

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain.

Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.25 OF 2013.

(From the judgment and order dated 27.01.2013 passed by the High Court Division in First Appeal No.370 of 2007.)

With

CIVIL APPEAL NO.26 OF 2013.

(From the judgment and order dated 27.01.2013 passed by the High Court Division in First Appeal No.371 of 2007.)

With

CIVIL PETITION FOR LEAVE TO APPEAL NO.1587 OF 2013

(From the judgment and Decree dated 25.07.2010 passed by the High Court Division in First Appeal No.291 of 2005.)

With

CIVIL PETITION FOR LEAVE TO APPEAL NO.2027 OF 2012

(From the judgment and Order dated 11.06.2012 passed by the High Court Division in First Appeal No.293 of 2005.)

With

CIVIL PETITION FOR LEAVE TO APPEAL NO.1134 OF 2015

(From the judgment and Decree dated 11.12.2014 passed by the High Court Division in First Appeal No.170 of 2006.)

Md. Sekandar and another:

Appellants.
(In C.A.No.25 of 2013)

Begum Shamsun Nahar being dead his
heirs: Md. Abul Basher and another:

Appellants.
(In C.A.No.26 of 2013)

Abdullah Chowdhury and others:

Petitioners
(In C.P.No.2027 of 2012)

Janata Bank Ltd. :

Petitioner
(In C.P.Nos.1587 of 2013
and 1134 of 2015)

=Versus=

Janata Bank Ltd. and others:

Respondents.
(In C.A.Nos.25-26 of 2013
and C.P.No.2027 of 2012)

Fasiul Mowla and others:

Respondents
(In C.P.No.1587 of 2013)

Mohammad Islam being dead his heirs;
Jabed Islam Shushung and others:

Respondents
(In C.P.No.1134 of 2015)

For the Appellants:
(In C.A.Nos.25-26 of 2013)

Mr. Shamim Khaled Ahmed, Senior
Advocate, instructed by Mr. Zainul
Abedin, Advocate-on-Record.

For the petitioner: (In C.P.No.2027 of 2012)	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the petitioner: (In C.P.No.1587 of 2013)	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mrs. Shahanara Begum, Advocate-on-Record.
For the petitioner: (In C.P.No.1134 of 2015)	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For Respondent No.1: (In C.A.Nos.25-26 of 2013)	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mrs. Shahanara Begum, Advocate-on-Record.
For Respondent No:7 (In C.A.Nos.25-26 of 2013)	Mr. Fida M. Kamal, Senior Advocate, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
For Respondent Nos:2-6: (In C.A.Nos.25-26 of 2013)	N.R.
For the Respondent: (In C.P.No.2027 of 2012)	N.R.
For the Respondents: (In C.P.No.1587 of 2013)	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.
For Respondent Nos.1-7: (In C.P.No.1134 of 2015)	Mr. A.S.M.Khaleque, Advocate, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
For Respondent Nos.8-13: (In C.P.No.1134 of 2015)	N.R.

Date of hearing: 28th and 29th July, 2015.

Date of Judgment: 6th December, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ: This certificated appeal is directed from a judgment of the High Court Division in its appellate jurisdiction which arose out of a judgment passed in Other Class Suit No.99 of 2004 declaring the plaintiffs title to in schedule 'Kha' land measuring .03 acre out of schedule 'Ka' land and that the ex-parte decree passed in Mortgage Suit No.35 of

1995 shall not be binding upon the plaintiffs in respect of the said property.

Short facts relevant for the disposal of this matter are as under:

"three brothers namely, Lal Miah, Md. Yunus and Chand Miah, purchased the land in schedule-'Ka' measuring 1.54 acres from (1) Srimati Promoda Bala Debi, (2) Sudhir Ranjan Nath, and (3) Srimati Mohan Tara Debi, by kabala dated 28.01.1951. Said three brothers purchased more 0.80 acre of land of R.S. khatian No.153 from the aforesaid three sellers by Kabala dated 21.01.1951. Lal Miah died leaving brothers Md. Yunus and Chand Miah and Kala Miah and sisters Safia Khatoon and Chamana Khatoon. Yunus Meah transferred 0.03 acre of land of R.S. Plots Nos. 531, 551, 552 and 553 to Habibur Rahman by kabala dated 01.08.1982. Yunus alias Yunus Meah again transferred 0.03 acre of land to Daulat Ahmed out of R.S. Plot No.551 by kabala dated 15.7.1982. Chand Meah transferred 0.03 acre of land to Golapur Rahman out of R.S. Plots Nos.531, 551, 552, 553 by kabala dated 02.08.1982. He again sold .03 acre land to Mustafizur Rahman, Daulat Ahmed, Habibur Rahman. Golapur Rahman

