

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL PETITION FOR LEAVE TO APPEAL NO.720 OF 2022

(From the judgment and order dated the 6th day of January, 2022 passed by the High Court Division in Writ Petition No. 1699 of 2021).

Midland Bank Limited	:	. . .	Petitioner
		-Versus-	
Nasima Aktar and others	:	. . .	Respondents
For the Petitioner	:	Mr. A.M. Amin Uddin, Senior Advocate, instructed by Mrs. Hasina Akhter, Advocate-on-Record	
For Respondent No.1	:	Mr. Shah Monzurul Hoque, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record	
Respondent No. 2-3	:	Not represented	
Date of hearing and judgment	:	The 16th day of January, 2023	

JUDGMENT

M. Enayetur Rahim, J: This civil petition for leave to appeal is directed against the judgment and order dated 06.01.2022 passed by the High Court Division in Writ Petition No.1699 of 2021 making the Rule absolute.

Facts of the case, in brief, are that the petitioner herein (writ-respondent No.2) as plaintiff filed Artha Rin Suit No.686 of 2016 before the Artha Rin Adalat No.4, Dhaka, against respondent No.3 herein and another for realization of loan money amounting to Tk.12,53,73,414.71 stating, *inter alia*, that the defendants availed a credit facility from the bank, since the defendants failed to repay the loan, the plaintiff bank compelled to file the suit.

Upon hearing the parties and considering the evidence and materials on record the learned Judge of the Artha Rin Adalat No.4, Dhaka, decreed the suit against defendant No.1 on 24.06.2019. In order to execute the said decree, the petitioner (writ-respondent No.2) on 21.10.2019 filed Artha Execution Case No.437 of 2019 in the Artha Rin Adalat No.4, Dhaka. During the proceeding of the said execution case, the petitioner decree-holder bank on 06.10.2020 filed an application for striking out five buses from the schedule of the execution case contending that, on the basis of the application filed by the judgment-debtor No.1, the decree holder bank sold out those five buses in favour of one 'M/S Dipzal Enterprise' and in view of the said sale, the list of the buses were required to be excluded from the schedule of the execution case. Thereafter, on 06.10.2020 when the execution case was fixed for taking step for selling the property through auction, the learned Judge of the Artha Rin Adalat allowed the said application by striking out the buses from the schedule of the execution case contending that for such exclusion, the nature and character of the execution case will not be changed. Then the judgment-debtor No.2 (guarantor) the present respondent No.1 filed an application under section 33(1) of the Artha Rin Ain, 2003 (the Ain) for setting aside the order passed earlier on 06.10.2020 seeking to sell the said buses following the provision

so laid down in section 33(1) of the Ain. That application was rejected by the Artha Rin Adalat holding that the judgment-debtor did not take any step to pay the outstanding dues to the decree-holder-bank. At that stage, the judgment debtor No.2-(guarantor) as petitioner filed Writ Petition No. 1699 of 2021 before the High Court Division and obtained Rule *Nisi*.

The present petitioner, decree-holder bank as writ-respondent No.2 contested the Rule by filing an affidavit-in-opposition contending, *inter alia*, that the buses were sold out in compliance with the provision provided in section 12 of the Ain and, therefore, writ-respondent No.1 rightly allowed the application of this writ-respondent No.2 by striking out the list of the buses from the schedule. It was also contended that section 12 of the Ain mandates the decree-holder-bank to sell any property which is in its possession or control taken as mortgage of lien before filing of the suit and in the instant case, in compliance with that very provision of law, those buses were sold out to a private entity and, therefore, the learned Judge of the Artha Rin Adalat rightly rejected the application of the writ-petitioner. By referring several documents annexed with the affidavit-in opposition to the writ-petition contended that, it was the judgment-debtor No.1, on whose instance, the initiative was taken to sell five buses to a third party which was initiated during the proceeding of the

Artha Rin Suit and as such the bank has committed no illegality in selling those property because it is the judgment-debtor whose liability would have to be adjusted in favour of the decree-holder bank from the sale proceedings of the buses and if, any illegality is committed by selling those buses it has not been done by the bank rather the judgment-debtor.

In due course after hearing both the parties by the impugned judgment and order the High Court Division made the Rule absolute directing writ-respondent No.1-Artha Rin Adalat No.4, Dhaka, to take necessary step for restoring the schedule of the movable properties in the schedule of the execution case in other words, five buses in the schedule of the execution case so that, apart from the immovable property those movable properties can be sold through auction in compliance with Section 33(1) as well as 33(4) of the Artha Rin Adalat Ain, 2003 by setting aside the alleged sale so have been made to a third party immediately.

Being aggrieved by the judgment and order passed by the High Court Division writ-respondent No.2, i.e. the decree-holder bank is now before us having filed the instant civil petition for leave to appeal.

Mr. A.M. Amin Uddin, learned Senior Advocate, appearing on behalf of the petitioner submits that the High Court Division failed to consider the facts that respondent No.3, husband of respondent No.1 herein being loanee made an application to the petitioner bank

on 30.10.2016 for selling the buses in question and he having negotiated with the buyer sold the buses by fixing price. The auction was conducted by respondent No.3 and he requested the decree-holder bank to sell the hypothecated buses in favour of M/S Dipzal Enterprise as it was the highest bidder among the three bidders. On 17.11.2016 respondent No.3 made another application to the petitioner bank for transferring ownership of the buses to the purchaser. Thereafter, the petitioner bank by transferring ownership of the hypothecated buses in favour of M/S Dipzal Enterprise has only complied with the request of respondent No.3-loanee, and the sale money was adjusted with respondent No. 3's loan. After adjustment, the writ petition filed by the wife of respondent No.3 is nothing but an act to defraud the decree-holder bank, which is purely *mala fide*.

The learned Advocate finally submits that the ownership of the buses has long been transferred to another *bona fide* purchaser upon request of the defaulter borrower, and the judgment and order of the High Court Division is adversely affecting interest of an innocent third party, and on such view of the matter the judgment and order of the High Court Division is erroneous and liable to be set aside.

Mr. Shah Monzurul Hoque, learned Senior Advocate, appearing on behalf of the respondents has made

submissions in support of the impugned judgment and order of the High Court Division.

We have considered the submissions of the learned Advocates appearing for the respective parties, perused the impugned judgment and order of the High Court Division and other connected papers on record.

Upon perusal of the impugned judgment it appears that the High Court Division made the Rule absolute holding that the Artha Rin Adalat has committed error of law in allowing the decree holder bank to sell the buses in question through private negotiation. Since Artha Rin Ain is a special law and it will take precedence over any other law, so the order passed by the Artha Rin Adalat striking out 5 buses from the schedule of the execution case cannot be sustained at all, and further held that the provision of section 33(1) as well as 33(4) of the Artha Rin Adalat Ain has been violated in this particular case.

It appears that on behalf of the judgment-debtor an application was filed before the Artha Rin Adalat on 06.10.2020 swearing an affidavit to the effect that:

“যেহেতু, দায়িকগণ ঋণ গ্রহণের সময় অত্র জারী মামলায় তফসিল বর্ণিত বাস সমূহ *Hire Purchase Agreement* এর আলোকে ডিক্রীদার ব্যাংকের নামে নিবন্ধিত করেন এবং উক্ত বাস সমূহ প্রথম হতেই দায়িকের দখল ও নিয়ন্ত্রণে রাখেন। পরবর্তীতে, দায়িকের আবেদনের আলোকে তফসিল বর্ণিত বাস সমূহ মেসার্স ডিপজল এন্টারপ্রাইজ এর বরাবরে বিক্রয় করতঃ বিক্রয় লব্ধ অর্থ সমন্বয়ের সিদ্ধান্ত হয়। এবং সেই আলোকে ডিক্রীদার ব্যাংক দায়িকের আবেদনের প্রেক্ষিতে মেসার্স ডিপজল এন্টারপ্রাইজ এর বরাবরে তফসিল বর্ণিত বাস/গাড়ী সমূহ বিক্রয় করেন। বিধায় তফসিল বর্ণিত অস্থাবর সম্পত্তি বাস সমূহ কর্তন হওয়া একান্ত আবশ্যিক, অন্যথায় দরখাস্তকারী ডিক্রীদার ব্যাংক অপূরণীয় ক্ষতির সম্মুখীন হবে।”

