

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 3292 of 2015

Md. Mostafijar Rahman @ Md. Mostafizur
Rahman

... Petitioner

-Versus-

Md. Nur Mohammad Mandal and others

...Opposite-parties

Mr. Bivash Chandra Biswas with

Ms. Shebani Biswas, Advocates

...For the petitioner

Mr. Hosnara Begum, Advocate

...For the opposite-party No. 9.

Heard on 11.06.2024 and

Judgment on 12th June, 2024.

In this application under Section 115(1) of the Code of Civil Procedure, Rule was issued calling upon the opposite party Nos. 1-9 to show cause as to why the impugned judgment and order dated 13.08.2015 passed by the learned Additional District Judge, 3rd Court, Bogura in Miscellaneous Appeal No. 118 of 2013 disallowing the same and thereby affirming the judgment and order dated 18.08.2013 passed by the learned Artha Rin Adalat, Bogura in Artha Rin Execution Case No. 160 of 2001 allowing an application under Order 21 Rule 89 of the Code of Civil Procedure should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of this Rule, in short, are that the opposite party-Rupali Bank, as plaintiff, filed Artha Rin Suit No. 119 of 1994 in the Court of learned Subordinate Judge (now Joint District Judge) and Artha Rin Adalat, Joypurhat against one Md. Bahar Uddin, predecessor of opposite party Nos. 10-18 for realization of loan amounting to Tk. 52,638.55/-. The defendant contested the suit and after hearing the trial court decreed the suit in favour of the plaintiff-bank. Thereafter, the bank put the decree in execution by filing Execution Case No. 160 of 2001. The opposite party Nos. 10-18 as heirs of original mortgagor were duly substituted in the execution case. In execution case, mortgage property was put in auction, present petitioner participated in the auction held on 27.01.2005 and being highest bidder his offer was accepted and he paid entire auction money in Court. After acceptance of his bid by the execution court, opposite party Nos. 1-8, filed an application under Order 21 Rule 89 of the Code of Civil Procedure. The said application was kept in record undisposed of. Thereafter, the opposite party Nos. 1-8 filed an application under Order 21 Rule 58 of the Code of Civil Procedure for release of the property from

execution without depositing money, which was registered as Miscellaneous Case No. 05 of 2005. Similarly, the opposite party Nos. 10-18, as judgment-debtors, also filed an application in the same manner which was registered as Miscellaneous Case No. 03 of 2005. The execution court allowed both the miscellaneous cases, against which the decree-holder-bank preferred Miscellaneous Appeal Nos. 197 of 2005 and 200 of 2005 and the auction purchaser preferred Miscellaneous Appeal Nos. 192 of 2005 and 193 of 2005. All the appeals were heard analogously and after hearing by the judgment and order dated 30.11.2008 the appellate court allowed the same and set aside the judgment and order dated 22.06.2005 passed by the execution court. Thereafter, the opposite party Nos. 1-8 preferred Civil Revision No. 4232 of 2008 in which Rule was discharged. Being failed, they have pressed the application under Order 21 Rule 89 of the Code filed earlier. The execution court heard the application and by the judgment and order dated 18.08.2003 allowed the application and set aside the auction sale dated 06.02.2005.

Being aggrieved by and dissatisfied with the judgment and order of the execution court, auction-purchaser moved before the learned District Judge, Bogura by filing Miscellaneous Appeal No. 118 of 2013. The appeal was heard by the learned Additional District Judge, 3rd Court, Bogura on transfer who after hearing by the impugned judgment and order dated 13.08.2015 dismissed the appeal affirming the judgment and order passed by the execution court. At this juncture, the petitioner moved this Court by filing this revision and obtained the present Rule and order of stay.

Mr. Bivash Chandra Biswas, with Ms. Shebani Biswas, learned Advocates appearing for the petitioner submit that after selling the property in auction and purchase by the petitioner, both the judgment-debtors and subsequent purchasers from them filed two separate applications under Order 21 Rule 58 of the Code of Civil Procedure which were allowed by the execution court, but set aside by the appellate court in Miscellaneous Appeal Nos. 192, 193, 197 and 200 of 2005. Thereafter, opposite party Nos. 1-8 as subsequent purchasers filed Civil Revision No. 4232 of 2008 in which Rule was discharged on the ground that the petitioners did not comply with the

provision of Section 32(2) of the Artha Rin Adalat Ain. Thereafter, opposite party Nos. 1-8, as subsequent purchasers from judgment-debtors took initiative for hearing the application filed earlier under Order 21 Rule 89 of the Code of Civil Procedure praying for setting aside the sale upon deposit of five percent above the auction price as provided in law. The application was resisted by auction purchaser. The execution court after hearing by order dated 18.08.2013 allowed the application and set aside the auction sale. The appellate court also affirmed the judgment and order of the execution court by the impugned judgment and order dated 13.08.2015.

He submits that the application being filed by a 3rd party under Order 21 Rule 89 of the Code is not maintainable. A 3rd party can raise claim in any execution proceedings seeking release of the property from attachment in an auction only under Order 21 Rule 58 of the Code, subject to deposit as provided under Section 32(2) of the Artha Rin Adalat Ain, 2003 as held by the Appellate Division in the case of *Md. Salim Hossain Vs. Artha Rin Adalat, First Court, Munshigonj and others* reported in X ADC 420. Accordingly, both the judgment-debtors and subsequent purchasers earlier raised claim

as 3rd party under Order 21 Rule 58 of the Code which was finally knocked down by the appellate court as well as by this Court in civil revision discharging the Rule. Therefore, present opposite party Nos. 1-8 have no scope to file any application under Order 21 Rule 89 of the Code of Civil Procedure. But the execution court as well as the appellate court unfortunately, failed to appreciate the provision of law, both under Rules 58 and 89 of Order 21 of the Code and wrongly passed both the judgment and order under challenge, as such, committed an error of law in the decision occasioning failure of justice.

Ms. Hosneara Begum, learned Advocate appearing for the opposite-party No. 9, bank submits that the bank by filing Artha Rin Suit obtained decree against the predecessor of opposite party Nos. 10-18 named Bahar Uddin. Thereafter, put the decree in execution by filing Execution Case No. 160 of 2001 in which in compliance of procedure provided in the Code as well as the Artha Rin Adalat Ain, the property was put in auction. Thereafter, the judgment-debtors as well as subsequent purchasers filed application for release of the property from attachment and execution under Order 21 Rule 58 of

the Code of Civil Procedure, both the applications were allowed by the execution court. Thereafter, the bank as well as the auction purchaser preferred 04(four) miscellaneous appeals against the judgment and order of the execution court which was analogously heard by the appellate court and by the judgment and order dated 03.11.2008, all those appeals were allowed and order of the execution court was set aside. Consequently, the purchasers moved this Court by filing civil revision in which Rule was discharged. Thereafter, the purchasers pressed the application under Order 21 Rule 89 of the Code filed earlier before the execution court. The application was resisted by the auction purchaser. The execution court after hearing allowed the same and on appeal the order of execution court was affirmed. She submits that because of rejection of application under Order 21 Rule 58 of the Code, no provision provided either in Artha Rin Adalat Ain or in the Code of Civil Procedure debarring owner of the property and the person having interest in the property from filing an application under Order 21 Rule 89 of the Code of Civil Procedure praying for setting aside the

sale upon deposit of auction money along with five percent compensation.

She argued that both the courts below in their judgment and orders rightly held that the applicants being subsequent purchasers from judgment-debtors they have interest in the property and are entitled to file application under Order 21 Rule 89 of the Code for setting aside the sale upon deposit of five percent compensation on auction price and there is no illegality and or error in the decision occasioning failure of justice.

Heard the learned Advocates of both the sides, have gone through the revisional application and impugned judgment and order passed by the learned Additional District Judge, 2nd Court, Bogura in Miscellaneous Appeal Nos. 192, 193, 197 and 200 of 2005, judgment and order passed in Civil Revision No. 4232 of 2008 annexed with the application as Annexures-C and A respectively, and the judgment and orders of both the courts below.

Fact of the case need not be repeated again. It is true that the bank, for realization of loan money from predecessor of opposite party Nos. 10-18, named Bahar Uddin filed Artha Rin Suit No. 119

of 1994 which was decreed on contest. The decree was put in auction by filing Execution Case No. 160 of 2001, wherein heirs of judgment-debtors was substituted who filed an application under Order 21 Rule 58 of the Code and subsequent purchasers of the property, the opposite party Nos. 1-8 also filed an application under Order 21 Rule 58 of the Code both praying for release of the property from execution. Ultimately, their claim failed upto this Court in revision. Before filing of applications under Order 21 Rule 58 of the Code, the opposite party Nos. 1-8 as purchasers from judgment-debtors, filed an application under Order 21 Rule 89 of the Code which was not moved and kept in record undisposed of because of order of stay. After disposal of application under Order 21 Rule 58 of the Code upto this Court, the purchasers of the property, that is, opposite party Nos. 1-8 took step for hearing of application under Order 21 Rule 89 of the Code filed in Execution Case No. 160 of 2001. The execution court after hearing by its order dated 18.08.2013 allowed the application and set aside the auction sale accepting five percent compensation on auction price. The auction purchaser moved before the appellate court by filing

Miscellaneous Appeal No. 118 of 2013 which was also dismissed affirming the order of the execution court.

