

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

Present:

**Mr. Justice Md. Mozibur Rahman Miah
and**

Mr. Justice Md. Bashir Ullah

Civil Revision No. 2329 of 1998

In the matter of:

An application under Section 115(1) of the Code of
Civil Procedure, 1908

And

In the matter of:

Md. Abdul Mannan and others

--- 3rd Party-Petitioners.

-Versus-

Rupali Bank Limited and others

--- Plaintiffs-Opposite parties.

None appears

---For the petitioners.

Mr. Md. Imam Hasan, Advocate

--- For the opposite party No. 1

Heard on 09.12.2024

Judgment on: 10.12.2024

Md. Bashir Ullah, J.

At the instance of the 3rd party in Mortgage Execution Case No. 13 of 1996, this Rule was issued calling upon the opposite party no. 1 to show cause as to why the order no. 17 dated 01.06.1998 passed by the then learned Sub-ordinate Judge, Artha Rin Adalat, First Court, Chattogram should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

At the time of issuance of the Rule, the proceeding of Mortgage Execution Case No. 13 of 1996, pending in the then learned Sub-

ordinate Judge, Arthar Rin Adalat, First Court, Chattogram was stayed for 02(two) months, which was subsequently extended from time to time and it was lastly extended on 15.03.1999 till disposal of the Rule.

The salient facts, relevant for the disposal of the Rule are:

On 17.4.1993, the opposite party no.1 as plaintiff instituted Mortgage Suit No. 25 of 1993 in the 1st Artha Rin Adalat, Chattogram against the opposite party nos. 2 to 4 for realisation of money. The case of the plaintiff-opposite party no. 1 in short is that the defendant-opposite party no. 2 is a business concern and the defendant-opposite party no.3 is the owner of defendant-opposite party no. 2. The defendant-opposite party no. 2 opened a current account with the plaintiff bank and subsequently took loan of Tk. 2,00,000/- on 15.02.1984 for the business of cement and C.I. sheet by mortgaging immovable property. The defendants from time to time repaid some amount of money however the liabilities stood at Tk. 8,65,965.70 as of 31.12.1992 and the defendant admitted the above dues but failed to pay the dues on repeated requests hence the plaintiff-opposite party no. 1 was constrained to file the Mortgage suit.

The suit was decreed in preliminary form by judgment and order dated 02.09.1993 and the final decree was passed on 08.10.1994. After that, the decree-holder-opposite party no. 1 on 11.01.1996 filed Mortgage Execution Case No. 13 of 1996 for execution of the decree. Subsequently, the court passed an order to publish a proclamation for sale in the daily newspaper. Accordingly, the auction notice was

published on 26.04.1998 in 'the Daily Azadi'. The petitioners came to know the above mortgage execution case from the auction notice and then they filed an application under Order 21 Rule 58 read with section 151 of the Code of Civil Procedure on 01.06.1998 in the First Artha Rin Adalat, Chattogram to release the scheduled land from attachment.

The case of the 3rd Party-petitioners is that the defendant-opposite party no.4 sold the suit land measuring 5 decimals to one, Mohammad Fazlul Hoque Chowdhury under R.S. Plot No. 498 and 499 by deed no. 1385 dated 07.03.1994. Mohammad Fazlul Hoque Chowdhury mortgaged the same to National Credit and Commerce Bank Limited and took a loan of Taka 25,00,000/-. Fazlul Hoque Chowdhury could not pay the loan and as such he sold the schedule land along with the building to the petitioners by registered deed no. 4481 on 30.06.1997 with the approval of National Credit and Commerce Bank Limited. Thus the petitioners are the owners and possessors of the schedule land and their names have been recorded in the B.S. Khatian through mutation and paid rent to the government up to the current year. It has further been stated that, the defendant-opposite party no. 4 has no manner of right, title, interest and possession of the schedule land. The petitioners have a 6-storey commercial building named 'Annanda Hotel' in the scheduled land. If the suit land is sold in auction without determination of right, title in that case the petitioners shall suffer irreparable loss and injury.

The petitioners also filed an application to stay further proceeding of the execution case. The executing court heard the applications and

after hearing both the parties rejected both the applications by order no. 17 dated 01.06.1998.

Being aggrieved by and dissatisfied with the order no. 17 dated 01.06.1998 passed by the First Artha Rin Adalat, Chattogram in Mortgage Execution Case No. 13 of 1996, the petitioner preferred the instant Civil Revision and obtained Rule and order of stay.

It has been submitted in the revisional application that in Order 21, Rule 58 of the Code of Civil Procedure provides that when an objection has been raised regarding any property attached in an execution of a decree on the ground that such property is not liable to attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other aspects, as if he was a party to the suit but in the present case the learned Sub-ordinate Judge committed an error of law resulting in an error in the decision occasioning failure of justice in rejecting the application without any investigation.

It is further stated that the finding of the court below is based on no evidence and it is absolutely based on conjecture and surmises,

None appeared for the petitioner to press the rule though the matter has been appearing in the list with the name of the learned counsels for the parties.

Mr. Md. Imam Hasan, learned Advocate appearing on behalf of the opposite party no. 1 contends that the application filed by the third party under Order XXI, Rule 58 of the Code of Civil Procedure in a mortgage execution case is not maintainable. He further contends that

the petitioners in connivance with the judgment debtors filed the said Miscellaneous Case to delay the disposal of the execution case and recovery of public money.

