

6 SCOB [2016] HCD 102**HIGH COURT DIVISION
(Special Original Jurisdiction)**

Mr. Lokman Karim, Advocate,
....For the Petitioner.

Writ Petition no. 6572 of 2012.

Mr. A.S.M. Nazmul Haque, Advocate
.... For respondent no.3

Mahbub Ali

...Petitioner.

Versus

Heard on : The 25th May, 2014
Judgment on: The 2nd June, 2014.

**The Judge, Artha Rin Adalat-1,
Chittagong and others**

....Respondents

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Mohammad Ullah

Necessary parties in an Artha Rin Suit:

A company incorporated under the companies Act is a juristic person. A share holder is not the owner of the company or its assets. The company itself owns its property. A share-holder is only entitled to the dividends, if declared. On winding up, however, after payment of its debts, he is entitled to participate in the distribution of its assets. It is no doubt, the liability of a share-holder, whether he is the Chairman of the Board of Directors, or a director, is only to the extent of the face value of the shares he holds, nothing more than that. But a share-holder of a company is not a necessary party in the Artha Rin Suit. The chairman or the directors or any other guarantor who executed the charge document in respect of payment of loan are liable and are necessary parties in the Artha Rin Suit for the purpose of effectual adjudication of the matter between the loanee- company and the financial institutions. Chairman or director, if he did not execute any charge document, he or she shall not be liable for the loan save and except their liability to the extent of the face value of the shares he/she holds. ... (Para 10)

Artha Rin Adalat Ain, 2003**Section 6:**

It appears that, admittedly, defendant no. 3-petitioner was neither a borrower nor guarantor and even nor a mortgagor relating to the loan liability and, therefore, he is not liable for repayment of the loan inasmuch as the petitioner does not come within the purview of sub-section (5) of section 6 of the Ain, 2003, wherein who will be the necessary party in the Artha Rin suit has been provided, and hence the suit ought to have been dismissed as against this defendant no. 3- petitioner. ... (Para 11)

It is settled principle that jurisdiction of a Court cannot be conferred upon consent of the parties, it is the statute only which can confer the jurisdiction of the Court.

... (Para 13)

Judgment

Mohammad Ullah, J:

1. Rule Nisi was issued calling upon the respondents to show cause as to why the order No. 67 dated 01.04.2012(Annexure-G) as well as the judgment and decree dated 27.04.2011 (decree signed on 03.05.2011) (Annexure-E) passed by the Artha Rin Adalat-1, Chittagong in Artha Rin Suit No. 252 of 2004 should not be declared to have been passed without lawful authority and is of no legal effect.

