

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

First Appeal No. 101 of 2005.

Sarder Shafiqul Islam.

...Appellant.

-Versus-

Mahbubur Rahman and others .

....Respondents.

Mr. Ahmed Nowshed Jamil, Advocate

... For the Appellant

Mr. Md. Mahbub Ali with

Mrs. Nurun Nahar, Advocates

... For respondent No. 1

None appears

.....For respondent Nos. 4-12 & 14

Heard on: 14.01.2024, 23.01.2024.

Judgment on: 28.01.2024,

Md. Badruzzaman, J:

This appeal is directed against judgment and decree dated 13.04.2004 (decree signed on 20.04.2004) passed by learned Joint District Judge, 1st Court, Khulna in Title Suit No. 61 of 2004 rejecting the plaint under Order VII rule 11(d) of the Code of Civil Procedure.

Facts, relevant for the purpose of disposal of this appeal, are that the appellant and another as plaintiffs filed Title Suit No. 61 of 2004 in 1st Court of Joint District Judge, Khulna praying for a decree of declaration that all proceedings including auction sale dated 29.04.2004 as well as delivery of possession dated 26.07.2004 in Title Execution Case No. 61 of 1996 of the Court of Sub-ordinate Judge and Artha Rin

Adalat, Khulna (arising out of decree dated 17.01.1988 passed in Miscellaneous Case No. 166 of 1985 of the Court of District Judge, Khulna) are *mala fide*, illegal, unlawful, effective, without any lawful authority, without jurisdiction and not binding upon the plaintiffs.

The case of the plaintiffs, as is made out in the plaint, is that the property described in schedule B of the plaint was originally belonged to Dr. Noor Uddin Ahmed and his wife Most. Jobeda Khaton and they transferred the same by three registered sale deeds being No. 6125 dated 14.03.1983, No. 6415 dated 16.03.1983 and No. 7224 dated 27.03.1983 in favour of Sarder Kawser Uddin Ahmed, S.M Rabiul Islam and S.M Nazrul Islam (plaintiff No. 2) and delivered possession thereof to them and since then they had been residing therein. S.M Rabiul Islam and Sarder Kawser Uddin have died and their heirs are plaintiff No. 1 and defendants Nos. 13-23. Said Noor Uddin Ahmed and his wife Jobeda Khaton mortgaged the suit property to defendant No. 2 Bangladesh House Building Finance Corporation (In-short HBFC) against housing loan obtained from HBFC and to realize the loan, HBFC filed Miscellaneous Case No. 166 of 1985 in the Court of learned District Judge, Khulna which was decreed vide judgment and decree dated 17.01.1988. Said decree dated 17.01.1988 was put to execution in Title Execution Case No. 14 of 1989 in 3rd Court of Sub-ordinate Judge, Khulna which was dismissed on 20.07.1990. Defendant No. 2 then filed Second Execution Case No. 61 of 1996 on 27.06.1996 in the Court of Subordinate Judge, Artha Rin Adalat, Khulna which was barred by limitation but the Execution Court, without dismissing the case, condoned the delay without having jurisdiction to condone such delay. In course of execution process in Title Execution Case No. 61 of 1996, the suit property was put to auction on 29.04.2004 and defendant No. 1

purchased the property in auction at a consideration of Tk. 7,48,000/- though the property was valued at least Tk. 20,00,000/- at the relevant time. Having learnt about the same, the plaintiffs appeared in the title execution case on 26.07.2004 and prayed for staying the execution proceedings but the same was rejected. Defendant No. 1 auction purchaser came to take possession of the suit property on 26.07.2004 and found all the rooms of the building under lock and key and accordingly, he could not take possession of the suit property. The plaintiffs and their co-sharers have been residing in the suit property as usual. The execution case was proceeded by suppression of summons and the Execution Court had no jurisdiction to proceed with the execution case, as such, the plaintiffs have filed the present suit challenging the execution proceedings.