In view of the above application, the Artha Rin Adalat by its order dated 06.10.2020 allowed the said application. From annexure-8 to the affidavit-in-opposition filed by the decree-holder bank, it also appears that the principal loanee Md. Nazmul Karim @ Tuhin on 17.11.2016 requested the decree holder bank to allow him to sell out the 5 buses in order to pay the loan money and the bank allowed his prayer on 17.01.2016. Said Nazmul Karim @ Tuhin requested the bank to accept the proposal of M/S Dipzol Enterprise for the 5 buses, and also requested to adjust the loan amount. The contention of the said letter is as follows:

”বরাবর ,
উপ-ব্যবস্থাপনা পরিচালক
মিডল্যান্ড ব্যাংক লিমিটেড
প্রধান কার্যালয়
গুলশান-২, ঢাকা-১২১২

বিষয়ঃ বন্ধকীকৃত বাসগুলি বিক্রয় প্রসঙ্গে।

জনাব,

বন্ধকীকৃত বাসগুলি বিক্রয়ের জন্য অনুমতি প্রার্থনায় প্রেরিত চিঠির প্রেক্ষিতে আমার তত্ত্বাবধানে ৩টি পরিবহন কোম্পানী উল্লেখিত নির্মাণাধীন ৫টি বাস ক্রয় করার জন্য আপনাদের বরাবরে প্রস্তাব করেছে।

উক্ত চিঠির প্রেক্ষিতে ডিপজল এন্টার প্রাইজ কর্তৃক প্রস্তাবকৃত দাম সর্বোচ্চ হওয়ায় নির্মাণাধীন বাসগুলি ডিপজল এন্টার প্রাইজের নিকট বিক্রয় করে বিক্রয়লব্ধ অর্থ ইয়োলো লাইন পরিবহন এবং এস, করিম এন্টার প্রাইজ এর নামে গৃহীত ঋণের সাথে সমন্বয় করার জন্য আবেদন করছি।

অতএব, প্রার্থনা ডিপজল এন্টারপ্রাইজের বরাবরে বিক্রয় করে বিক্রয়লব্ধ অর্থ ঋণের সাথে সমন্বয় করার বিশেষভাবে অনুরোধ করছি।

বিনীত নিবেদক,

স্বাঃ

মোঃ নাজমুল করিম (তুহিন)

প্রোপ্রাইটর-মের্সিস ইয়োলো লাইন এবং এস, করিম এন্টার প্রাইজ

৪৩, নিউ এলিফ্যান্ট রোড, ঢাকা ১২০৫।”

The above facts clearly show that the bank had taken initiatives at the instance of the principal judgment debtor. Now another judgment-debtor, who is the guarantor, has challenged such steps of the bank.

It is our considered view that the High Court Division failed to consider and appreciate the cardinal principle of law that no one should be allowed to take advantage of his own wrong action. The negotiation was conducted by the principal loanee himself and he requested the bank to sell the 5 buses in favour of M/S Dipzal Enterprise as it was the highest bidder amongst the 3 bidders. The bank has just complied with the request of the principal loanee and the sale money was adjusted with the judgment-debtor's loan. After such adjustment the present respondent No.1, who is the wife of the principal loanee, and the guarantor filed Writ Petition No.1699 of 2021 before the High Court Division stating that such step of the bank is illegal and the Artha Rin Adalat has proceeded beyond the scope of law striking out the five buses from schedule of the execution case.

