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IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION, DHAKA

(Civil Appellate Jurisdiction)

25 JAN 2015

Appeal from Original Order F.M.A. No. 64/2013.

The 23rd day of October, 2014

Present:

Mr. Justice Farid Ahmed

And

Mr. Justice Muhammad Khurshid Alam Sarkar

2(two) of the Judge's of this Court.

In the matter of:

An appeal from Original Order F. M. A. No. 64/2013 preferred to this Court against the Order dated 18.09.2012 passed by the Learned Judge Artha Rin Adalat No. 1, in Artha Jari Case No. 204/2010.

-And-

In the matter of:

Sonali Bank Limited.

.....Appellant.

-Versus-

M/S. Asa Tex International and other's

.....Respondents.

Court's Judgment Dated 23.10.2014(In Separate Sheets) .

Present:
Mr. Justice Farid Ahmed
And
Mr. Justice Muhammad Khurshid Alam Sarkar

First Miscellaneous Appeal No. 64 of 2013.

Sonali Bank Limited ..... Appellant.

-Versus-

M/S Asa Tex International and others
..... Respondents.

Mr. M. Khaled Ahmed with
Mr. Ashiqur Rahman, Advocates,
..... For the appellant.

Mr. Md. Mesbahul Islam Asif with
Mr. Md. Mofizur Rahman and
Mr. Md. Jasimuddin, Advocates
..... For respondent nos. 2-4.

Mr. Sikder Mahmudur Razi, Advocate,
... For respondent no. 5.

Heard on: 11.09.2014, 14.09.2014, 21.10.2014 and Judgment on 23.10.2014.

MUHAMMAD KHURSHID ALAM SARKAR, J.

This appeal has been preferred by the Sonali Bank Limited, who is the plaintiff-decree holder-appellant, questioning the legality and propriety of the order dated 18.09.2012 passed by the Judge, Artha Rin Adalat No. 1, Dhaka in Artha Jari Case no. 204 of 2010 rejecting the decree holder's application for cancellation of the auction.

On 26.07.2009 the Sonali Bank limited (hereinafter referred to as the decree holder or the bank) instituted Artharin Suit no. 66 of 2009 for realization of its loan of an amount of Taka

5,07,21,701/- from respondent nos. 1-4 and the Artharin Adalat no. 1, Dhaka (hereinafter called Adalat) decreed the suit on 15.04.2010 for an amount of Taka 5,68,59,303/-, including interest, to be paid by respondent nos. 1-4. Pursuant to the aforesaid decree, the Bank on 30.11.2010 filed Artha Rin Execution case no. 204 of 2010 in the Adalat for realization of the decretal amount with interest @ 12% thereto to be accrued till the payment of the decretal amount. When the Adalat (execution court) vide its order no. 23 sold all three mortgaged properties on 18.09.2012 at a price of Tk. 1,40,00,000/- (one crore and forty lacs only), then, on the same date the bank filed an application before the said Adalat under Section 33(২গ)(2"ga") for non-acceptance of the offer of the highest bidder and, thereby, to proceed for fresh tender but the Adalat rejected the said application. On the following day, the bank filed another application for cancellation of the acceptance of the offer of the highest bidder on the ground that the price quoted was too low compared to the market value of the properties and was not efficient for realization of the bank's loan but the said application was also rejected by the Adalat and, then, the bank preferred this appeal assailing the Adalat's order no. 23 dated 18.09.2012.

The highest bidder appeared before this Court and added itself as respondent no. 5. It is the case of respondent no. 5 that 3

bidders participated in the tender and among them respondent no. 5 having offered Tk. 1,40,00,000/- became the highest bidder as the second highest bidder's offer was Tk. 72,75,000/- and the third bidder's offer was Tk. 36,00,000/-. It has been contended that since, in the bank's application, the auction price was not expressly stated to be too low compared to the present market value, and since the bank has not raised any specific allegations of fraud in the auction arrangement, the Adalat has rightly rejected the bank's application for cancellation of the auction sale.

Respondent nos. 2-4 appeared in the appeal having alleged that fraud has been practiced, firstly, in obtaining the decree and, thereafter, in selling out their valuable properties at a shockingly low price. It is contended that an application filed by them under Order 21 rule 90 of the Code of Civil Procedure (CPC) is being awaited to be heard and disposed of by the Adalat (execution court) but due to the order of stay passed by this Court, the same remains pending before the said Adalat.

Mr. M. Khaled Ahmed, the learned Advocate appearing for the appellant, submits that 3 properties had been mortgaged by the respondent nos. 2-4 as security against the loan taken from the bank and the present market value of the said three properties is more than 20 crores as the property under the Schedule (ka) of a quantum

of 36 decimals is situated in the Gazipur Sadar, the 'kha' Scheduled property of a quantum of 14 decimals of land also is situated within Gazipur Sadar and the property under 'gha' Schedule of a quantum of 7.84 decimals of land is situated in the Metropolitan City of Dhaka at Mohakhali. He strenuously canvasses that while the decretal amount is 6 crores and the present dues with interest to date have exceeded the figure of TK. 6 crores, the Adalat's order dated 18.09.2012, selling the property at a price of Tk. 1,40,00,000/- is too low to realize the decretal amount of the bank. He argues that the bank filed an application before the Adalat on the date of auction with a prayer for rejection of the bids offered on the said date and, thereby, arrangements for fresh tender as the price quoted by the highest bidder was too low for realization of the decretal amount but the Adalat rejected the application filed by the bank on a frivolous ground that since no allegation as to the price being too low had been specifically mentioned in the application, there was no reason to stop the auction sale.

By placing Section 33(2"ga") of the Artharin Adalat Ain, 2003 (hereinafter referred to as the Ain, 2003) the learned Advocate for the decree holder-bank proferrs that it was imperative upon the Adalat to take the application of the bank into consideration when the bank had requested the Adalat to proceed for arranging a fresh

tender. He takes us through the contents of the application filed by the decree-holder bank on 18.09.2010 before the said Adalat and submits that the said application has been filed with a request to ignore the offer of the highest bidder inasmuch as, on the one hand, the decretal amount would not be realized from the price quoted by the highest bidder and, on the other, there would be no other security left for realization of the debt and, thus, placing the decree-holder bank in a vulnerable position to recover the remaining debt from the debtor. He submits that the Sonali Bank Ltd is a state-owned bank and if the bank incurs financial loss because of the impugned order, ultimately it is the public who will suffer the said financial loss and, thus, for public interest the impugned order is liable to be set aside.

In his humble endeavouring to candidly controvert the submissions of the learned Advocate for the added respondent no. 5 on the issue of maintainability of the instant appeal, he places Section 7 of the repealed Artha Rin Adalat Ain, 1990 and side by side Section 41 of the Ain, 2003 and submits that previously there was no provision for preferring any appeal against an order passed by the Artha Rin Adalat and after Section 41 of the Ain, 2003, was incorporated, the legal scenario has changed; under the provisions of the present law 'any party to the suit' is entitled to prefer an

appeal against an order. Then, he places the Preamble together with Sections 2, 3, 5 and 6 of the Ain, 2003 and submits that the Ain, 2003 is a special law which holds a special status in the hierarchy of laws and has an overriding effect on all other laws of the land. He, thereafter, places Section 44 of the Ain, 2003 and submits that the provisions laid down in this section should be read and applied in conjunction with the provisions of Preamble, Sections 2-5, 12, 22, 23, 31, 33, 41, 45 and 57 of the Ain, 2003 inasmuch as the scheme of this special Act dictates that the Artharin Adalats should take necessary steps for realization of the bank's due debts. Lastly, he submits that since the appeal is the proper forum under Section 41of the Ain, 2003, no writ would lie against an order passed by the Artha Rin Adalat and in support of his submissions he places an unreported judgment passed in Writ Petition No. 5746 of 2005. He submits that the principle laid down in the cases referred to by the learned Advocate for respondent no. 5 as to non-availability of the appellate or the revisional forum in challenging an order of Artharin Adalat is not applicable to this case as the facts of the referred cases are completely different from the present case and, further, after making provisions for appeal against the Adalat's order in the Ain, 2003 the *ratio* of the cases cited by the learned Advocate for the appellant has lost its force. By making the

aforesaid submissions the learned Advocate for the appellant prays for setting aside the impugned order.

Mr. Md. Mesbahul Islam Asif, the learned Advocate appearing for respondent nos. 2-4, submits that fraud has been practiced in obtaining the decree as the decree has been obtained in their absence and, furthermore, the execution case proceeded without notifying them and when they came to know about the sale of their properties at a shockingly low price, they had filed an application under Order 21 rule 90 of the CPC for cancellation of the auction sale. He submits that though the Adalat (execution court) is the right forum for cancellation of the auction under Order 21 rule 90 of the CPC and their application has not been disposed of by the Adalat due to the operation of the order of stay passed by this Court, however, since this Court is in seisin of the matter, their grievance may be mitigated if the order of auction sale is set aside by this Court and, accordingly, the learned Advocate for respondent nos. 2-4 prays for setting aside the impugned order or, in the alternative, for remanding the appeal back to the Adalat for disposal of their application filed under Order 21 rule 90 of the CPC.

Mr. Sikder Mahmudur Razi, the learned Advocate appearing for added respondent no. 5, at the very outset of his submissions picks up the technical aspect of this appeal for our consideration

and proferrs that the present appeal is not maintainable as the order impugned in this appeal is not a final order. He, in an endeavour to interpret the words 'ডিক্রী বা আদেশ' এবং 'অন্তবর্তীকালীন আদেশ', takes us through Section 41(1) and 44 of the Ain, 2003 and submits that the order impugned here, in this appeal, is not an order as contemplated in the provisions of Section 41(1) inasmuch as, from concurrent reading of Sections 41 and 44 of the Ain, 2003 the only meaning apparently emerges is that the 'order' should be a final order. To substantiate the above submissions he places the meaning of 'Final Order' from the Black's Law Dictionary (8th edition at page 1130) and posits that final order, as defined therein, means "an order that is dispositive of the entire case" and the term "interlocutory order" has been defined as "an order that relates to some intermediate matters in the case, any order other than a final order" and, on top of furnishing the dictionary meaning, he refers to the case of Trade Multi Plex Vs Artharin Adalat 62 DLR 533 in support of his above submissions. He emphatically submits that since Section 44 of the Ain, 2003 unambiguously provides that an order passed by the Artha Rin Adalat, having the status of interlocutory order, is not competent to be challenged by way of appeal and, thus, forum under Article 102(2)(a)(ii) of the Constitution should have been availed of. In support of his submissions the learned Advocate for

the added respondent no. 5 refers to a list of cases of the Apex Court and this Court which are as follows: Harum-Or-Rashid (Md) Vs Pubali Bank Ltd and others 60 DLR(AD) 18, Antibiotic Stores and others Vs Subordinate Judge 55 DLR(AD) 13, Bulbul Electric Market & others Vs Rupali Bank Ltd 11MLR 409, Hosne Ara Begum Vs Islami Bank Bangladesh Ltd 5 MLR (AD) 290, Sardar Jan-e-Alam Vs Arab Bangladesh Bank Limited and others 4 BLC(AD) 178, Sultana Jute Mills Ltd. Vs Agrani Bank 46 DLR(AD) 174, Sonali Bank Vs Ali Tennery 48 DLR 57, Kazi Gowaherul Islam Vs Standard Cooperative 50 DLR 431, Iftekhar Afzal Vs Pubali Bank Ltd 50 DLR 623, Syed Monjur Morshed and another Vs Manager, Agrani Bank Ltd. 14 BLC (HCD) 501 and Awlad Hossain Vs Bangladesh Shilpa Bank and others 30 BLD (HCD) 314.