Defendant No. 1 auction purchaser on 10.08.2004 filed written statement and defendant No. 2 HBFC filed written statement on 25.08.2004. The cases of the defendants are more or less same. They contended that the suit is not maintainable in its present form; that there is no cause of action of the suit; that the plaintiffs have no *locus standi* to file the suit and the suit is barred by limitation as well as under section 42 of the Specific Relief Act. Their positive case is that the suit land belonged to Dr. Noor Uddin Ahmed and his wife Jobeda Khatoon and while they were owner in possession thereof took loan from defendant No. 2 HBFC for construction of residential building therein and as security of the loan they mortgaged the suit land vide two registered mortgage deeds being Nos. 20559 dated 21.12.1978 and 15011 dated 11.08.1979 and they constructed residential building in the suit land with the loan money obtained from HBFC. Since the mortgagors failed to repay the loan amount with interest, defendant

No. 2 HBFC filed Miscellaneous Case No. 166 of 1985 in the Court of learned District Judge, Khulna under provision of P.O 7 of 1973 against the borrowers for realization of the outstanding dues and the miscellaneous case was allowed *ex parte* on 17.01.1988. Thereafter, defendant No. 2 decree-holder filed Execution Case No. 14 of 1989 before the learned District Judge, Khulna who transferred the same to the then Commercial Court, Khulna for disposal but the miscellaneous case was dismissed for default on 20.07.1990. After dismissal of aforesaid case defendant No. 2 filed Second Execution Case No. 61 of 1996 before the Artha Rin Adalat, Khulna and after due service of all process of the execution case, the mortgaged property was put to auction and defendant No. 1 purchased the property in auction on 29.04.2004 at a consideration of Tk. 7,48,000/- following which the sale was confirmed on 30.05.2004 and the auction purchaser took delivery of possession of the suit property through Court on 26.07.2004 with the aid of police forces and process server. After taking possession, the auction purchaser is owning and possessing the suit property.

It has also stated that the alleged sale deeds of the plaintiffs are null and void deeds because of the fact that the mortgagors had no right to transfer the suit property without prior permission of defendant No. 2 HBFC and accordingly, the plaintiffs have or had acquired no right, title or interest in the suit property. In order to frustrate the auction purchaser's right, title and possession, the plaintiffs have filed the suit.

After filing the written statement, defendant No. 1, auction purchaser, on 06.01.2005 filed an application under Order VII rule 11(d) of the Code of Civil Procedure for rejection of the plaint on the plea that the suit is barred under provision of section 20 of the Artha Rin Adalat

Ain and the Court has no jurisdiction to proceed with the suit. The plaintiffs did not file any written objection against the application. The trial Court, after hearing the parties, vide order dated 13.04.2005 rejected the plaint holding that the suit is barred under section 20 of the Artha Rin Adalat Ain, 2003. Following which the decree was drawn up on 20.4.2004.

Being aggrieved by and dissatisfied with the judgment and decree dated 13.04.2005, plaintiff No. 1 has preferred the instant appeal.

Respondent No. 1 alone, respondent Nos. 13-16 jointly and respondent Nos. 4-12 and 14 jointly filed Voklatnama to contest the appeal.

Mr. Ahmed Nowshed Jamil, learned Advocate appearing for the appellant submits that the trial Court upon misconception of law rejected the plaint without considering the true perspective of the provisions under section 20 of the Artha Rin Adalat Ain. Learned Advocate further submits that no summons or process of the miscellaneous case and execution case was served upon the borrowers/judgment debtors. Learned Advocate further submits that the judgment was pronounced by the learned District Judge under provisions of P.O. 7 of 1973 and the District Judge had only jurisdiction to execute the decree and the Artha Rin Adalat had no jurisdiction to execute the decree or order passed by the learned District Judge in miscellaneous proceeding under P.O 7 of 1973 and accordingly, all the proceedings commenced by the Artha Rin Adalat are nullity in the eye of law and accordingly, the auction purchaser acquired no right, title or interest in the suit property. Learned Advocate further submits that the provisions under Artha Rin Adalat Ain does not specifically or impliedly debar a citizen to establish his title to in a civil Court in respect of any