2. Short facts, for the disposal of the Rule, are that the respondent no.2-Sonali Bank Limited, K.C. Dey Road, Corporate Branch, Police Station Kotwali, District Chittagong (hereinafter referred to as the Bank) as plaintiff, on 28.4.2004, instituted Artha Rin Suit No. 252 of 2004 before the Artha Rin Adalat, 1st Court, Chittagong (in short, the Adalat) for recovery of loan amounting to Tk. 5,42,27,515.18 along with interest thereon till realization impleading respondent no. 4, M/S. Mukta Apparels Limited (hereinafter referred to as the respondent-company) and others including the petitioner-Mahbub Ali as defendants of the suit. The defendants entered appearance and filed a joint written statement on 26.7.2005 denying the material averments made in the plaint. Thereafter, the defendant no. 3- petitioner filed an amended written statement on 23.2.2010 stating, *inter alia*, that he is mere a Director of the borrower-company and he never executed any personal guarantee for the loan and became a Director of the company long after the sanction and disbursement of loan on 14.12.1996. The defendant no.3-petitioner purchased 100 shares from one of the Director of the borrower-company, Md. Nurul Huda, on 11.12.1996 and the plaintiff –Bank approved this defendant no.3-petitioner as Director of the borrower-company on 13.05.1998 according to the decision of its 58th Board Meeting. The previous Director Md. Nurul Huda resigned from the borrower-company on 18.03.1997. Therefore, the petitioner is not liable for the loan availed by the respondent-company. The petitioner, on 23.2.2010, filed two separate applications, one for accepting the amended written statement and other under section 6(5) read with section 57 of the Ain, 2003 (in short the Ain, 2003), for striking out of his name from the plaint of Artha Rin Suit No. 252 of 2004 but the learned Judge of the Adalat continued the proceeding of the suit without disposal of the said two applications. Therefore, the petitioner filed a Writ Petition being No. 3520 of 2010 before this Court seeking a direction upon the Artha Rin Adalat for disposed of the applications filed by the petitioner on 23.2.2010 before further proceeding of the suit and the said writ petition was disposed of summarily on 09.05.2010 with a direction to the learned Judge of the Adalat to consider and dispose of the applications dated 23.02.2010 filed by the defendant no. 3-petitioner before further proceeding of the Artha Rin Suit. Thereafter, Adalat upon hearing the parties, rejected the said applications filed by the respondent no. 3-petitioner vide its order no. 50 dated 13.05.2010. Then the petitioner filed another Writ Petition being No. 4010 of 2010 challenging the decision dated 13.05.2010 passed by the Artha Rin Adalat No.1, Chittagong in Artha Rin Suit No. 252 of 2004 and Rule was issued, but subsequently the same was discharged on 01.02.2011 with certain observations. Then the Adalat framed Additional issues to the effect whether the defendant no. 3 executed any personal guarantee, whether the defendant no. 3 is liable for the loan, and whether the share of the defendant no. 3 would be liable for repayment of the loan liability. Thereafter, the Artha Rin Adalat by its judgment and order dated 27.4.2011 decreed the suit (decree signed on 3.5.2011) against all the defendants including the petitioner for claimed amount of Tk. 5,42,27,515.18 to be paid by the defendant Nos. 1-4 jointly within 60 days failing which the decree holder bank would realize the same with 12% interest till realization thereof. Thereafter, on 20.2.2012, the

petitioner filed an application under section 57 of the Ain, 2003 for deleting the name of the petitioner from the judgment and decree of the Artha Rin Suit dated 27.4.2011 and 3.5.2011 respectively by way of correction of the same and the Adalat, by one of the impugned order dated 01.04.2012, rejected the said application of the petitioner holding that since against the judgment of the Artha Rin Adalat alternative remedy for preferring an appeal is available, the application under section 57 of the Ain, 2003 for correction of the judgment and decree is not maintainable. Therefore, the petitioner approached this Court and obtained the present Rule as stated above.

3. Mr. Lokman Karim, learned Advocate, drawing our attention to the case of Md. Arfan Uddin Akand vs. Joint District Judge and Artha Rin Adalat No. 1 Gazipur and another, heard and disposed of along with Writ Petition No. 6930 of 2004, reported in 15 BLT(2007) 343, and Fariduddin Mahmud Vs. Md. Saidur Rahman and others, reported in 63 DLR(AD) 93, submits that if the Adalat passes any order which is wholly without jurisdiction, in other words in excess of jurisdiction, then despite the fact that the law provided forum for appeal, the petitioner cannot be debarred from availing the writ jurisdiction under Article 102 of the Constitution and as such the instant Writ Petition is maintainable since the Adalat acted without jurisdiction in passing the impugned judgment and decree so far against the petitioner is concerned as the Adalat found that the petitioner never executed personal guarantee and signed any charge document for the loan availed by the respondent-company.

4. Mr. Karim submits further that prior to sanction of the loan dated 22.11.1995 in favour of the respondent-company, the petitioner was neither Director nor guarantor and even nor a share-holder of the company and in that admitted situation the petitioner ought not to have been made a party in the Artha Rin Suit in view of the provision of sub-section(5) of Section 6 of the Ain, 2003 and as such the impugned judgment and decree, so far the petitioner is concerned, is liable to be declared to have been passed without lawful authority and is of no legal effect.

