

**1 SCOB [2015] HCD 110****High Court Division**

(Special Original Jurisdiction)

Mr. Md. Afzal Hossain

... for the petitioners

Writ Petition No. 6328 OF 2003

Mr. A.B.Siddique with

**Abul Hossain Khan & another** ... Petitioners

Mr. Ziaul Hasan,

Mr. K.M.Salauddin Ahmed and

Mr. Kalipada Mridha

-Versus-

... For the respondent No.2 Bank

**Artha Rin Adalat, Barguna and others.**

... Respondents

Heard on 7.4.2014 &amp; 13.4.2014

&amp;

Judgment on the 20<sup>th</sup> April, 2014.**Present:****Mr. Justice Syed Refaat Ahmed****And****Mr. Justice Mahmudul Hoque****Article 102 (2)(a)(ii) of the Constitution of the People's Republic of Bangladesh****&****Section 6(5) of the Artha Rin Adalat Ain, 2003:**

**In the event of execution of a decree for realization of decretal amount the court shall proceed with the property of the borrower first and then the property of the third-party mortgagors.**

...(Para 13)

**Judgment****Mahmudul Hoque, J:**

1. On an application under Article 102 of the Constitution of Bangladesh this Rule Nisi has been issued at the instance of the petitioners calling upon the respondents to show cause as to why the impugned proceeding of Money Execution Case No. 01 of 1999 subsequently renumbered as Money Execution Case No. 96 of 2003 arising out of Artha Rin Case No. 03 of 1997 pending in Artha Rin Adalat, Barguna, respondent No.1 so far as it relates to the property of Schedule "Ka" of the plaint (as well as of the decree) should not be declared to have been passed without lawful authority and is of no legal effect, and/or such other or further order or orders passed as this Court may deem fit and proper.

2. Facts relevant for disposal of this Rule Nisi, in short, are that the respondent No.2 Bank as plaintiff instituted Artha Rin Suit No. 03 of 1997 before the Artha Rin Adalat, Barguna, against the petitioners and respondent No.4 as defendants in the suit for recovery of Tk. 10,69,705/- stating inter alia, that the respondent No.4 as proprietor of M/S. Hydraulic Engineering availed of a loan for Tk.4(four) lac from the respondent No.2 bank. The petitioners mortgaged their landed property as security against loan with the respondent No.2 bank. Since the respondent No.4 borrower failed to pay the said loan along with interest within time inspite of repeated demands of the respondent No.2 bank, the bank has filed the instant suit for realization of money against the respondent No.4 and the present petitioners as defendants in the suit.

3. The petitioners contested the suit by filing written statement contending inter alia that they stood guarantors as third party mortgagors for Tk. 4 Lac against Work Order No.6/470 and the respondent No.4 borrower paid back the said amount within the stipulated time as per terms and condition of the sanction letter but subsequently the respondent No.4 in collusion with the respondent No.2, the Manager of the bank on the basis of a false work order being No. W6/330 took loan of Tk.5 Lac more without the knowledge and consent of the petitioners for which the petitioners never stood as guarantors nor mortgaged their property as security to the bank and as such the suit is liable to be dismissed against them. The trial court decreed the suit against the respondent No.4 borrower (defendant No.1 in the suit). Unfortunately at the time of drawing decree the land of the petitioners as mentioned in Schedule 'Ka' to the plaint was also included though the said land was mortgaged by the petitioners as guarantors and which can be sold for realization of the decreetal amount if there be any shortfall after selling the mortgaged property of the borrower first and adjustment of the sale proceeds.

4. The decree holder bank filed Money Execution Case being No. 01 of 1999 subsequently renumbered as No.96 of 2003 in the Artha Rin Adalat, Barguna for realization of decretal money and in the execution proceedings the court put the property of the petitioners in auction alongwith the landed property of the borrower fixing 28.10.2003 for holding auction without holding auction of the borrower's property first. The petitioners by filing a supplementary affidavit on 10.04.2014 further stated that the petitioners being the third party mortgagors their property cannot be sold in auction without selling the mortgaged property of the borrower first as per Section 6(5) of the Artha Rin Adalat Ain 2003 ("Ain") but in the instant case the decree holder bank published auction notice for selling the petitioners' mortgaged property along with the borrower's mortgaged property in violation of the provision of Section 6 (5) of the Ain. At this stage the petitioners moved this court by filing this application under Article 102 of the constitution of Bangladesh and obtained the present Rule Nisi and order of stay.