property which has been mortgaged with a financial institution. Learned Advocate further submits that the plaintiffs are third party claimants and they have right to file suit under Order 21 rule 103 of the Code of Civil procedure and this provision can be applied even after exhausting remedies provided under rules 98, 99 and 101 of Order 21 of the Code. Learned Advocate further submits that the financial institution like Bangladesh House Building Finance Corporation has two options to realize the loan from the defaulter borrower, one is an application before the District Judge under article 27 of the President Order 7 of 1973 by depositing a very nominal court fee applicable to the applications and the other is by filing regular suit before the Artha Rin Adalat upon deposition *ad valorem* court fee and the Artha Rin Adalat will only has jurisdiction in such a case if the concerned financial institution has filed a suit before it upon depositing *ad valorem* court fee for realization of loan, and this position of law has already been settled by the Apex Court in various decisions. Learned Advocate further submits that in the instant case the House Building Finance Corporation got decree against the borrowers by application filed under Article 27 of P.O 7 of 1973 from the District Judge but it filed second execution case before the Artha Rin Adalat and the Adalat proceeded with the execution case and sold the mortgage property in auction without having jurisdiction to do so and as such, all proceedings in Title Execution Case No. 61 of 1996 are nullity in the eye of law.

In support of his contention learned Advocate has referred to the cases of Mohammad Gias Uddin Chowdhury and others vs. Bangladesh and others 8 LM (AD) 322, Government of Bangladesh and others vs. Basaratullah and others 9 BLD (AD) 97 and Abdul Mukid (Md) vs. Artha Rin Adalat, Khulna and another 66 DLR 211.

As against the above contention, Mr. Md. Mahbub Ali, learned Advocate appearing for respondent No. 1, auction purchaser, submits that admittedly, before so called purchase by the plaintiffs the suit property was mortgaged to House Building Finance Corporation and as such, the subsequent transfers by the mortgagors to plaintiff No. 2 and others cannot be treated as valid and legal transfer and those transfers did not create any right, title or interest in favour of the plaintiffs. Learned Advocate further submits that after mortgaging the property in question to Bangladesh House Building Finance Corporation, subsequent transfers of the same to the plaintiff No. 2 and predecessors of plaintiff No.1 and defendant Nos. 13-23 by the mortgagors without the consent of the mortgagee and without repaying the loan is nothing, but a fraudulent act and it is by now well settled that fraud vitiates everything. Learned Advocate further submits that in view of the provisions under rule 103 of Order 21 of the Code, the plaintiffs did not have *locus standi* to file the suit challenging the execution proceeding. Learned Advocate further submits that the suit is not maintainable because the plaintiffs have no right, title or interest in the suit property and as such, the trial Court committed no illegality in rejecting the plaint. In support of his contention learned Advocate has referred to the cases of Syed Jubayer Hossain vs. Judge, Artha Rin Adalat No. 1, Dhaka and others 28 BLC (AD) 50 and Additional Deputy Commissioner (Revenue) and Assistant Custodian, Vested and Non-Resident Property vs. Tohidul Hossain Choudhury and others 51 DLR (AD) 116.

We have heard the learned Advocates, perused the plaint, written statements, application filed under Order VII rule 11(d) of the

Code of Civil Procedure, the impugned order passed by the trial Court and other materials available on record.

On perusal of the plaint of Title Suit No. 61 of 2004 it appears that the plaintiffs at paragraph 1-2 of the plaint stated that Dr. Noor Uddin Ahmed and his wife Jobeda Khatoon were owners of the suit property who transferred the same by three registered sale deeds dated 14.03.1983, 16.03.1983 and 27.03.1983 in favour of plaintiff No. 2 and two others (predecessors of plaintiff No. 1 and defendant Nos. 13-23) and that Dr. Noor Uddin Ahmed and his wife Jobeda Khatoon mortgaged their properties to defendant No. 2 Bangladesh House Building Finance Corporation against loan obtained by them and the defendant No. 2 got decree on 10.01.1988 in Miscellaneous Case No. 116 of 1985 against the mortgagors.