In view of the above facts and circumstances, we have no hesitation to hold that judgment-debtor No.2 (guarantor) in connivance of the principal judgment-debtor in order to frustrate the execution case has taken a device to prolong the matter by filing an application before the Artha Rin Adalat and, thereafter, before the High Court Division.

The High Court Division failed to consider the above aspects of the case and held that law, in particular section 33 of the Artha Rin Adalat Ain, 2003 does not permit to do so.

Section 38 of the Artha Rin Adalat Ain, 2003 provides for arbitration at the stage of execution proceeding and section 27 of the said Ain also provides arbitration during pendency of the suit. If a judgment-debtor comes up to settle the dispute amicably during pendency of the suit and even at the stage of execution, that should be encouraged. In the instant case the buses in question were sold out at the instance of judgment-debtor No.1 and at his instance the decree-holder bank filed an application before the executing Court for striking out 05(five) buses from the schedule of the execution case. Section 33 of the Artha Rin Adalat Ain, 2003 is not a bar to make any settlement, outside the Court, if the parties agree to do so.

It should be borne in mind that Artha Rin Adalat Ain has been promulgated for recovery of loans given by the financial institutions. In interpreting a certain provision of a statute, the intention and object of such statute has to be taken into consideration.

In the present case the High Court Division in interpreting various provision of section 33 of the Artha Rin Adalat Ain has not at all taken into consideration the intention and object of the said Ain.

And thus, proceeded in a wrong way and arrived at a wrong decision.

Further, in the instant case the guarantor-judgment debtor No.2 had approached before the Artha Rin Adalat to set aside the order dated 06.10.2020 striking the 05 buses from the schedule of the execution case. It emerged from the record that the alleged buses were sold out in November, 2016 just after filing of the suit (suit filed on 19.05.2016). The suit was decreed on 24.06.2019 (decree signed on 27.06.2019). Thereafter, the execution case was filed and decree-holder bank had taken initiative to amend the schedule of the execution case striking out the names of 05 buses. Thereafter, the guarantor judgment-debtor No.2 came forward to set aside the said order.

Section 6(5) of the Artha Rin Adalat Ain, 2003 runs as follows:

“(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 কর্তৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথক ভাবে (*Jointly and severally*) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়কের বিরুদ্ধে একই সাথে পরিচালিত হইবেঃ

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 করিবেঃ

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।” (under line supplied).

The above provision of law has fixed up the liabilities of a third party guarantor. In view of the liabilities as fixed in the above law, the guarantor judgment-debtor has no authority to file any application before the Artha Rin Adalat to set aside the order amending the schedule of the property in execution case as it has been done at the instance of principal judgment-debtor. The High Court Division has also failed to appreciate that prior to passing the decree and filing of the execution case the alleged 05 buses were sold out by the principal judgment-debtor himself, with the permission of the bank and sale money was adjusted with the judgment-debtor's loan. Thus, in this circumstances question of following of section 33 of the Artha Rin Adalat Ain, 2003 does not arise at all. The alleged buses were not auctioned neither as per provision of section 12 as claimed by the bank nor during pendency of execution case as per provision of section 33 of the Ain.

It is also not the case of respondent No.1(guarantor) that her owned buses were sold out before selling the property of the principal judgment-debtor, which violated the provision of section 6 (5) of the Artha Rin Adalat Ain, 2003.

Having considered as above, we are of the view that the High Court Division in deciding the merit of

the Rule *Nisi* proceeded in a wrong way and thereby committed error of law in passing the impugned judgment and order.

Since, the learned Advocates for the respective parties have made their submissions at length on the issues involved in the case, we are inclined to dispose of the leave petition to avoid further delay in disposal of the case.

Accordingly, the civil petition for leave to appeal is disposed of.

The impugned judgment and order of the High Court Division is set aside.

C. J.

J.

J.