IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,C.J.

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO.129 OF 2014

(Arising out of CPLA No.1139 of 2010)

(From the judgment and order dated the 13th April, 2009 passed by a Division Bench of the High Court Division in Writ Petition No.7416 of 2006)

Abdus Sattar Miah	:	. . . Appellant
	-Versus-	
Bangladesh and others	:	. . . Respondents
For the Appellant	:	Mr. Harun-or-Rashid, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record
For the Respondent No.1	:	Mr. Taherul Islam, Advocate instructed by Mr. Haridas Paul, Advocate-on-Record
For the Respondent Nos.2-3	:	Mr. Foyez Ahmed, Advocate instructed by Ms. Nahid Sultana, Advocate-on-Record
For the Respondent Nos.6-7	:	Mr. Md. Taufique Hossain, Advocate-on-Record
For the Respondent Nos.4-5	:	Not represented
Date of Hearing	:	**The 10th day of August,2022**
Date of Judgment	:	**The 17th day of August, 2022**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 13.04.2009 passed by a Division Bench of the High Court Division in Writ Petition No.7416 of 2006 discharging the Rule.

The relevant facts for disposal of the instant appeal are that, the respondent No.2 Sonali Bank,

Principal Office, Dhaka as plaintiff instituted Title Suit No.217 of 1987 in the Court of Sub-ordinate Judge and Commercial Court No.1, Dhaka impleading the present appellant and others as defendants for realization of Tk.1,35,772.00.

The principal loanee, respondent No.5, herein, filed written statement before the trial Court stating that he took loan of Tk.1,50,000/- and deposited Tk.93,000/- but failed to repay the balance of the loan due to his loss in the business and he further averred that the amount he has deposited may be adjusted with the loan amount and he may be allowed to repay the rest without interest and also stated that "দুই নম্বর বিবাদী (present appellant) যদিও জামিনদার কিন্তু এই টাকা তিনি নেন নাই বা তাহার নি-জর কা-জও খরচ ক-রন নাই। সেই হেতু তাহা-ক টাকা আদা-য়র জন্য অ-হতুক হয়রানি না করা বাঞ্চনীয়। তাহার উপ-র স্বীকৃত পাওনা টাকা কিস্তি-ত পরি-শাধ করি-ত বাধ্য থাকি-ব এবং যদি অপারগ হয় ত-ব তাহার স্থাবর সম্পত্তি বিক্রি করিয়া উহা আদায় করিলেও এই বিবাদীর কোন ওজর আপত্তি থাকিবে না।" Inasmuch as respondent No.5 wrote a letter on 06.01.1980 to the decree-holder Bank for releasing the appellant from the liability of guarantor.

The present appellant who was third party mortgagor defendant No.2 also filed a separate written statement admitting the fact of taking loan by the respondent No.5, and he himself stood surety of the loan and mortgaged his property as security and the respondent No.5 has other properties and is also in a position to repay the Bank loan, and that he stood as guarantor on good faith at the request of respondent No.5 and the money may be realized through attachment of the property of respondent No.5, and that the respondent No.5 changed the name of his

business establishment and started a fresh business and by taking further loan from the plaintiff Bank.

The respondent No.5 though filed a written statement but did not contest the suit and it is only petitioner-defendant No.2 who contested the suit.

Eventually, the trial Court decreed the suit in preliminary on 28.02.1989 for Tk.1,35,000/- along with interest at the rate of 20% from 23.09.1987 till realization.

Against the said judgment and decree the present appellant preferred First Appeal No.34 of 1990 before the High Court Division and by the impugned judgment and order the High Court Division dismissed the same on 09.05.1994 with cost.

Being aggrieved by the aforesaid judgment and order passed by the High Court Division, the appellant preferred Civil Petition for Leave to Appeal No.343 of 1994 before this Division which was ultimately dismissed on 07.05.1995 on a technical point with the following observation:

> "This petition has been preferred against the decree passed in the suit and not against the execution thereof."

The appellant thereafter filed the civil petition for leave to appeal No.1139 of 2010, which gave rise the instant appeal.

Mr. Harun-or-Rashid, learned Advocate, appearing for the appellant referring to section 6(5) of the Artha Rin Adalat Ain, 2000 submits that in view of the said provision the borrower's property should be sold first

before selling the property of the guarantor and the High Court Division failed to consider the said provision of law.