5. The respondent No. 2 bank contested the Rule Nisi by filing an affidavit-in-opposition and supplementary affidavit-in-opposition contending inter alia that the respondent no. 4 availed a loan of Tk. 4 Lac against mortgage of the properties owned by the writ petitioners. Thereafter, he further applied for enhancement of the loan up to Tk. 10 Lac upon renewal of the loan facility. The respondent no. 2 allowed enhancement up to Tk. 5 Lac and subsequently sanctioned a TOD limit of Tk. 2 Lac totaling Tk. 7 Lac against the mortgage of the petitioners' properties. The respondent no. 4 having failed to repay the loan money within specified time the bank filed Artha Rin Suit against the respondent no. 4 and the petitioners. The suit was decreed against the petitioners on contest and ex parte against the respondent no. 4. For execution of the said decree the respondent no. 2 bank filed Execution Case No. 96 of 2003 and the mortgaged properties were put in auction upon compliance of all procedures as provided in law and there was no illegality and hence the present writ petition is not maintainable and the rule is liable to be discharged.

6. Mr. Md. Afzal Hossain, the learned Advocate appearing for the petitioners submits that the decree passed in Artha Rin Suit No. 3 of 1997 is against the respondent no. 4 as specifically mentioned in the judgment and order of the trial court. But the execution case has been filed against the petitioners and respondent No.4 as judgment-debtors and putting the petitioners' mortgaged property in auction is absolutely contrary to the operative portion of the judgment of the Artha Rin Adalat and as such the impugned proceedings of the said Execution Case are illegal and liable to be declared without lawful authority. Mr. Hossain further submits that since the petitioners are third party mortgagors the mortgaged property mentioned in "Ka" Schedule to the plaint is not liable to be sold in auction without selling the property of the borrowers mortgaged property first as per Section 6 (5) of the Ain.

7. Mr. A.B.Siddique, the learned advocate appearing for the respondent No.2 bank in reply to the submissions made by the petitioners' counsel submits that the petitioners mortgaged their landed property as security against loan granted to the respondent No.4 who ultimately failed to pay the bank dues as per terms and conditions of the sanction and the bank filed the suit being No. 3 of 1997 in the Court of Artha Rin Adalat, Barguna for recovery of the bank dues against the petitioners as guarantors and the borrower respondent No.4. The suit was decreed on contest against the petitioners and ex parte against the borrower respondent No.4. Thereafter the decree holder bank respondent No.2 put the decree into execution and in the execution proceedings the mortgaged property of the judgment debtors has been put in auction as per provisions of Section 33(1) of the Ain and as such there is no illegality in the execution proceedings and publishing the auction notice inviting seal quotation. Mr. Siddique further submits that the mortgaged property of the borrower-respondent No.4 is situated in a rural area and not so valuable and the claim of the bank will not be satisfied by the sale of the borrower's property as mentioned in Schedule "Kha" without selling the mortgaged property of the third party mortgagors petitioners. For that reason, and for satisfaction of the decree in its entirety the mortgaged property of the petitioners and the borrower have been put in auction at the same time for the sake of saving time and expenditure. It is also argued that the decree was passed by the court against the petitioners and the borrower -respondent No.4 jointly and as such there is no illegality in filing the execution case against the petitioners along with the respondent No.4 and putting the mortgaged property in auction for recovery of the banks dues.

8. Heard the learned Advocates for the parties, perused the petition, supplementary affidavits, Affidavit-in-opposition, Supplementary Affidavits-in-opposition and the Annexures annexed there to.

9. In the instant case the petitioners have challenged the execution proceedings in Execution Case No. 1 of 1999 renumbered as No. 96 of 2003 in its entirety on the grounds that the decree for recovery of money has

been passed against the borrower –respondent No.4 only and not against the present petitioners- defendant Nos. 2 and 3 in the suit and the mortgaged property of the petitioners being a third-party mortgage cannot be sold in auction without selling the property of the borrower first as per Section 6(5) of the Ain.