With regard to the legality of the impugned order, Mr. Razi argues that one property is situated at an awkward location in the Mohakhali area of Dhaka and the other two are agricultural lands in Gazipur and, as such, the offer made by the added respondent is the correct price in the light of present market value of the said properties and the Adalat has accepted the offer of the highest bidder having been satisfied with the issue of the present market value. He submits that the courts of this country, in carrying out

their functions under the special statute, primarily follow the procedures laid down in the said special statutes on top of the procedures prescribed in the CPC and, thus, for cancellation or setting aside the auction, the bank ought to have expressly raised allegation of sale price to be low in its application in clearer statements or the bank could have filed an application under Order 21 rule 90 of the CPC and in the light of the fact that the bank did not make the appropriate application before the Adalat, no illegality has been committed by the said Adalat. With his above submissions, for which apparently he had to put huge but impressive efforts, he prays for dismissing the appeal.

We have heard the learned Advocates for all the sides, perused the entire papers appended to and compiled in the Paper Book, including the Memo of Appeal together with the grounds taken therein for preferring this appeal, and the laws and decisions placed before this Court for our consideration.

Since the question of maintainability of the present appeal has been raised by the added respondent no. 5, this Court is required to deal with the said issue at first before embarking upon the substantial issue of the appeal.

To deal with the aforesaid technical issue, we should look at the provisions of Section 41(1) of the Ain, 2003 which run as follows:

> ৪১(১). মামলার কোন পক্ষ, কোন অর্থ ঋণ আদালতের আদেশ বা ডিক্রী দ্বারা সংক্ষুব্ধ হইলে, যদি ডিক্রীকৃত টাকার পরিমাণ ৫০ (পঞ্চাশ) লক্ষ টাকা অপেক্ষা অধিক হয়, তাহা হইলে উপ-ধারা (২) এর বিধান সাপেক্ষে, পরবর্তী ৬০ (ষাট) দিবসের মধ্যে হাইকোর্ট বিভাগে, এবং যদি ডিক্রীকৃত টাকার পরিমাণ ৫০ (পঞ্চাশ) লক্ষ টাকা অথবা তদঅপেক্ষা কম হয়, তাহা হইলে পরবর্তী ৩০ (ত্রিশ) দিবসের মধ্যে জেলা জজ আদালতে আপীল করিতে পারিবেন।
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> (২) আপীলকারী, ডিক্রীকৃত টাকার পরিমাণের ৫০% এর সমপরিমাণ টাকা বাদীর দাবীর আংশিক স্বীকৃতিস্বরূপ নগদ ডিক্রীদার আর্থিক প্রতিষ্ঠানে, অথবা বাদীর দাবী স্বীকার না করিলে, জামানতস্বরূপ ডিক্রী প্রদানকারী আদালতে জমা করিয়া উক্তরূপ জমার প্রমাণ দরখাস্ত বা আপীলের মেমোর সহিত আদালতে দাখিল না করিলে, উপ-ধারা (১) এর অধীন কোন আপীল কার্যার্থে গৃহীত হইবে না। (underlined by us)

From a plain reading of the above provisions of the Ain-2003, it appears that 'any party to the suit' (মামলার কোন পক্ষ) is competent to prefer an appeal if aggrieved by a decree (ডিক্রী) or by an order (আদেশ). The words "ডিক্রী বা আদেশ" are clearly disjunctive words and, thus, under the present form of the law, an order of the Adalat is appealable, which was not the position in the repealed Artharin Adalat Ain, 1990. However, since the above provisions has been made applicable only after fulfillment of the conditions as to depositing the 50% of the decretal amount and maintaining the time of limitation of 60 (sixty) days for the decretal amount of more than 50 (fifty) lacs, and 30 (thirty days) for the decretal amount of less than 50 (fifty) lacs, for preferring an appeal, as stipulated in

Section 41(2) of the Ain, 2003, the provisions of right to preferring an appeal against an order appears to be available only at the post-decree-phase, thereby, not at the pre-decree-stage as from the concurrent reading of both the Sections 41(1) or 41(2) of the Ain, 2003 it appears that the law prominently emphasises on the words "ডিক্রীকৃত টাকার পরিমাণ", which means that the law allows the parties to the suit to prefer an appeal only against those orders which have been passed after pronouncement of the judgment and decree in an artharin suit.

Furthermore, Section 31 of the Ain, 2003, which is quoted below, also indicates that an appeal lies against an order.

> ৩১. অর্থ ঋণ আদালত কর্তৃক প্রদত্ত কোন আদেশ বা ডিক্রীর বিরুদ্ধে আপীল বা রিভিশন উচ্চতর আদালতে দায়ের করা হইলে উহা স্বয়ংক্রিয়ভাবে জারীর কার্যধারা স্থগিত করিবে না; উচ্চতর আদালত সুস্পষ্টভাবে তদুদ্দেশ্যে স্থগিতাদেশ প্রদান করিলেই কেবল জারীর কার্যধারা তদ্অনুযায়ী স্থগিত থাকিবে। (underlined by us)

The above provisions of law, in course of enumerating the provision for staying the execution process, unambiguously speak of an appeal filed against an order passed by the artharin execution court.