transferred the same to Abul Kalam Azad by deed of exchange dated 09.01.1990. Abul Kalam Azad being owner transferred 0.03 acre of land to plaintiff No.1 out of R.S. Plots Nos. 531, 551, 552 and 553 by kabala dated 19.07.1984. Abul Kalam Azad again transferred 0.02 acre of land to plaintiff No.2 out of R.S. plots Nos.531, 551, 552 and 553 by kabala dated 19.07.1994. Plaintiffs Nos. 1 and 2 took permission from the authority for construction of 4(four) storey building. Plaintiffs on 04.04.99 came to know about the decree passed in Mortgage Suit No.35 of 1995.

Defendant No.1 contested the suit by filing a written statement denying the material allegations stating that the suit is barred by the provisions of Artha Rin Adalat Ain. Further contention of the defendant was that Lal Meah and others never transferred the suit land as such the plaintiffs got no possessions therein. The land possessed by the plaintiffs is situated outside the boundary of the mortgaged property. Defendant Nos.4 to 6 being owners of the schedule-'Ka' property mortgaged the same with the defendant-bank and on their failure to repayment of loan the bank got

decree in Suit No.35 of 1988 and for execution of decree filed Execution Case No.27 of 1998. The decree is binding upon the plaintiffs.

The trial court decreed the suit and on appeal from the said judgment, the High Court Division was of the view that the Joint District Judge was wrong in entertaining the suit, inasmuch as, in presence of the remedy against the judgment of the Artha Rin Adalat, the suit is not maintainable. However, it was of the view that since a question of law which has public importance is involved in the matter, it granted certificate to the plaintiffs to resolve the law point by this court finally. In arriving at such conclusion, the High Court Division held that if it could be shown that the decree was obtained by practicing fraud, the aggrieved party had its remedy under the Artha Rin Adalat Ain under section 32 by depositing 10% of the decretal amount and that an independent suit is not maintainable.

On behalf of the appellants it is argued that in the absence of any provision in the Artha Rin

Adalat specifically, there cannot be ousting the jurisdiction of the civil court to entertain a suit for declaration of title in respect of a mortgaged property and the High Court Division fell in an error in holding that the suit is not maintainable. Secondly, it is argued that it is not consonant in law to disentitle a person to have his right established in a court of law even if there is infringement of his right to property.

Section 9 of the Code of Civil Procedure confers the jurisdiction upon a civil court to adjudicate upon a right or obligation except to grant a substantive right or action which has to be established by a statute or common law, that is to say, the right to recover damages under the law of tort. The jurisdiction of a civil court is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purpose of section 9 of the Code of Civil Procedure (Union of

India V. Sir Shadi Lal Sugar & General Mills Ltd.,
AIR 1980 All 379 FB and Dhulabhai V. S, AIR 1969 SC
78).

A suit in respect property is suit of civil nature (Secretary of State V. Fahim Dannisa, ILR 17 Cal 95(PC)) and Dildar Ahmed Chowdhury V. Farrouque Ahmed, 27 DLR (AD) 138). In every case where the dispute has the characteristic of affecting one's right which is not only civil but is of civil nature (PMA Metropolitan V. Marthoma, AIR 1995 S.C. 2001.) Where the cognizance of a specified type of suit which is ousted either expressly or impliedly that the jurisdiction of the civil court would be ousted to entertain such a suit. The general principle is that a statute excluding the jurisdiction of a civil court should be construed strictly (Dhruv Green Field Limited V. Hukam Singh and others, (2002) 6 SCC 416; Secy of State V. Mask, AIR 1940 P.C. 105; Solaiman Bibi V. Administrator, 45 DLR 727; Md. Shahidullah V. Abdus Sobhan, 1996 BLD 423). A

provision seeking to bar the jurisdiction of civil court requires strict interpretation and the court will normally lean in favour of construction upholding retention of jurisdiction (Dwaraka Prasad V. Ramesh Chandra, AIR 2003 S.C. 2696).