Admittedly, the suit property was mortgaged by the real owners Dr. Noor Uddin Ahmed and his wife Most. Jobeda Khatoon to Bangladesh House Building Finance Corporation against loan obtained by them and they executed and registered two mortgage deeds dated 21.12.1978 and 04.08.1979. The plaintiffs claimed that said Dr. Noor Uddin Ahmed and his wife Most. Jobeda Khatoon transferred said property by three registered sale deeds in 1983. It has also stated that Bangladesh House Building Finance Corporation filed miscellaneous Case No. 166 of 1985 before the learned District Judge, Khulna and got decree against the mortgagors on 17.01.1988. The plaintiffs did not state anything in the plaint as to whether the judgment debtors have or had filed any appeal or any other proceeding challenging the said decree passed by the learned District Judge.

Now question arises whether the plaintiffs or their predecessors have acquired any right, title or interest in said mortgaged property by dint of their purchased deeds.

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 mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees that in the event of his failing to pay according to his contract, the mortgagee shall have a 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 and the mortgagee, a simple mortgagee.

In the instant case, the mortgagors did not deliver possession of the mortgaged property to the mortgagee but agreed to pay the loan amount and failing which they agreed that the mortgagee shall have the right to sale the property if they fail to repay the amount. Accordingly, this is 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 60 A 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 mortgagor has with him. He can then redeem the property and enjoy subrogation. He cannot have better right than the mortgagor. It is the responsibility of the third party to make proper inquiry before purchasing the property from the mortgagor and ask him to clear the encumbrance.

Section 48 of the Transfer of 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 interests in the same immovable property which cannot be enjoyed to their full extent or conflict each other, each 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 sale 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 mortgaged-property, steps into the shoes of the mortgagor.

From the record it reveals that after mortgaging the property in question in favour of the Bangladesh House Building Corporation in 1978 and 1979, the mortgagors allegedly transferred the property in question in favour of plaintiff No. 02 and two others in 1983 by

executing and registering three sale deeds. In Syed Jubayer Hossain vs. Artha Rin Adalat reported in 28 BLC (AD) 50 the Appellate Division held as follows:

“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.”

It is settled principle of law that when there is no right, there is no remedy. For the maintainability of a declaratory suit under section 42 of the Specific Relief Act the plaintiff must have a legal character or any right as to the property in suit. A person cannot sue for a declaration of his right unless he has an existing right. In the instant case, the mortgagors neither took permission from HBFC before the transfer was made to the plaintiffs nor repaid the loan amount before the transfer. As such, in view of the relevant provisions of Transfer of Property Act, as discussed above, as well the decision the hon'ble Appellate Division in Syed Jubayer Hossain (*supra*) the transaction was a fraudulent one and by dint of such transfer plaintiffs could not acquire right, title or interest in the suit property. Accordingly, their suit for declaration that the execution proceeding against their vendor-mortgagors was illegal, in effective and not binding upon them is not maintainable under section 42 of the Specific Relief Act.

Now another question arises whether, the plaintiffs can be considered as third party claimants and whether they have right to institute Suit under rule 103 of order 21 of the Code of Civil Procedure.

In Md. Sekandar and another vs. Janata Bank Limited and others 3 LM (AD) 448 this issue has specifically decided. The plaintiffs of that suit were claiming title to in the mortgaged-property by way of

purchase from Md. Abul Kalam Chowdhury and Raja Miah and the judgment debtors mortgaged the property showing Md. Khorshed Mia, Kashem Mia and Md. Hossain as sons of Lal Miah, Chand Mia and Younus Mia, who had no sons under the name Md. Khorshed Mia, Kashem Mia and Md. Hossain. They prayed for declaration of title in respect of the suit land and they also prayed for declaration that the decree passed in Mortgage Suit No. 35 of 1995 was void and not binding upon them. The Appellate Division, after considering the plaintiffs as third-party-claimants came to the conclusion that the said suit was maintainable. The Appellate Division in coming to such conclusion observed, *“a third party claimant, 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 Appellate Division also took the view, *“the scope of the suit under Order 21 Rule 103 is not merely to ascertain whether the 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 Artha Rin Adalat 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 Decrees and Orders’.”*