Also, from the above provisions of Sections 31 and 41 of the Ain, 2003 it is abundantly clear that appeal may be preferred against any kind of order passed at the time of carrying out the execution process, irrespective of its nature of finality or

interlocutory, and, thus, we hold that no distinctive meanings have been attributed to the words "order" or 'interlocutory order" by the Legislature for the order passed at the post-decree-stage by the Adalats. Our above view is further buttressed up by the provisions of Section 44(3) of the Ain, 2003. However, the meaning of the said words provided in Black's Law Dictionary, which has been quoted by the learned Advocate for the added respondent no. 5, appears to be applicable for the orders passed at the pre-decree stage of an Artharin suit in compliance with the provisions laid down in Section 44(2) of the Ain, 2003.

Now, let us look at the provisions of Sections 44(2) & 44(3) of the Ain, 2003 which run as follows:

"৪৪(১) .....
(২) উপ-ধারা (৩) এর বিধান সাপেক্ষে, এই আইনের অধীনে কোন আদালত কর্তৃক প্রদত্ত কোন অন্তবর্তীকালীন আদেশকে উচ্চতর কোন আদালতে আপীল বা রিভিশন আকারে বিতর্কিত করা যাইবে না।
(৩) উপ-ধারা (২) এর বিধান সত্ত্বেও, কোন পক্ষ ধারা ৪১ এর অধীন দায়েরকৃত আপীল এইরূপ কোন বিষয় যুক্তি হিসাবে গ্রহণ করিতে পারিবে,যাহা উপরি-উল্লিখিত বিধানের কারণে বিতর্কিত করা যায় নাই, এবং আপীল আদালত ঐরূপ বিষয় বিবেচনায় গ্রহণ করিয়া ন্যায়বিচারের স্বার্থে উপযুক্ত যে কোন আদেশ প্রদান করিতে পারিবে। (underlined by us)

From a bare reading of Section 44(2) in tandem with Section 44(3) of the Ain, 2003, it appears that while the former provides that no appeal or revision lies against an interlocutory order passed by the Artharin Adalat, the latter provides that notwithstanding the provisions of 44(2) if the Adalat is satisfied that an interlocutory

order (against which an appeal/revision could not be preferred/filed due to the operation of Section 44(2) of the Ain, 2003) should be taken up for consideration in an appeal under Section 41(1) of the Ain, 2003, the appellate court may pass any appropriate order as it deems fit and proper for ends of justice. Thus, on skimming through the provisions of Section 41(2) conjointly with that of Section 42(3) of the Ain, 2003, on first sight, they may apparently he in conflict with each other, however, from the words couched in Sections 31, 41 and 44 of the Ain, 2003, if they are read concurrently with an aim to attribute cohesive meaning towards maintaining the operation of all the provisions of the Ain, 2003 (without rendering any of the provisions of the Ain, 203 nugatory), it transpires that while an appeal may be preferred against those orders which are passed only after drawing the decree, the orders passed by the Adalat at pre-decree stage, which have been defined as interlocutory orders, can also be taken into consideration by the appellate court in course of dealing with the appeal matter preferred against the decree itself or the post-decree order. It is the cardinal principle of statutory interpretations, as we derive from the authoritative books of jurisprudence, that in construction of a particular statutory provision if it appears to be inconsistent with another provision of the same statute, a harmonious interpretation

should be attached thereto with the aid of the Preamble plus the rest of the provisions of the said statute so as not to render any of the provisions unworkable. Thus, from the minute reading of Sections 31, 41 & 44 of the Ain, 2003, the consistent and coordinated meaning we may gather is that 'interlocutory order' as used in Section 44(2) of the Ain, 2003 refers to an order passed by the Adalat before pronouncement of the decree of an Artharin suit. In other words, once the decree is drawn, thereafter, 'any party to the suit' is competent to prefer any appeal against any order passed by the Adalats inasmuch as the precondition for preferring an appeal to deposit a certain amount of money can be fulfilled only after ascertaining the decretal amount.

Although after pronouncement of the judgment and decree, a pre-decree order might seem appealable as the defendant, by then, would be in a position to fulfill the preconditions for appeal of payment of 50% of the decretal amount (provided the time for preferring appeal still remains after drawing the decree) however, instead of independently or separately appealing against a specific pre-decree order, preferring appeal against the judgment and decree as a whole would be the right course of action where he will have the opportunity to agitate the said order against which he had intended to appeal as we opine that allowing a defendant to prefer

appeal separately against a pre-decree-stage order would render the provisions of Section 44(2) of the Ain, 2003 nugatory. The apparent purpose behind imposing the prohibition on preferring appeal against any pre-decree-stage order, meaning interlocutory order under Section 44(2) of the Ain, 2003, is that the Legislature intended to let the trial of the Adalat proceed smoothly and expeditiously without being disturbed by any party to the suit and without being hindered by the typical applications as are filed on and often under provisions of the CPC on this or that plea. It, however, does not mean that the Legislature intended to see the adjudications of the Artharin suits ignoring the rights of the concerned parties to the suit by completing the trial in a cursory manner, and keeping this aspect in view, therefore the Legislature has mandated the Artharin Adalats to take the matters, which fall within the mischief of the interlocutory orders, into consideration when they deal with an appeal filed by any party to the suit against the decree or any post-decree-order. All that we find from a minute reading of the entire Ain, 2003 is that it aims at requiring a debtor-defendant to prefer an appeal with payment of half of the dues of the financial institutions in a bid to clamp down the prevailing proclivity of the litigants to frivolously challenge the lawful orders with a motive solely to delay the disposal of the Artharin suits.