Normally all disputes between the parties of a civil nature would be adjudicated upon by a civil court. There is no absolute right in any one to demand that his dispute is to be adjudicated upon only by a civil court. Access to civil court which is an important vested right in every citizen of the country implies the existence of the power of the court to render justice according to law. Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience. (M.V. Elisabeth V. Harwan Investment, AIR 1993 SC 1014).

Where the action challenged is without jurisdiction civil court's jurisdiction is not

ousted (Sardara Singh(dead) by Lrs. V. Sardara Singh, (1990) 4 SCC 90). In that case the plaintiff instituted a suit to restrain the State of Punjab and the auction purchaser to take possession of the suit land. Defence specific plea was that the suit was not maintainable in view of Section 158 of Punjab Land Revenue Act, 1887. Trial Court dismissed the suit on the ground of maintainability. The appellate Court reversed the findings of the trial court. The High Court restored the decree of the trial court. The Supreme Court noticed section 158(2) of Act of 1887 which debars the civil court's power to exercise jurisdiction over two eventualities. The Supreme Court was of the view that to protect the property the plaintiff instituted the suit and 'The suit was, therefore, clearly de hors the provisions of the Act and hence ordinarily the civil court was entitled to hear and decide the same.'

An express bar is where a statute itself contains a provision that the jurisdiction of a civil court is barred, that is to say, section 182 of the Income Tax Ordinance 1984. Jurisdiction of civil court to entertain a suit, though of civil nature, may be barred if it is so provided in a statute. There are, in fact, many statutes which have made provision specifically ousting jurisdiction of civil court in specified matters. Section 26 of the Union Parishad Ordinance has put a clear bar to the determination of election dispute by any court except the election tribunal. (Rafiqul Alam V. Mustafa Kamal, 42 DLR (AD) 137. Section 102 of the waqf Ordinance debars a civil court to question the decision of the Waqf Administrator except as otherwise expressly provided in the Ordinance (Syed Masud Ali V. Asmatullah, 32 DLR (AD) 39.) (Director, Housing & Settlement V. A.M. Howlader, 9 BLC(AD) 51; Bangladesh V. Basharatullah,

42 DLR (AD) 91, Shahabuddin Chisty V. RAJUK, 18 BLT (AD) 501.

An implied bar may arise when a suit provides a special remedy to an aggrieved party i.e. a right of appeal contained in a statute. (N.D.M.C. V. Satish Chan, AIR 2003 SC 3187.) Where the legislature acts within its powers, it is not open to the civil court to question the legality of the enactment BWDB V. Syed Moazzem Hossain, 1 BLC (AD) 13. It is an ordinary principle of law that the court will not interfere with the internal management of a company acting within its powers.

If a court has no jurisdiction to try a suit, it goes to very root of the matter and it is a case of inherent lack of jurisdiction. Preponderance principle is that the jurisdiction of a civil court to deal with civil causes can be excluded by a special law to deal with special subject-matters. It is only if the said law must expressly provide for such exclusion. The presumption to be drawn must be

in favour of the existence rather than exclusion of the jurisdiction. The test aiming such question is (a) whether the legislature intent to exclude arises explicitly and (b) whether the statute provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it. Exclusion of jurisdiction of civil court is not readily to be inferred unless law regarding exclusion of jurisdiction has been laid down. (State of Andhra Pradesh V. Manjeti Laxmi Kantha Rao, AIR 2000 S.C. 2220, Secy of S.V. Mask, AIR 1940 P.C. 105; Church of North India V. Lavajibhai Ratanjibhai, AIR 2005 S.C. 2544).

When a question as regards jurisdiction arises, the court has always the inherent jurisdiction to examine whether it has jurisdiction. (Nur Mohammad V. Mainuddin, 39 DLR (AD) 1; Rouf V. Hamid, 17 DLR (SC) 515. Civil Courts have always the jurisdiction to determine whether a court of special jurisdiction is acting in accordance with the law or within the

limits prescribed by law or in conformity with the fundamental principles of judicial procedure (Nur Muhammad) as such determination in effect amounts to determining the extent to which the jurisdiction of civil court is ousted. (Amir Hasan V. Sheo Baksh, 11 Cal 6 (pc)).

Keeping these statements of law, let us consider whether a suit for establishment of title in respect of a property against which a decree has been passed by the Artha Rin Adalat Ain is maintainable against a person, who has allegedly created some papers and mortgaged the property with a bank and also against the mortgagee bank.