The case of *Sekandar, 3 LM (AD) 448 (supra)* is quite distinguishable considering the facts and circumstances of the instant case because in the said case the third-party-claimants claimed their independent title to and possession in the suit property from the persons other than the mortgagors. In the instant case the plaintiffs are claiming their title to and possession in the suit property through the mortgagors. As such, the plaintiffs cannot be considered as third-party-claimants and accordingly, they have no remedy under rule 103 of Order 21 of the Code of Civil Procedure for setting aside the auction process because of the fact that the plaintiffs have stepped into the shoes of the mortgagors/ judgment debtors.

Now another question arises whether Artha Rin Adalat has jurisdiction to execute the decree passed by learned District Judge.

It appears that Bangladesh House Building Finance Corporation got decree on 17.01.1988, the mortgaged property was sold in auction on 29.04.2004 which was confirmed on 30.05.2004 and the auction purchaser took delivery of possession of the suit property through Court on 26.07.2004. Thereafter, the plaintiffs filed the suit challenging the execution proceeding as well as the auction process on the plea that the execution Court had no jurisdiction to execute the decree. We are unable to accept such contention because a transferee from mortgagor or judgment debtor is presumed to be aware of the mortgage of the property and the pendency of the proceeding before Court and he should be careful in purchasing a mortgage property. If any unfair, un-equitable or undeserved protection is afforded to a transferee from mortgagor, the decree holder will never be able to realize the fruits of the decree. Moreover, in *Additional Deputy Commissioner vs. Tohidul Hossain 51 DLR (AD) 117* it is held, “ auction sale having taken place and

the sale having been confirmed by issuance of the sale certificate in favour of the auction purchaser, such sale cannot be illegally withheld by parties not connected with the mortgage suit or with the mortgage execution case”.

It appears from the impugned order that the trial Court rejected the plaint as being barred under section 20 of the Artha Rin Adalat Ain, 2003. Said section is quoted verbatim below:

“২০। এই আইনের বিধান ব্যতিরেকে, কোন আদালত বা কর্তৃপক্ষের নিকট অর্থ ঋণ আদালতে বিচারাধীন কোন কার্যধারা বা উহার কোন আদেশ, রায় বা ডিক্রীর ~~বিশেষ~~ কোন প্রশ্ন উত্থাপন করা যাইবে না, এবং এই আইনের বিধানকে উপেক্ষা করিয়া কোন আদালত বা কর্তৃপক্ষের নিকট আবেদন করিয়া কোন প্রকার দাবী বা প্রার্থনা করা হইলে, ঐরূপ আবেদন কোন আদালত বা কর্তৃপক্ষ গ্রাহ্য করিবে না।”

From a plain reading of section 20 of the Artha Rin Adalat Ain 2003, it appears that except the provisions of this Act, no question shall be raised before any Court or authority about any pending proceeding in the Artha Rin Adalat, or against its order, judgment or decree, and if any relief is claimed or prayed before any Court or authority ignoring the provisions of this Act, no Court or authority shall accept any such prayer. Section 20 of the Artha Rin Adalat Ain specifically debarred in filing of a separate suit against any order or decree passed by the Artha Rin Adalat.

In the instant case, the appellant and another by filing the suit, have challenged the execution proceeding as well as auction process conducted by the Adalat on the ground of lack of jurisdiction and fraud. Section 20 of the Artha Rin Adalat Ain, 2003 creates a clear bar in instituting such suit making such prayer even on the ground of fraud or lack of jurisdiction to execute the decree by the Adalat. Therefore, we are of the view that the trial Court committed no illegality in rejecting

the plaint by the impugned judgment and decree as being barred by law.

Other cases, which have been cited by the learned Advocate for the appellant, are not applicable in this case because the facts and circumstances of those cases and those of the present one are distinguishable.

In view of the above, we find no merit in this appeal.

Accordingly, the appeal is dismissed, however without any order as to costs.

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

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)