Be that as it may, from the reading of Section 41(4), which runs as follows; "৪১(৪) উপরি-উল্লিখিত বিধানাবলী সত্ত্বেও,বাদী আর্থিক প্রতিষ্ঠান এই ধারার অধীনে কোন আপীল দায়ের করিলে, উহাকে উপরি-উল্লিখিত মতে কোন টাকা বা জামানত জমাদান করিতে হইবে না।", it appears that no money or deposit is required from the banks or financial institutions to prefer any appeal against any decree or order, thus, it is our view that such an exceptional provision for financial institutions has been made with a view to enabling them to appeal against any order at any point of time, both at pre-decree and post-decree phases, thus, there remains no room or reason left for debate on the maintainability of the present appeal and, accordingly, we hold that the present appeal having been filed by a financial institution, the same is undisputedly maintainable.

Let us now deal with the cases referred to by the learned Advocate for the added respondent no. 5 in support of his submissions on the maintainability count of the instant appeal.

In the case of Sultana Jute Mills Vs. Agrani Bank 46 DLR(AD) 174, the Adalat had passed an order in favour of a defaulter-defendant having purported to hold that (a) since the Code of Civil Procedure will be applicable to the proceedings of an Artharin Adalat, a counter claim can always be made in a written statement and (b) the counter claim having not been barred by any

law, Order 7 rule 11 of the CPC is not applicable. When the Agrani Bank filed writ petition challenging the said order, the loan defaulter-defendant raised the question of maintainability in the High Court Division which made the Rule absolute holding that the Artha Rin Adalat does not have any jurisdiction to entertain a counter claim exercising the power under the provisions of the CPC and since there is no alternative forum to seek remedy against the impugned order, writ is the appropriate forum. The Appellate Division upon examining the relevant laws *at extenso* affirmed the view of High Court Division holding that writ is the proper forum for challenging an order passed by the Artharin Adalats.

In the case of Sardar Jan-E-Alam Vs. AB Bank Limited 4 BLC (AD) 178, the bank filed writ petition challenging the auction sale of the Artharin Adalat as the bank alleged that the auction was held at a low price and in making the Rule absolute the High Court Division, among other issues, had the occasion to deal with the issue of maintainability of the writ petition and hold that the writ petition was maintainable and the Appellate Division affirmed the view of the High Court Division.

In the case of Hosne Ara Begum and another Vs. Islami Bank of Bangladesh 5 MLR (AD) 290, an interlocutory order passed by the Artharin Adalat was challenged before the High

Court Division invoking revisional jurisdiction and the High Court Division discharged the Rule having viewed that writ was the proper forum for challenging an order passed by the Artharin Adalat, which was affirmed by the Appellate Division.

In the case of Bulbul Electric Market and others Vs. Rupali Bank Limited 11 MLR (AD) 409, an order passed by the Artharin Adalat rejecting an application under Order 21 rule 90 of the CPC was challenged before the High Court Division invoking revisional jurisdiction but the said revisional application was summarily rejected holding that revisional application is not maintainable and the Apex Court upheld the said view.

In the case of Antibiotic Stores Vs. Subordinate Judge 55 DLR (AD) 13, the mortgager challenged the order of Artha Rin Adalat by which his mortgaged property was sold at a low price invoking writ jurisdiction and the Apex Court held that since the allegation of practicing fraud in arranging the auction has been raised, writ jurisdiction is not appropriate in adjudication of such like issues and viewed that an application under Order 21 rule 90 of the CPC could have been a proper step for the aggrieved person for investigation of the said allegation and, thereafter, writ jurisdiction could have been availed of.

In the case of Haron-Or-Rashid Vs. Pubali Bank 60 DLR (AD) 18, our Apex Court upon discussing all the above cases confirmed that writ is the appropriate forum for challenging any interlocutory order passed by the Artharin Adalats.

The rest of the cases referred to by the learned Advocate for the added respondent no. 5 are the decisions of the High Court Division on the issue of the forum and the same do not require to be taken up for consideration after discussing the above 6 (six) decisions of the Apex Court which consistently held that forum under Article 102(2)(a)(ii) is the appropriate place for challenging an order passed by the Adalat. The above portrayal on the issue of forum for challenging the Adalat's order is displayed on the basis of provisions of the repealed Artharin Adalat Ain, 1990 where no provision was available for preferring an appeal against an order and our Apex Court was consistent to lay down the principle that since no appellate forum was created in the statute on top of incorporating a Proviso in Section 7 of the said Ain barring any appeal against an interlocutory order, no appeal or revision was entertainable. However, after enactment of the Ain, 2003 the *ratio* laid down in the afore-referred cases are no more applicable in the light of the fact that the Ain, 2003 created an appellate forum for challenging the orders passed by the Adalats and, thereby, rendered

the *ratio* of the above discussed cases nugatory inasmuch as the position of the statutory provisions is higher than that of the judgment-made law and, furthermore, the Ain, 2003 is actually an offspring of judicial activitism on this special law given that the loopholes of the repealed Ain, 1990 were revealed by this Court through examination of innumerable cases. When the state creates a specific forum for redressing grievances of the aggrieved parties by an Act of Parliament in unambiguous terms with an aim to cover up the lacuna of a statute (which was revealed through the examination of the cases by the Apex Court) it should be taken as bonafide legislative action by the Legislature towards respecting the interpretations stemming from the Apex Court's decisions.