The preamble of the Artha Rin Adalat Ain, 2003 (the Ain) reads "আর্থিক প্রতিষ্ঠান কর্তৃক ঋণ আদায়ের জন্য প্রচলিত আইনের অধিকতর সংশোধন ও সংহতকরণকল্পে প্রণীত আইন।

যেহেতু আর্থিক প্রতিষ্ঠান কর্তৃক প্রদত্ত ঋণ আদায়ের জন্য প্রচলিত আইনের অধিকতর সংশোধন ও সংহতকরণ প্রয়োজনীয়

The preamble of the Ain indicates the object of promulgating it. It is for realization of 'ঋণ' (loan)

by financial institutions by amending the prevailing laws which the legislature felt necessity to integrate the law. The expression 'আর্থিক প্রতিষ্ঠান' has been defined in section 2(Ka) that includes the Janata Bank, the respondent. The word 'ঋণ' means advance, loan, overdraft, banking credit, discounting bills, guarantee, indemnity, letter of credit etc. Section 3 says that the Ain shall prevail over any other law which are inconsistent with the Ain. Section 5 empowers the exclusive jurisdiction of the Artha Rin Adalat to adjudicate upon disputes relating to realization of 'ঋণ' by a financial institution. It is said, notwithstanding anything contained in any other law, subject to the provisions of sub-sections (5) and (6), all suits relating to realization of 'ঋণ' by a financial institution shall be instituted before the Artha Rin Adalat established under section 4 of the Ain and to be disposed of in the said Adalat. This Adalat shall be constituted by a gazette notification and though it is a civil court

within the meaning of Civil Courts Act, 1887, the Officer of the Adalat cannot adjudicate upon any civil or criminal case other than a suit relating to ‘অর্থ ঋণ’.

It has power to sell the mortgaged property or for the purpose of forclosoure under section 67 of the Transfer of Property Act or for filing a suit under Order XXXIV of the Code of Civil Procedure. Such suit can be filed in the Adalat and in those cases, the provisions of the Code of Civil Procedure shall as far as possible be applicable. Sub-sections (3) and (4) provide the procedure for treating a mortgage suit or a suit of forclosoure. Sub-section (5) provides that notwithstanding anything contained in the Public Demands Recovery Act, 1913, if any ‘ঋণ’ even if it is government due is recoverable under the Artha Rin Adalat, which shall be filed in the Artha Rin Adalat except the ‘ঋণ’ for a sum below taka five lacs taken from Bangladesh Krishi Bank, Rajshahi Krishi Unnayan Bank or any other government

bank recoverable under the Public Demands Recovery Act by filing certificate case. Sub-section (6) provides that if there is any special provision for realization of loan by a financial institution, the provisions of the Ain shall be taken as additional provision and if such financial institution files any suit in the Artha Rin Adalat, the provisions of the Ain shall be applicable.

A plain reading of these provisions clearly show that it is a special law and this law shall prevail over any other law and for the purpose of realization of 'ঋণ' by a financial institution, the suit shall be filed and adjudicated upon by the Artha Rin Adalat constituted under the said Ain. These provisions do not prohibit specifically or impliedly a citizen to establish his title to in a civil court in respect of any property which has been mortgaged with a financial institution.

The provisions of the Code of Civil Procedure will be applicable in filing and adjudicating upon a

suit under the Artha Rin Adalat Ain, if those provisions are not inconsistent with the provisions of the Ain. In filing a suit against the principal debtor, the financial institution may implead the the third party mortgagor or the third party guarantor, if he is involved in the 'ঋণ'. These are three persons against whom a suit of the nature can be filed seeking relief. There is no scope under the scheme of the Ain to implead in the category of defendants other than those mentioned above or any third party can add as defendant. The judgment, order or decree of the Artha Rin Adalat can be jointly and severally executable. The execution proceeding shall be proceeded against all judgment debtors subject to the condition that the Adalat shall execute the decree against the principal debtor and subsequently, against the third party mortgagor or the third party guarantor for the recovery of the loan, as the case may be. There is a second proviso providing that if the third party

mortgagor or third party guarantor repays the total amount of dues, the decree can be transferred in their favour and that they also can realize the total amount against the principal debtor.

In case of ex-parte decree, the judgment debtor can file a petition for setting aside the ex-parte decree under sub-section (2) of section 19 within 30 days from passing of the decree subject to the condition that the judgment debtor shall have to deposit equivalent to 10% of the decretal amount by cash, draft, pay order etc. within 15 days from the date of filing application. So a third party other than a mortgagor or guarantor is not entitled to make an application for setting aside the decree.