Mr. Hasan contends that Order XXI, Rule 58 of the Code of Civil Procedure has no manner of application where the property is directed to be sold under a mortgage decree, and the said Rule is applicable only where the property has been attached for the purpose of satisfying any general money claim. He submits that there is no illegality in the impugned order. He finally prays for discharging the Rule.

In support of his contention learned Advocate referred to the case *Yunus Mia (Md) and others Vs. Bangladesh Krishi Bank*, reported in 54 DLR 123, *M.S. Doraisami Iyer Vs. A.R. Arunachalam Chettiar and others*, reported in AIR 1991 Madras, 275.

We have heard the submissions of the learned Advocate for the opposite party no. 1, perused the Civil Revision, impugned order passed by the trial Court, and other materials on record.

The record shows that the petitioners filed some documents with the application filed under Order XXI, Rule 58 of the Code of Civil Procedure but the executing Court did not examine those documents and rejected the application without assigning any reason and without investigating the claim made by the petitioners. The provision of Order XXI, Rule 58 of the Code of Civil Procedure is reproduced below for our convenience:

“58.(1) Where any claim is preferred to, or any objection is made to the attachment of, any property

attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.”

Order XXI, Rules 58, 59, 60 and 61 of the Civil Procedure Code provides that if in the execution of a decree any property is attached any person interested may raise the objection that such property is not liable to attachment. After such a claim or objection is raised, the Court should investigate and adjudicate upon the claim or objection.

In this regard, reliance may be placed in the case of *Foyez Ahmed and others Vs. Uttara Bank Limited and others*, reported in 55 DLR(2003)635 wherein this Court observed:

“Where a third party has claimed property under attachment in execution of a decree and filed an application under the aforesaid provision of law, then

it is the duty of the Court to investigate the claim and the executing Court should not reject the application without assigning any reason.”

In such a view of the matter, we are of the opinion that the executing Court has committed error of law in rejecting the application simply mentioning that, “শুনিলাম। অদ্য বেলা ১২ ঘটিকায় নিলাম কার্যক্রম পরিচালিত হইবে মর্মে বহু পূর্বেই পত্রিকায় বিজ্ঞপ্তি প্রকাশ ক্রমে নিলামের অপেক্ষায় আছে। ডিক্রিদার ব্যাংকের বক্তব্য শুনিলাম। দায়িক পক্ষ এবং ডিক্রিদার এর স্বীকৃতমতে দায়িক কিছু টাকা Down payment করিয়াছেন এবং দায়ীকের প্রদর্শিত মতেই বন্ধকী জমি নিলাম হইবে। দায়িক যে দাগ বন্ধক দেয় সে দাগের অবিরোধীয় বা বন্ধকী সম্পত্তির বাইরের আরো জমি আছে। দায়িক নুরুন্নবীর মালিকানাধীন সম্পত্তি নিলাম বিক্রয় করিবার উদ্যোগ গ্রহণ করিয়াছে ফলে মূল ডিক্রি ও জারী মামলাকে হতাশ করার উদ্দেশ্যে অত্র মিস মোকদ্দমা আনিত। এমতাবস্থায় অত্র মিস মোকদ্দমা খারিজ করা গেল।”

The said order appears as merely a non-speaking order and the same cannot be maintained in the eye of law. The petitioners have the right to know as to why his application has been rejected. Since, the impugned order is totally non-speaking one, the same deserves to be interfered with by this Court. The impugned order as it transpires does not lead to any lawful satisfaction.

We also get support from the decision passed in *Arab Bangladesh Bank Ltd. Vs. Janata Bank and others*, reported in 11 BLC(2006)186 wherein this Court held:

“Rule 58 of Order XXI of the Code of Civil Procedure requires an executing Court to investigate the claim or objection of an objector as if he was a party to suit. Such

investigation is dispensed with only when the court considers the claim or objection was designedly or unnecessarily delayed...

After omission of section 47 from the Code of Civil Procedure, provision of Order XXI, Rule 58 of the Code of Civil Procedure is now left only for consideration and examination of all claims and/or objections of a third party in respect of a property attached in execution of a decree. It is also the duty of an executing Court to decide and adjudicate finally, all questions that may arise relating to execution of a decree.”

Given the above facts and circumstances as well as the *ratio* passed by this Court, we are of the view that the execution court failed to apply its judicial mind and hence the impugned order is found to be not sustainable in law and the same is liable to be set aside.

We find substance in the Rule.

Accordingly, the rule is made absolute, however without any order as to cost.

The impugned order no. 17 dated 01.06.1998 passed by the learned Sub-ordinate Judge, Artha Rin Adalat, First Court, Chattogram in Mortgage Execution Case No. 13 of 1996 is hereby set aside.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Since it is a very old case, the executing court is hereby directed to proceed with the execution case and to dispose of the application under Order XXI, Rule 58 in accordance with law on merit as expeditiously as possible, preferably within 02(two) months from the date of receipt of the copy of this order.

Let a copy of this judgment be communicated to the court concerned forthwith.

Md. Mozibur Rahman Miah, J.

I agree.