5. Mr. A.S.M. Nazmul Haque, learned Advocate appearing on behalf of respondent no. 3-Sonali Bank, by filing an affidavit-in-opposition, on the other hand, submits that the petitioner is not competent to challenge the legality and propriety of the impugned judgment and decree passed by the Artha Rin Adalat under writ jurisdiction and the remedy, if any, lies for the petitioner to prefer an appeal in an appropriate Court. In such view of the matter, the Rule bears no merit and it should be discharged, he submits. Mr. Haque, learned Advocate, submits further that the writ petition involving the disputed question of facts, cannot be decided in writ jurisdiction and as such the Rule should be discharged. Mr. Haque, lastly submits that the defendant no.3-petitioner filed joint written statement with other defendants and thereby assumed the jurisdiction of the Artha Rin Adalat and as such he cannot escape himself from the jurisdiction of the Adalat at this stage.

6. We have heard the learned Advocates from both the parties, perused the materials on record including the writ petition, annexures thereto, affidavit-in-opposition filed by the respondent no.3 Sonali Bank and have gone through the decisions as referred to.

7. It appears that the loan was sanctioned on 22.11.1995 in favour of the respondent-company while petitioner purchased 100 share from one of the Director of the borrower company, S.M. Nurul Huda, on 11.12.1996 and the respondent no. 2 lender Bank approved this petitioner as Director of the borrower-company on 13.05.1998 by its 58th Board Meeting. It further appears that the Adalat found that the petitioner did not execute any

charge document for the purpose of taking liability of loan availed by the respondent-company. The findings of the Adalat about the execution of charge document, so far the petitioner is concerned, is as follows:

“চার্জ ডকুমেন্টে ৩ নং বিবাদীর স্বাক্ষর না থাকিলেও পরবর্তীতে কোম্পানীর পরিচালক নিযুক্ত হওয়ায় তিনি বাদী ব্যাংকের দেনার জন্য ১০০ শেয়ারের মালিক হিসাবে ২০% দেনা পরিশোধ করিতে বাধ্য।”

8. Although the petitioner without understanding the situation filed joint written statement with other defendants denying the material allegation of the plaint, but, subsequently, he filed two applications, one was for amendment of the written statement and other for striking out the name of the petitioner from the plaint of Artha Rin Suit. When the Adalat proceeded with the suit without disposing of those applications, the petitioner obtained an order of this Court invoking writ jurisdiction for disposal of the said applications at first. When the Adalat rejected those applications of the petitioner, he further moved this Court and filed Writ Petition No. 4010 of 2010 whereupon Rule was issued and subsequently was discharged with the following observations:

“However, while disposing the suit on merit the learned Judge of the Artha Rin Adalat should examine as to whether defendant No. 3-petitioner executed any personal guarantee for the loan or his loan liability is limited to his shares of the Company as well as the property owned by the Company.”

9. The High Court Division by its aforesaid observations firstly observed that the Adalat should ascertain whether the defendant no. 3 petitioner executed any personal guarantee for the loan availed by the respondent-company and if it is found negative, the petitioner was required to be discharged or released from the alleged liability brought by the respondent-Bank in the suit against the petitioner. But if it is found that the petitioner executed any letter of guarantee, he will never be discharged from the liability of the loan taken by the respondent-company. The Adalat on consideration of the evidence on record found that the defendant no. 3 petitioner did not execute any personal guarantee for taking liability of the loan at any point of time. This being so, Adalat ought to have dismissed the suit against the petitioner is concerned.

10. A company incorporated under the companies Act is a juristic person. A share holder is not the owner of the company or its assets. The company itself owns its property. A share-holder is only entitled to the dividends, if declared. On winding up, however, after payment of its debts, he is entitled to participate in the distribution of its assets. It is no doubt, the liability of a share-holder, whether he is the Chairman of the Board of Directors, or a director, is only to the extent of the face value of the shares he holds, nothing more than that. But a share-holder of a company is not a necessary party in the Artha Rin Suit. The chairman or the directors or any other guarantor who executed the charge document in respect of payment of loan are liable and are necessary parties in the Artha Rin Suit for the purpose of effectual adjudication of the matter between the loanee- company and the financial institutions. Chairman or director, if he did not execute any charge document, he or she shall not be liable for the loan save and except their liability to the extent of the face value of the shares he/she holds.