Section 41 of the Ain empowers any party to the litigation to file an appeal against a decree or order in the High Court Division if the decretal amount is above taka fifty lacs within 60 days and in the court of District Judge below the said amount within 30 days, but the judgment debtor shall have

to deposit 50% of the decretal amount or a security of the similar amount at the time of filing appeal in default of which the appeal will not be entertainable. This provision for appeal is also not available to a third party. Under the said provision, a third party cannot file any application for setting aside the decree or order. Even if a third party has the power to file a petition for setting aside the ex-parte decree, he is not entitled to take the plea of his ownership in the mortgaged property because the powers and jurisdiction given to an Adalat by the Ain is to decide a suit of the nature which has limited ambit of the amount of 'ঋণ' and interest. The question of title to in the mortgaged property cannot be looked into by the Adalat.

A third party is neither a necessary nor a proper party in a suit for realisation of 'ঋণ' against debtors. Therefore, neither section 19 nor section 41 has provided any provision to redress the

grievances of a third party in respect of a mortgaged property. If someone takes loan from a bank by mortgaging another's property by way of deceitful means or by resorting to forgery or collusion or by misrepresentation, the Adalat cannot adjudicate the issue. Sub-section (5) of section 6 has specifically provided the parties against whom a suit under the Ain can be filed. Other than those persons, there is no scope under the Ain to implead any person to add as defendant in the suit.

It is only section 32 of the Ain which enables a third party to file objection against the decree in execution proceedings within a period of 30 days subject to payment of 10% of the decreetal amount. This section is included in Chapter VI for execution of decree. If the scheme of the law does not authorise the Adalat to decide the title of a third party in respect of the mortgaged property how it can decide the right, title and interest of a third party in an execution proceeding is difficult to

comprehend. The only right given to a third party is to file such objection in accordance with the Code of Civil Procedure. It is said that objection can be filed in accordance with provisions of the Code of Civil Procedure.

Under the Code of Civil Procedure, there are three provisions for making claim in respect of the attached property under the decree or to setting aside the sale. The first provision is Order 21 rule 58 of the Code of Civil Procedure for adjudication of claims and objections. This relates to objection against attachment by a party to the suit or his representatives but there is little scope to raising the question of title under this provision. It provides that if the property is not liable to attachment, the court shall proceed to investigate the claim or objection. The words used in sub-rule (1) have reference merely to an attachment and not to a claim preferred to the property. The claimant can file objection on the ground that there is no

decree or that the court which executes the decree has no jurisdiction to do so. It is not open to a claimant to attack the validity of the decree or the decree holder's right to execute the same. A claim proceeding is not a proceeding analogous to a suit. There is a provision in rule 63 to file a suit to establish right to attached property. This provision has been omitted by Ordinance No.XLVIII of 1983. The effect of this rule is that unless a suit is brought, the party against whom the order in the claim proceeding is made or any person claiming through him cannot reagitate in any other suit or proceeding against any other party. (Mangru V. Taraknathji, AIR 1967 S.C. 1390) The scope of inquiry under rule 58 is very limited and is confined to question of possession while suit under rule 63 is concerned with question of title. (Sani V. Union, AIR 1966 S.C. 1068)

Court has no jurisdiction to entertain an objection under rule 58 after a sale has taken

place. If the sale takes place then, the third party's objection to such sale is under order 21 rule 90. The Adalat's power to entertain the application under Order 21 Rule 58 is against attachment only and before the sale takes place. So under this provision a very limited power has been given to an executing court to hold inquiry. Under this rule the Adalat cannot decide complicated questions of title in such application. That is why in India sub-rule (2) has been amended authorizing the executing court to decide 'all questions including questions relating to right, title or interest in the property attached arising between the parties to a proceeding or their representatives'. As per our provision the third party's right, title and interest has not been protected.