In line with the above proposition, in the case of Trade Multiplex Vs. Artha Rin Adalat 62 DLR 533 the High Court Division held that writ is not maintainable and appeal under Section 41 of the Ain, 2003 is the proper forum albeit the concerned Division Bench's interpretations on the words of 'order' and 'interlocutory order' seem to be incompatible with the scheme of incorporation of Section 31 and 41 of the Ain, 2003. However, in the case of Monjur Morshed Vs. Agrani Bank 14 BLC 501 when 5 (five) petitioners in 5 separate applications moved the High Court Division invoking jurisdiction under Section 115 of the CPC

challenging the orders of arrest passed by the executing Artharin Adalat, the High Court Division rejected all the 5 Rules holding that the revision is not proper forum for challenging such like orders, albeit in these cases the learned Judges did not indicate which forum is appropriate for challenging an order passed by the Artha Rin Adalat under Section 33(5) or any other provision of the Ain, 2003.

Thus, the facts of the present appeal being different from the facts of the referred cases, the position of the Artharin Ain, 2003 being dissimilar to the position of Artharin Ain, 1990 and, finally, the bank being the appellant in the present appeal from whom no deposit is required to appeal, we find that the instant appeal is maintainable.

The issue of maintainability of the instant appeal being resolved in the affirmative, we may now safely turn to delve into the substantial issues of the appeal as to whether the impugned order has been passed in consonance with the provisions of law.

It transpires from the papers placed before this Court that the decree was drawn up on 15.04.2010 for an amount of Taka 5,68,59,303/- with an interest at the rate of 12% to be incurred until the decretal amount is paid off and, thereafter, following the institution of the execution case, the Adalat fixed 18.09.2012 for

auction of the mortgaged properties when, due to passage of more than 2 years of time from the date of drawing up the decree, the decretal amount with 12% interest had exceeded a figure of more than 6 crores and, under the circumstance, Adalat's view ought to have been to target a price, at least, equivalent to the decretal amount with 12% interest, as it stood on the auction day. From information and data received by this Court against the query made to the parties of this appeal, as to the location and quantum of the three mortgaged properties, as well as ideas deiced from the Schedules of the said lands (as annexed in the plaint) the fact which emerges is that although it is claimed by the bank and respondent nos. 2-4 that the properties are worth Taka 20 (twenty) crores, the normal price of the properties in the assessment of someone with ordinary prudence may be estimated at around TK. 6 (six) crores given that the value of 7.84 decimals of land at Mohakhali should be estimated at least around TK. 4 crores (as the most backward property in the Mohakhali area of Dhaka Metropoliton city is worth more than 50 (fifty) lacs per decimal) and the price of 50 (fifty) decimals of land in Gazipur Sadar deserves to be assessed at around TK. 2 (two) crores. There would not have been any scope for making the above hypothetical price assessment, had the Adalat exhausted the procedures laid down in Sections 33 (2"ga") and its

subsequent provisions seeking a second auction, and if required, a third auction. As a pertinent issue, we should look at the provisions of Section 33 (2"ga") which reads as follows:

> ৩৩(২গ) ডিক্রীদারের পক্ষে যদি লিখিতভাবে আদালতকে এই মর্মে অবহিত করা হয় যে, উপ-ধারা (২) এর অধীন দাখিলকৃত দরপত্রে সম্পত্তির প্রস্তাবকৃত মূল্য অস্বাভাবিকভাবে অপর্যাপ্ত বা কম আদালত যদি উহাতে একমত পোষণ করে, তাহা হইলে আদালত, কারণ লিপিবদ্ধ করিয়া, উক্ত দর প্রস্তাব অগ্রাহ্য করিতে পারিবে।

The plain meaning of the above provisions is that the Adalat may decline to accept the highest offer made in an auction, if the bank/financial institution makes an application stating that the offer is too low to accept.

It is reasonable to expect from the Adalat that it would put its best efforts exercising its discretionary powers as bestowed upon it under Section 57 of the Ain, 2003, in addition to observing and complying with the procedures laid down in the Ain, 2003 and the CPC, to find a bonafide purchaser with the market value of the mortgaged properties. Here, in the case at hand, the Adalat was carrying out its functions under the authority of the Ain, 2003 which is a special law inasmuch as it's Section 3 heralds that "আপাততঃ বলবৎ অন্য কোন আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন, এই আইনের বিধানাবলীই কার্যকর হইবে" and the sole purpose of enacting the law is to enable the financial institutions to recover the money from the loan defaulters which is apparent from the Preamble that "যেহেতু আর্থিক

প্রতিষ্ঠান কর্তৃক প্রদত্ত ঋণ আদায়ের জন্য প্রচলিত আইনের অধিকতর সংশোধন ও সংহতকরণ প্রয়েজানীয়" and, accordingly, the forum has been created solely for the financial institutions; no other category of natural or legal person is allowed to avail this forum as plaintiff as provided in Section 5(1) of the Ain, 2003. Furthermore, from a reading of Section 12 it appears that before filing an Artharin suit the financial institutions have been empowered to directly sell the mortgaged property for realization of their loans without taking recourse to the Adalat and, thereafter, again under Section 33(5) of the Ain, 2003 the Adalat is empowered to sell the mortgaged property following the failure by the Adalat to get a satisfactory price. Therefore, empowering the financial institutions with blanket power of sale of the mortgaged property under Section 12 and the positive power of acquiring possession, use and sale of the mortgaged property under Section 33(5) of the Ain, 2003 implies that realization of money is the prime object for enactment of this law. Also, the concurrent reading of Sections 22, 44('ka') and 45, which insist on recovering of money through mediation and negotiations at any stage of the Artharin suits, gives an understanding that realization of money from the defaulter customers is the main purpose of this Ain, 2003, be it through amicable discussions between the bank and their customers or by selling the mortgaged/non-encumbered properties.