11. It appears that, admittedly, defendant no. 3-petitioner was neither a borrower nor guarantor and even nor a mortgagor relating to the loan liability and, therefore, he is not liable for repayment of the loan inasmuch as the petitioner does not come within the purview of sub-section (5) of section 6 of the Ain, 2003, wherein who will be the necessary party in the Artha Rin suit has been provided, and hence the suit ought to have been dismissed as

against this defendant no. 3- petitioner. For better understanding sub-section (5) of section 6 of the Artha Rin Adalat Ain, 2003 is quoted below :

- “৬। (১)
 (২)
 (৩)
 (৪)

(৫) আর্থিক প্রতিষ্ঠান মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে মামলা দায়ের করার সময়, তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) বা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) ঋণের সহিত সংশ্লিষ্ট থাকিলে, উহাদিগকে বিবাদী পক্ষ করিবে; এবং আদালত কতৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথকভাবে (Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরুদ্ধে একই সাথে পরিচালিত হইবে :

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

আরো শর্ত থাকে যে, বাদীর অনুকূলে প্রদত্ত ডিক্রীর দাবী তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) অথবা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) পরিশোধ করিয়া থাকিলে উক্ত ডিক্রী যথাক্রমে তাহাদের অনুকূলে স্থানান্তরিত হইবে এবং তাহারা মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে উহা প্রয়োগ বা জারী করিতে পারিবেন।”

(underlined by us)

12. The Adalat at the time of passing any judgment or finally disposing of the suit should have to take into consideration of the facts as to whether the plaintiff-financial institution made the defendant/defendants in the Artha Rin Suit in view of the statutory provision of sub-section(5) of section 6 of the Ain, 2003 and also to determine whether the defendant in the Artha Rin Suit is a borrower or mortgagor or guarantor for the purpose of fixing the liability of the loan taken by a company, for different business purpose, from the plaintiff-financial institution. When the Adalat passed the impugned judgment beyond the scope of law as provided for in section 6(5) of the Ain, 2003, then it can be said that the same is without jurisdiction.

13. However, the learned Advocate for the respondent-Bank, drawing our attention to the joint written statement filed by the defendants including the petitioner, submits that the petitioner assumed the jurisdiction of the Artha Rin Adalat, so at a later stage he cannot escape or say he was not a necessary party in the Artha Rin Suit. It is settled principle that jurisdiction of a Court cannot be conferred upon consent of the parties, it is the statute only which can confer the jurisdiction of the Court. When the petitioner filed written statement without understanding the legal consequence with the other defendants it does not mean that he assumed the jurisdiction of the Artha Rin Adalat unless and until it is found that he is a necessary party in the Artha Rin Suit in view of the provision of sub-section (5) of Section 6 of the Ain, 2003.

14. Further, when the defendant no.3 petitioner was in no way connected with the loan in question, as the loan was taken before his joining to the loanee company and that the petitioner never executed any letter of guarantee to secure the loan, in this situation the judgment and decree of the Adalat directing the petitioner with other defendants jointly to pay Tk.5,42,27,515.18 is liable to be declared to have been passed without lawful authority and is of no legal effect so far the petitioner is concerned. We cannot shut our eyes when there is error apparent on the face of the record or where the decision of the Adalat is vitiated by malafide or the Adalat acted in excess of jurisdiction or acted contrary to the fundamental

principles or acted with malice in law. In that case, despite the alternative remedy, writ jurisdiction can be invoked under Article 102 of the Constitution.

15. Regard being had to the above discussions of law and facts, we are of the view that the Rule has substance and as such the same should succeed.

16. In the result, the Rule is made absolute in part, however without any order as to costs.

17. Accordingly, the judgment and decree dated 27.4.2011 (decree signed on 03.05.2011) passed by the learned Artha Rin Adalat No. 1, Chittagong in Artha Rin Suit No. 252 of 2004 is hereby declared to have been passed without lawful authority and is of no legal effect so far the petitioner is concerned only.

18. Let a copy of this judgment be sent to the learned Judge, Artha Rin Adalat No. 1, Chittagong.