Other provisions are Order 21 rule 90, which empowers a third party to file application for setting aside sale. In view of the language used in

sub-rule (1) of rule 90 that 'or whose interests are affected by the sale', it is only material irregularity or fraud in publishing or conducting the sale; substantial injury to the applicant, and such injury must be connected directly with the result of the irregularity or fraud. Though the scope under this provision is wider than rule 89 of Order 21, which also empowers to file an application for setting aside sale on payment of a sum equal to 5% of the purchased money, the court has limited power to investigate under this provision. But then a person who has title to in the said land can raise only limited point of irregularity of sale or fraud, but the court does not possess any power to decide the title of the third party in the said property. Reference in this connection is Naganna V. Venkatrayulu, AIR 1945 PC 178. The rule speaks of regularity which is different from irregularity and if the act or omission complained of amounts to material irregularity, the sale is not null and

void. It is only voidable and the persons specified in the rule can apply to have it set aside on proof of substantial injury, that is to say, even if a third party claimant has title, he cannot get relief under this provision unless and until he can prove the substantial injury.

Under Rule 89 a judgment debtor or a transferee from the judgment debtor before the sale can make an application, but a third party who has title to in the property has limited scope to make application under the rule. Other provisions which are applicable to a third party are Order 21 rules 100 and 101. Under rule 100 a third party can file a complaint in the executing court if he is dispossessed by the purchaser in execution of a decree and in such circumstances, the court has power to hold investigation and if the court is satisfied that the applicant was in possession on his own account, or on account of someone other than the judgment debtor, the court may restore him in

possession. Dispossession must be in the course of execution. This provision is very complicated one in view of the fact that it is only after the third party has been dispossessed from the property. Rule 101 provides bonafide claimants to be restored to possession. The object of rules 100 and 101 is to ascertain the possession of the person who was dispossessed by the purchaser on execution of a decree. The court is concerned with the actual possession of the property which is to be restored to the person who is dispossessed and such person is not claiming a right of his own other than through the judgment debtor.

On an exploration of the provisions above, there is no gainsaying that a third party's claim who has right, title and interest in the decretal property has limited scope to file objection against the attachment of the property in dispute or sale of the attached property in execution of a decree. He has also a right to file a suit under Order 21 Rule

103 and this provision can be applied even after exhausting remedies provided in rules 98, 99 and 101. Suit under rule 103 is in the nature of a special remedy. The proviso to section 42 of the Specific Relief Act does not debar the suit if the plaintiff does not ask for recovery of possession or other consequential relief because of the fact that he has been dispossessed by the process of the court over a property which he has right, title and interest. Procedures prescribed by rules 97-102 are summary in nature and not intended for decision after hearing oral evidence and the conclusion is subject to result of a suit under rule 103. Reference in this connection is *Tarabai V. N & G Bank*, AIR 1969 Bombay 447 and *Md. Hiyat V. Gulam*, AIR 1931 Lahore 598.

The scope of the suit under rule 103 is not merely to ascertain whether plaintiff was in possession at the date of order against him, but the establishment of the right and title by which the

plaintiff's claim to be in possession of the property. Therefore, in view of sub-section (1) of section 32 of the Ain that while a third party can pray for setting aside the decree or order, the provisions of the Code of Civil procedure will be applicable, we find no cogent ground to prevent a third party to file a suit to establish his title to in the property sold in execution of a decree in view of Order 21 Rule 103 since the said provision appears in order 21 under the heading 'Execution of Decree and Orders.'

The High Court Division has considered the case of Sheikh Harun-or-Rashid V. Pubali Bank Limited, 15 BLC 458. In that case a third party was added in the Artha Rin Suit as defendant No.4, but ultimately he did not contest, and the suit was decreed ex-parte. The decree was put in execution and in the said execution proceeding the third party applicant moved an application under Order 21 rule 58 of the Code of Civil Procedure for exclusion of 0.42 acre of land

out of the mortgaged property on the ground that on the date of mortgage as well as the date of attachment, he was in possession of the property through the judgment debtor. Though he was claiming under the judgment debtor, he did not deposit the requisite money and the application was rejected. Admittedly, the third party was claiming under the judgment debtor. Therefore, this case is quite distinguishable and not applicable.

The other case is Jamal Uddin V. Md. Salim Hossain, 7 ADC 291. In that case the third party applicant moved an application under rules 100 and 101 of Order 21 of the Code for restoration of possession on the ground that the auction purchaser took possession of the property through the process of the court although the principal judgment debtor has no right, title and interest in the property and that he has purchased the property for valuable consideration from the rightful owner. His application was rejected by the Adalat but it was

allowed by the District Judge. The High Court Division set aside the said order on the ground that the third party did not make requisite deposits along with the application for setting aside sale. This court maintained the order. This decision is also not applicable in the facts and circumstances of the case.