In other words, the aforesaid provisions of law, thus, indicates that the Adalat should take the scheme and spirit of the law into consideration in carrying out its judicial functions in adjudication of the suits under this special law.

Reverting to the fact of the case at hand, we find that when the bank on the date of auction, i.e. on 18.09.2012, filed an application before the Artharin Adalat No.1, Dhaka for cancellation of the auction, the Adalat ought to have considered the application of the Bank to have been filed under Section 33 (2"ga") without pinpointing to the contents therein given that when the prayer in the application is made for cancellation of the auction, it becomes insignificant to emphasise on the words couched in the application and, as such, as long as the prayer of the application speaks of the cancellation of the auction, an attempt by the Adalat to consider the appropriateness of the words used in the application to vet as to whether the application speaks of low price seems to be a travesty of justice. When all the sub-Sections, which are as many as 10 (ten), subsequent to Section 33 (2"ga") suggest that the Adalat is to act for and on behalf of the decree-holder in execution of the decree, the Adalat was under an obligation to take those provisions of the Ain, 2003 into its consideration in disposing of the said application ignoring the fact as to whether the bank has properly

mentioned about the price being low or any other fact, including allegation of practicing fraud in arranging auction as alleged by respondent nos. 1-4 in their Miscellaneous Case No. 33 of 2012 pending before the Adalat. In course of adjudication of such applications filed by the financial institutions, the Adalats are under an obligation to consider the purpose of filing this type of application as the Ain, 2003 is aimed at facilitating the financial institutions towards realization of their moneys due from their customers. In our country there is a common propensity of the employees and officials of state-owned banks, enterprises and companies etc not to carry out their duties with due diligence when they deal with the government interest and, thus, they tend to refrain from taking proper steps in due course of time. Here, in the case at hand, since the Sonali Bank, is a state-owned bank, the concerned official and the engaged lawyer were under an obligation to come up with a proper and comprehensive application before the Artharin Adalat detailing that while the decretal amount stands more or less at TK. 6 crores and the market value of the 3 properties, which are situated within Dhaka city and Gazipur, positively being more than TK. 6 crores, the Adalat was not justified to accept the offer of the so-called "highest bidder". But instead of contending this aspect in the bank's application in clearer

terms, the bank prayed for cancellation of the auction saying that the offer is too low to realize the decretal amount. It appears form the order sheet that when the Adalat rejected the bank's application on the ground of non-mentioning of some words such as 'প্রস্তাবকৃত মূল্য অস্বাভাবিক ভাবে কম' as outlined above, after acceptance of the auction by the Adalat, the bank was prompt to file an application on the following day i.e. 19.09.2012, employing the aforesaid words. Clearly, it demonstrates the incompetency and negligence of the bank's lawyer for which the bank's interest, which is indirectly also the interest of the taxpayers of the Republic, should not he jeopardized and lost.

Nurul / So, whether or not the bank authority came up with a proper application phrasing the expected wordings, as stated hereinbefore, is immaterial, rather the scheme and spirit of the Artha Rin Adalat Ain, 2003, as can be gathered from Preamble, Section 3, Sections 2-6, 12, 22, 33, 45 and Section 57 of the Ain, 2003 ought to have been taken into consideration by the Adalat and, thereby, a fresh auction organized in the backdrop of the provisions laid down in Section 33 (2"ga") and its subsequent sub-Sections inasmuch as the concurrent reading of all the sub-Sections under Section 33 of the Ain, 2003 implies that the tender should be floated and, then, the auction should be aimed at getting the highest market price of any

mortgaged property with an effort to realise the bank's dues upon the customers and if the first auction fails to achieve the targeted price, in that event, the Section 33(4) of the Ain, 2003 and its onwards sub-Sections mandate the Adalat to opt for a second, and if necessary, to go for a third auction. In the light of the above discussions, we are of the view that the plea taken by the Artharin Adalat No. 1, Dhaka in rejecting the application filed by the Bank on 18.09.2012 is not lawful as the same is not in conformity with the provisions of Section 33 (2"ga"), 33(4) to 33(9) of the Ain, 2003 and, thus, the impugned order being not sustainable in the eyes of the law, is liable to be set aside.

With setting aside the impugned order dated 18.09.2012 by this Court vide this judgment the pertinent question surfaces for our consideration as to what would be the fate of the Miscellaneous Case no. 33 of 2012 filed by respondent nos. 2-4 under Order 21 rule 90 of the CPC. It is evident that they have not taken any step under Section 19(2) of the Ain, 2003 for setting aside the exparte decree of the Adalat, for which they were required to deposit 10% of the decretal amount, where they could have questioned the legality of the exparte decree and, instead of taking that step, they opted to challenge the impugned order on the ground of practicing fraud in arranging the auction alleging that they have not been

served with any notice for arranging auction of their properties. Now, with the setting aside the auction, they would be in a position not only to monitor the process of auction but also to negotiate with the bank to settle the bank's claim amicably under the provisions of Sections 23 and 45 of the Ain, 2003 and, thus, we unhesitatingly hold that the said application stands infructuous inasmuch as by this judgment and order respondent nos. 2-4 are also remedied with the ultimate relief they sought for, though not on the basis of the grounds they have taken in their application. It is pertinent to jot down that in examining the legality of the impugned order this Court ignored the provisions of the CPC inasmuch as this Court treated the bank's application dated 18.09.2012 to be an application under Section 33 (2"ga") of the Ain, 2003, which was made before acceptance of the offer of the highest bidder, thereby, this Court did not take into consideration the contents of the applications filed by respondent nos. 2-4 under order 21 rule 90 of the CPC. To record our above observations in a simpler version, all that we wish to say that from the view point of at what stage and by whom an application may be filed under Section 33 (2"ga") of the Ain, 2003 and a Miscellaneous case under Order 21 rule 90 of the CPC, there appears a fundamental difference in that, firstly, an application under the former provision can be filed only by the Banks/financial