He further submits that the appellant filed an application before the trial Court stating that the claim of the execution case is only for about Taka 2(two) lac, the entire decretal amount may be recovered by selling first, the property of principal debtor/ loanee described in schedule-2 of the execution case if so and in case of non-fulfillment of the said decretal amount the appellant and his property may be subjected for realizing the rest of the decretal amount. The Execution Court by his order dated 06.07.1994 allowed the application and directed the appellant to execute a bond as the appellant would pay the rest of amount within 10 days after the date of auction sale of the property of schedule No.2 of the defendant No.1 in case of non-fulfillment of decretal amount. As per aforesaid direction the appellant executed a bond which was accepted by the Court's order dated 17.08.1994. Following that order the decree holder bank filed an application on 01.10.1994 for permission to sell the property of principal debtor in auction described in schedule-2 of the case by setting aside the order dated 10.07.1994. But curious enough on 21.06.1995 the decree holder filed another application for auction sale of the property of the appellant described in schedule-1 by not pressing the application dated 01.10.1994 and accordingly on 26.10.1994 the court allowed the application of decree holder violating the earlier order of the court. Against

that order the petitioner filed a civil revision which was moved up to Appellate Division and rejected the same on the point of jurisdiction.

On the other hand Mr. Taherul Islam, learned Advocate, appearing for the Respondent No.1 submits that since the judgment-debtor failed to re-pay the loan, the Artha Rin Adalat passed the order after considering the relevant facts and laws because guarantor's liability is equal to re-pay the loan amount and the Bank put the mortgaged property in auction to sell out the said property as provided under the provision of Artha Rin Adalat Ain,2000 and as such the Artha Rin Adalat as well as the High Court Division did not commit any error of law in passing the impugned judgment and order.

Mr. Foyez Ahmed, learned Advocate, appearing for the Respondent Nos.2 and 3 having adopted the above submissions of the learned Advocate for of the Respondent No.1 further submits that the present Respondent is the auction purchaser of the property in question in due course of law and there is no illegality in the process of auction sell and thus, there is no scope to interfere with the impugned judgment and order.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and the leave granting order.

In the instant case the moot question is whether any violation of section 6(5) of the Artha Rin Adalat Ain has been committed in the auction process.

The provision of section 6(5) enumerates as follows:

> "তবে শর্ত থাকে যে ডিক্রী জারীর মাধ্যমে দাবী আদায়ের ক্ষেত্রে এ মর্মে মূল ঋণ গ্রহীতা-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষঃ বন্ধকদাতা (third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (third party guarantor) এর সম্পত্তি যতদুর সম্ভব আকৃষ্ট করিবে।"

The High Court Division upon taking consideration of the above provision of law coupled with the facts and circumstances of the present case has been held to the effect.

> "In our considered view, this provision is applicable only when the properties were mortgaged both by the principal debtor/loanee and the third party mortgagor. In the instant case, admittedly no property was mortgaged by the principal debtor-loanee but the property was mortgaged by the petitioner. So, in absence of any other property mortgaged by the principal debtor in favour of the Bank, the mortgaged property of the petitioner-judgment-debtor is to be sold to realize the decreetal amount. Therefore, the Adalat was bound to sale the mortgaged property which was included in the schedule of the plaint/decree."
>
> In view of the above, it appears to us that this writ petition is nothing but a cunning device to avoid payment of decretal amount. It be mentioned that the original suit was filed in the year of 1987 and it was decreed against the respondent-judgment-debtors on 22.06.1989 more than 20 years elapsed but till date the Bank is unable to realize its outstanding dues."

It is admitted fact that the judgment-debtor did not mortgage any property to the bank rather than the present appellant mortgaged his property as a guarantor and thus, no illegality has been committed in putting the auction of the mortgaged property of the present appellant.

Further, Section 12(8) of the Ain runs as follows:

"(৮) আপাততঃ বলবৎ অন্য কোন আইনে ভিন্নরূপ যাহা কিছুই থাকুক না কেন, এই ধারার অধীন আর্থিক প্রতিষ্ঠান কর্তৃক lien, pledge, hypothecation অথবা Mortgage এর অধীন প্রাপ্ত ক্ষমতাবলে কোন জামানতী স্থাবর বা অস্থাবর সম্পত্তি বিক্রয় করা হইলে, উক্ত বিক্রয় ক্রেতার অনুকূলে বৈধ স্বত্ব সৃষ্টি করিবে এবং ক্রেতার ক্রয়কে কোনভাবেই তর্কিত করা যাইবে নাঃ

তবে শর্ত থাকে যে, আর্থিক প্রতিষ্ঠান কর্তৃক বিক্রয় কার্যক্রমে কোনরূপ অবৈধতা বা পদ্ধতিগত অনিয়ম থাকিলে, জামানত প্রদানকারী ঋণ-গ্রহীতা আর্থিক প্রতিষ্ঠানের বিরুদ্ধে ক্ষতিপূরণ দাবী করিতে পরিবেন।"

The above law has given a protection to a purchaser in an execution process. Right, title and interest conferred upon the purchaser for value cannot be called in question. If any illegality or irregularity is found in process of sell, the judgment debtor may claim compensation from the decree holder-Bank.

In view of the above, the High Court Division did not commit any error or illegality in passing the impugned judgment and order.

Thus, we find no merit in the appeal.

Accordingly, the appeal is dismissed.

C.J.

J.

J.

B/O.Imam Sarwar/
Total Wards: