.1 contended that since the suit property was purchased by the daughter-in-law of the mortgagor-judgment-debtor, it is to be considered as a material irregularity or fraud but we are not inclined to accept this contention because of the fact that even a judgment-debtor has a right to purchase the mortgage-property sold in auction in an execution proceeding. In view of the above, no remedy is available to respondent No.1 under rule 90 of Order XXI of the Code to set aside the impugned auction-sale of the suit property.

On perusal of impugned order, it appears that the learned District Judge without consulting relevant provisions of law illegally

set aside the auction-sale with some irrelevant findings and as such, interference is called for by this Court.

In view of the above, we find merit in this appeal.

In the result, the appeal is allowed, however, without any order as to costs.

The impugned order dated 07.05.2005 passed by learned District Judge, Kushtia allowing Miscellaneous Case No. 106 of 2002 is set-aside.

The order of stay granted earlier is hereby vacated.

The learned District Judge, Kushtia is directed to dispose of Miscellaneous Execution Case No. 12 of 2001 in accordance with law.

Send down the LCR along with a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Justice Aynun Nahar Siddiqua)