Only question raised before this Court by the petitioner that whether subsequent purchasers of the property from the judgment-debtors can file an application under Order 21 Rule 89 of the Code praying for setting aside the auction sale instead of filing the application by the judgment-debtors. To substantiate such argument learned Advocate for the petitioner relied on the case reported in *X ADC 420*, wherein, it is held that if a 3rd party raises any objection against the execution proceeding by submitting any claim then he has to comply with the provision of Sub-section (2) of Section 32 of the Artha Rin Adalat Ain, 2003.

I have gone through the decision referred by the learned Advocate for the petitioner wherein, one Md. Ali filed an application under Order 21 Rule 100 of the Code of Civil Procedure read with Section 57 of the Artha Rin Adalat Ain, 2003 for restoration of possession of .75 decimals land of the same plot sold in auction in an execution case arising out of a decree passed by the Artha Rin Adalat. In the said case, claim of Md. Ali, firstly, was a 3rd party

claim and secondly, the property in question was not attracted by decree and finally he succeeded in that case, and got restoration of possession. But in the instant case, after auction purchase, no sale certificate was issued, no delivery of possession of the property and the opposite party Nos. 1-8 are not 3rd party in the instant case. They claimed their title in the property from judgment-debtors, not from a person other than the judgment-debtors. Therefore, purchasers from judgment-debtors are in no way can be treated as 3rd party, as they claim their title through the judgment-debtors not through a person independent of judgment-debtors. Because of this situation, neither heirs of judgment-debtors, nor the purchasers had any scope or cause of action to file an application under Order 21 Rule 58 of the Code of Civil Procedure praying for release of the property from attachment or execution. In the instant case, though they both filed applications under Order 21 Rule 58 of the Code earlier, the appellate court as well as this Court rightly refused their claim by allowing appeal as well as discharging the Rule in Civil Revision N o. 4232 of 2008.

Now, the question is whether purchasers from judgment-debtors, can come with an application under Order 21 Rule 89 of the

Code of Civil Procedure praying for setting aside auction sale in compliance with provisions of Rule 89. To appreciate the question, Rule 89 of Order 21 of the Code of Civil Procedure may be looked into which run thus;

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

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

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

From the provisions provided in Rule 89 as quoted above, it appears that any person, either owing such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court for payment to the purchaser, a sum equal to five percent, of the

purchase-money. In the instant case, the applicant-purchasers are holding an interest in the property and title acquired before sale and they complied with the provisions in Rule 89(1) by depositing a sum equal to five percent of the purchase-money. Therefore, when person holding interest in the property has come with an application for setting aside the sale in compliance with provision provided in Rule 89 of Order 21 of the Code, the execution court is to see whether in filing such application, the applicant has complied with the provision in Rule 89. Here the execution court while allowing the application held that the applicant have interest in the property sold in auction and they purchased the property from the judgment-debtors before such sale and finding merit in the application allowed the same by its judgment and order dated 18.08.2013. The appellate court while dismissing the appeal concurrently observed that the auction was held on 06.02.2005, but the opposite party Nos. 1-8 purchased the property much earlier from the judgment-debtors, as such, they have interest in the property and can file application under Order 21 Rule 89 of the Code.

Apart from this a mortgagee if transfer any property mortgaged with the bank as security without redemption, the purchaser purchased the property with all liability attaches with the same. Unless such liability is discharged either by the judgment-debtors or by purchasers of the same, the property will remain under encumbrances with the bank. Here, when the purchasers of the property came with an application to satisfy the claim of the bank as well as the claim of the auction purchaser upon deposit of amount equal to five percent of the purchase-money, there was no impediment on the part of the execution court to allow such application. Accordingly, the execution court as well as the appellate court rightly allowed the application and set aside auction sale accepting the amount equal to five percent of the purchase-money.

Moreover, the quantum of lands are measuring 5 acres and said 5 acres land was sold in auction only at a consideration of Tk. 2,20,000/- with the consent of the mortgagee-bank which is also unusual and to protect interest of the subsequent purchasers in the property they rightly filed application before the execution court

under Order 21 Rule 89 of the Code of Civil Procedure for setting aside the sale upon compliance of provisions of Rule 89.

In view of the above, I find that both the courts below committed no illegality or error of law in the decision occasioning failure of justice calling for interference by this Court.

In the result the Rule is discharged, however, without any order as to costs.

Order of *stay* granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned at once.