10. Before entering into the merit of the case let us have a look into the operative portion of the judgment and order dated 17.10.1998 passed in Artha Rin Suit No.3 of 1997 ( Annexure-A) which runs thus:-

আদেশ হয় যে,

অতি অর্থাৎন মোকদ্দমা দোতরফা সূত্রে ২/৩ নং বিবাদীর বিরলদে এবং একতরফা সূত্রে ১ নং বিবাদীর বিরলদে খরচাসহ ডিক্রী হয়। বাদী ব্যাংকপক্ষ ১ নং বিবাদীর নিকট ইং ৩০/১২/৯৬ তারিখ পর্যন্ত ১০,৬৯,৭০৫/= টাকা সুদাসলে পাইবেন এবং উক্ত টাকা আদায় পর্যন্ত ব্যাংকের প্রচলিত হারে ডিক্রীকৃত টাকার উপর সুদ পাইবেন।

11. It appears from the operative portion of the judgment as quoted above that the decree was passed against all the defendants in the suit and not against the borrower respondent No.4 ( defendant No.1 in the suit) only as claimed by the present petitioners. From a perusal of the decree it also appears that the present petitioners are defendant Nos. 2 and 3 in the Artha Rin Suit No.3 of 1997. So, the decree holder bank-respondent No.2 rightly initiated the execution proceedings against the petitioners along with respondent No.4 borrower as judgment-debtors. In these circumstances this Court does not find any illegality in initiating the execution proceeding against the present petitioners and as such the execution proceedings are quite maintainable against the present petitioners. The next question raised by the petitioners' counsel Mr. Hossain by referring to Section 6(5) of the Ain is that as per provisions therein in the event of realization of money by execution of the decree the court shall sell the property of the borrower defendant first and then the property of the third-party mortgagors if there be any shortfall. But in the present case the Artha Rin Adalat put the petitioners property in auction along with the mortgaged property of the borrower-respondent No.4 in violation of the provisions contained in the 1<sup>st</sup> proviso to 6 (5) of the Ain.

12. To appreciate the submissions of Mr. Hossain Section 6(5) is reproduced below:-

৬(৫) আর্থিক প্রতিষ্ঠান মূল ঋণঘাতীর (Principal debtor) বিরলদে মামলা দায়ের করার সময়, তৃতীয় পক্ষ বন্ধকদাতা ( Third Party mortgagor) বা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) ঝগড়ের সহিত সংশ্লিষ্ট থাকিলে, উহাদিগকে বিবাদী পক্ষ করিবে; এবং আদালত কর্তৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিরলদে যৌথভাবে ও পৃথক পৃথক ভাবে ( Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরলদে একই সাথে পরিচালিত হইবেঃ

তবে শর্ত থাকে যে, ডিক্রী জারীর মাধ্যমে দাবী আদায় হওয়ার ক্ষেত্রে আদালত প্রথমে মূল ঋণঘাতী-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) এর সম্পত্তি যতদূর সম্ভব আকৃষ্ট করিবেঃ

13. From a perusal of the first proviso to Section 6(5) it appears that in the event of execution of a decree for realization of decretal amount the court shall proceed with the property of the borrower first and then the property of the third-party mortgagors. In the present case admittedly the Schedule “Ka” property belongs to the present petitioners which was placed as security against the loan to the bank as third-party mortgage. Given these facts and circumstances, this Court finds that as per provision of law as quoted above the Artha Rin Adalat ought to have proceeded with the auction of the borrower's property first. But instead the Adalat published the auction notice for sale of the third-party mortgaged property along with property of the borrower in violation of the provisions to Section 6 (5) of the Ain which under the law the court cannot do. Keeping in mind the provisions of law as contained in the Ist proviso to Section 6 (5) the court ought not to have placed the Schedule “Ka” property owned by the petitioners as third-party mortgage without selling the property of the borrower first. Therefore, the Artha Rin Adalat, Borguna is, hereby, directed to proceed with the execution proceedings by putting the property owned by the borrower in auction first upon compliance of the provisions contained in Section 33(1) of the Ain and in the event of finding no bidder in the auction or any shortfall in the money raised in auction the property of the petitioners third-party mortgagors may be put in auction following the provisions of Section 33(1) of the Ain and other provisions related with the auction process and consequentially dispose of the execution proceedings within the shortest possible time.

14. With the above observations and discussions made above this court is now inclined to dispose of this Rule Nisi. In the result, the Rule Nisi is deposed of in the light of the observations made herein above without any order as to costs.

15. The Order of Stay granted by this Court is, hereby, recalled and vacated.

16. Communicate a copy of the judgment to the court concerned forthwith.