The High Court Division has totally overlooked the applicability of Order 21 rule 103 of Code of Civil Procedure so far as it relates to the right of a third party in the property sold. Sub-section (1) of section 32 of the Ain does not debar the applicability of the provisions of the Code of Civil Procedure, if a third party makes an application for setting aside the sale. He can file objection against the sale in accordance with the provisions of the Code, but the scope of investigation being limited, we find no cogent ground to debar a third party to file a suit to establish his right or title if his right is fringed by reason of sale in view of

order 21 rule 103. We hold the view that a suit for establishment of right, title and interest in respect of the mortgaged property by a third party is maintainable because there is no specific bar either expressly or impliedly in the Ain to file such suit.

Article 42(1) of the constitution provides that subject to any restriction imposed by law, every citizen shall have right to acquire, hold, transfer or otherwise dispose of the property. Right to property is a fundamental right. The expression 'restriction' has to be understood as not including 'prohibition' or 'extinction'. In placing a restriction on the right of the property, the Parliament cannot prohibit the exercise of right or extinguish the right. If any restriction imposed by law has the effect of confiscating a property without acquisition or nationalization under the authority of law. The restriction will be violative to article 42. The right to property is also

protected by article 31 which mandates that no action detrimental to the property can be taken except in accordance with law. The inclusion of the word 'in accordance with law' in article 31 would have subjected to any restriction imposed by law to a stricter scrutiny by the court. A law interfered with the right to property will not be reasonable under article 31 if it does not sub-serve any legitimate governmental interest. The combined effect of articles 31 and 42 is that any acquisition, requisition or nationalization of the property to be valid must be for a public purpose but otherwise not.

Now looking at the plaint it appears that the plaintiffs are claiming title to in the mortgaged property by way of purchase from Md. Abul Kalam Chowdhury and Raja Mia and that the judgment debtors mortgaged the property showing Md. Khurshed Mia, Kashem Mia and Md. Hossain as sons of Lal Mia, Chand Mia and Younus Mia, who had no sons under the name

Khurshed Mia, Khashem Mia and Md. Hossain. Accordingly, they prayed declaration of title in respect of 'B' schedule land. However, they also prayed a further declaration that the decree passed in Mortgage Suit No.35 of 1995 is void and not binding upon them. The relief (b) is impliedly barred under section 41 of the Artha Rin Adalat Ain. The trial court on assessment of the evidence on record made clear finding that the judgment debtors collusively mortgaged the 'B' schedule property although the plaintiffs have right, title and interest in respect of the said property and that there was no existence of Khurshed Mia, Khashem Mia and Md. Hossain, as heirs Lal Mia, Chand Mia and Younus Mia. Thus, the suit in respect of prayer 'Ka' is maintainable.

One may pose a question that if the relief in respect of schedule 'B' to the plaint is not maintainable even if the plaintiffs get a decree in respect of relief '(a)', they will get ineffective

decree in view of the decree passed in Mortgage Suit No.35 of 1995 in favour of Janata Bank, the defendant No.1. The relief (b) cannot be passed by law that will not disentitle the plaintiffs in the enjoyment of the property, if they can establish their title in the court. If the plaintiffs title is declared, naturally the judgment debtors title in respect of the said property would be clouded. Whatever, title the decree holder bank got in respect of the mortgaged property is subject to the right, title and interest of the judgment debtors had in the said property. By reason of the decree, the decree holder bank will not get a better title than what the mortgagors had therein. If the mortgagors had no right, title and interest, the mortgagee will not acquire any right therein which is pure and simple.

Therefore, the financial institutions should be cautious at the time of advancing money to the mortgagors by creating equitable mortgage or any

other type of mortgage in respect of any immovable property. The real owner's title will not be extinguished in any manner in a mortgaged property, even after passing a decree, if it is found that the mortgagors have no right, title and interest in the property mortgaged. Therefore, whatever decree the mortgagee will get, such the decree is subject to the mortgagor's title in the said property. Fraud vitiates a decree and the real owner can also ignore the decree under section 44 of the Evidence Act.

The appeal, therefore, is allowed without any order as to costs. The judgment of the High Court Division is set aside and the matter is remanded to the High Court Division for fresh hearing of the appeal on merit in the light of observations made above.

C.J.

J.

J.

J.

The 6th December, 2016
Md. Mahub Hossain.