institutions, not by any other party, (not even by the owner or mortgagor of the property) secondly, for adjudication of an application under the said provisions of the Ain, 2003, there is no need to take any evidence, but for adjudication of an application under Order 21 rule 90 of the CPC evidence might be required for finding out the veracity of the allegations of irregularity or practicing fraud and, thirdly, application under the provisions of Section 33 (2"ga") of the Ain, 2003 can be made both before and after the acceptance of the auction offer as Section 20 of the Ain, 2003 prohibits resorting to the provisions of other laws bypassing any provision of this special law, however, an application under Order 21 rule 90 of the CPC may be filed only after an offer is accepted by the Adalat. Section 20 of the Ain, 2003 reads as follows:

> ২০। এই আইনের বিধান ব্যতিরেকে, কোন আদালত বা কর্তৃপক্ষের নিকট অর্থ ঋণ আদালতে বিচারাধীন কোন কার্যধারা বা উহার কোন আদেশ, রায় বা ডিক্রীর বিষয়ে কোন প্রশ্ন উত্থাপন করা যাইবে না, এবং এই আইনের বিধানকে উপেক্ষা করিয়া কোন আদালত বা কর্তৃপক্ষের নিকট আবেদন করিয়া কোন প্রতিকার দাবী বা প্রার্থনা করা হইলে, ঐরূপ আবেদন কোন আদালত বা কর্তৃপক্ষ গ্রাহ্য করিবে না। (underlined by us)

Thus, since the present impugned order arose from the provisions under Section 33 (2"ga") of the Ain, 2003, and if read with the operation of a prohibitory/provision under Section 20 of the said Ain, 2003 (prohibiting recourse to another law) the bank was not required to file any application under Order 21 rule 90 of

the CPC for setting aside the auction inasmuch as the Ain, 2003 is a special legislation which provides a specific remedy and overrides the remedy provided in the CPC which is general law. Since in the impugned order a patent and flagrant error in procedure, as enshrined in Section 33 (2"ga") of the Ain, 2003, has crept, in resulting in manifest injustice to the bank and negatively affecting the interest of the Republic, we set aside the same for the ends of justice.

Accordingly, we direct the Artharin Adalat No. 1, Dhaka to proceed with the fresh tender for auctioning the mortgaged properties at a better price and dispose of the Miscellaneous Case No. 33 of 2012 filed by respondent nos. 2-4 under Order 21 rule 90 of the Code of Civil Procedure as being infructuous.

The Artharin Adalat No. 1, Dhaka is further directed to refund the money, whatever the amount, deposited by the added respondent no. 5, as per the law.

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

Before parting with the judgment, we fell that, as the Judges of the High Court Division, we should not confine ourselves to performing the duties of disposing of the impugned orders or decrees in course of exercising the power under the writ, appellate

or revisional jurisdiction but it is also our task to monitor and superintend the skill and quality of the learned judges of the sub-ordinate judiciary so that they do not indulge themselves in repeated errors in passing the judgments and orders/decrees causing proliferation in the number of appeals pending in the High Court Divisions which is overwhelmingly overburdened with a huge backlog of cases. More so, following overturning the lower courts 'orders', the lower courts again require to deal with the said cases for a second time. Therefore, we are inclined to make some directions under Article 109 of the Constitution upon the learned judges of the lower courts vested in conducting the trials of civil suits in an effort to ease their tasks in dealing with the execution matters.

The Judicial Administration Training Institute (JATI) should undertake a training course in order to facilitate the trial court judges to be acquainted with the guidelines enunciated in the Apex Court cases on the issue of execution process in the backdrop of the fact that the High Court Division is encountering a high volume of appeals and writs arising from the orders passed by the Artharin Adalats which are mostly found to have been passed unlawfully and, consequently, the invaluable working hours of both the lower courts and the High Court Divisions are being wasted to deal with a

case twice in a situation when the Bangladesh judiciary is receiving criticism for not being able to reduce the backlog of cases piled up both in the lower and higher judiciary.

Let a copy of this judgment be communicated to the learned DG of JATI for his perusal and necessary action in compliance with the observations made in the penultimate para of this judgment.

Also, the Register of the Supreme Court is directed to disseminate a copy of this judgment to each of the 64 learned District Judges for their information so that, in line with the observations made hereinbefore in this judgment, they may pass necessary instructions onto their respective junior colleagues, who are vested with the duties of conducting civil trials, for their compliance.

SD/- MUHAMMAD KHURSHID ALAM SARKAR, J.

FARID AHMED, J.

I agree.

SD/- FARID AHMED, J.

Memo No. 160 (F.M) Dated 20-1-15

Copy of the Court's Judgment dated 23.10.2014 forwarded to the

(1). Registrar, Supreme Court of Bangladesh.
(2). D.G. of Judicial Administration Training Institute (JATI)
(3). Judge, Artha Rin Adalat No. 1, Dhaka.

By order

20/1/15
Superintendent

20-1-15
Assistant Registrar.

Iqbal/-19.01.2015
Read by:
Exam. by: 19.1.15