IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Present:

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

WRIT PETITION NO. 6298 OF 2023

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

A N D

IN THE MATTER OF:

Abdur Razzak Miah

...Defendant No.6-Petitioner

-Versus-

The Governor, Bangladesh Bank and others

... Respondents

Mr. Md. Ozi Ullah with
Mr. Satya Ronjon Mondall and
Ms. Afroza Sultana, Advocate

... For the Petitioner

Mr. Ziaul Haque Sarker, Advocate

...For the Respondent No.04

Mr. Farid Uddin Khan, DAG with
Mr. Md. Anichur Rahman Khan, DAG

...For the Respondent

Judgment on: 05.11.2024

Md. Riaz Uddin Khan, J:

Rule *nisi* was issued upon an application under Article 102 of the Constitution of the People's Republic of Bangladesh asking the respondents to show cause as to why the impugned order No. 35 dated 30.03.2023 (Annexure-G) passed in Artha Rin Suit No. 395 of 2018 and thereby allowing the application filed by the plaintiff-respondent bank under Order XXXVIII, Rule 5 of the Code of Civil Procedure read with sections 44 and 57 of the Artha Rin Adalat Ain, 2003 shall not be declared to have been passed without any lawful authority and was of no legal effect and/or such other or further order or orders should not be passed as to this court may deem fit and appropriate.

At the time of issuance of Rule further operation of the impugned order No. 35 dated 30.03.2023 passed in Artha Rion Suit No. 395 of 2018 was stayed initially for a period 03 (three) months and lastly extended on 29.08.2023 for a further period of 01 (one) year from date.

Succinct facts for disposal of this Rule are that the proforma-respondent Nos. 5-7 being principal borrower availed loan facilities from respondent no.4, AL-Arafah Islami Bank Limited, Dakkinkhan Branch, Dhaka through a sanction letter dated 15.12.2012 by mortgaging their landed property along with the property of respondent nos.8 and 9, wife and father-in-law of respondent no.7, Md. Shafiqul Islam Shohel. Subsequently principal borrower Md. Shafiqul Islam Shohel failed to repay the loan of the bank and ultimately the bank as plaintiff instituted a suit being Artha Rin Suit No. 395 of 2018 before the respondent No. 2, Artha Rin Adalat for recovery of outstanding loan amount against M/S Shohel & Brothers and others. The instant petitioner has been impleaded as defendant No. 6 in the suit showing him as a third party guarantor.

At one stage of the suit the plaintiff-respondent no.4 being lending bank filed an application under Rule-5 of Order-XXXVIII of the Code of Civil Procedure read with section 44 and 57 of the Artha Rin Adalat Ain, 2003 in order to attach the immovable property of the petitioner, the alleged defendant no.6 before the judgment. The petitioner appeared in the suit by filing written objection against the said application for attachment before judgment stating that the petitioner in the year 2015 availed loan facilities from the same bank i.e. AL-Arafah Islami Bank Limited, Dakkinkhan Branch, Dhaka through a sanction letter dated 27.05.2015 for an amount of Tk. 30.00 lac by mortgaging his landed property in favour of bank and executed power of attorney along with other charge documents. The petitioner admittedly has paid entire loan

liabilities of the bank and the bank after adjustment of total loan liabilities issued statement of account showing zero balance by closing the account accordingly. The petitioner on several times approached to the authority of bank and finally to the central bank i.e. respondent No.1 by representation dated 07.04.2022, 25.04.2022, 01.06,2022 and 02.06.2022 requesting to give back the documents by releasing the landed property through redemption of mortgage and cancellation of power of attorney but the plaintiff-respondent-4 bank denied to give back the same on various pretext and finally impleaded the petitioner in the instant Artha Rin Suit No. 395 of 2018 as defendant No. 6 claiming him as personal guarantor. The petitioner admittedly is neither loanee not mortgagor guarantor as such there is no reason to allow the application of the plaintiff for attachment of the property of the petitioner, allegedly defendant no.6 though there is mortgaged property scheduled in the plaint.

The learned Judge of Artha Rin Adalat upon hearing the said application filed under Order-XXXVIII, Rule-5 of the Code of Civil Procedure read with section 44 and 57 of Artha Rin Adalat Ain, 2003 allowed the same vide order no. 35, dated 30.03.2023. Challenging the said order, the petitioner filed this writ petition before this Court and obtained the rule *nisi* and order of stay as stated at the very outset.

The Respondent No. 4 Bank entered appearance and filed affidavit-in-opposition wherein it is stated that according to the loan facility provided by the respondent bank, the principal borrower Md. Shafiqul Islam Sohel who is the son of the Petitioner initially took a 'Bai-Muajjal' investment facility on 15.02.2012, which was enhanced from time to time and lastly on 02.04.2015 vide sanction letter being Ref. No. AIBL/DKB/INV/2015/1967 dated 02.04.2015 against which the petitioner provided personal guarantee to

secure the loan. As the amount of the investment facility was significantly enhanced which exceeded the security provided by the principal borrower, the petitioner provided personal guarantee as per sanction to secure the loan of the borrower. The petitioner's property was attached before judgment by the court for being a guarantor of the loan of the principal borrower. Besides, what depicts in the proviso of sub section 5 of section 6 of Artha Rin Adalat Ain, 2003 that the sequence must be maintained in the matter of recovery of claim whereas, here the property of the guarantor-petitioner was attached 'as a security' for the 'security' provided by him for the loan availed by his son. As such there was no illegality in attaching the property of the guarantor-petitioner at this stage. Moreover, under the provision of this section there is no bar or any restrictions in attachment-before-judgment of the property of any guarantor of any Artha Rin suit.

Mr. Md. Ozi Ullah, the learned Advocate appearing for the petitioner submits that the present petitioner executed deed of mortgage and power of attorney along with other charge documents against his personal loan obtained from the same bank and branch and according to the plaint admittedly the said loan has already been paid to the bank but the bank seized and retained the said documents illegally showing him as 3rd party guarantor of the present loan availed by the defendant nos.1-3 (present respondent nos.5-7).

The learned advocate then submits that the respondent bank at the time of sanction of loan was supposed to take sufficient security from the principal borrower as well as mortgagors who are the defendant Nos. 1-5 of the suit. Therefore, without attachment of principal borrower’s property as well as mortgagors’ property the order of attachment before judgment against the 3rd party guarantor is arbitrary, *malafide* and illegal as per Sub-

Section 5 of Section 6 of the Ain, 2003, because it clearly puts restriction to attach the property of 3rd party guarantor at first phase. The primary liability for repayment of loan lies upon the principal borrower and upon his failure to pay the same, the mortgagor guarantor is liable to pay it. The respondent bank at first upon taking all initiative and lawful actions against the principal borrower for recovery of outstanding loan amount finally would move against the mortgagor-guarantor and if the liability still unrealized then property of the 3rd party guarantor may be attached. The impugned order has been passed violating the provision of law under Section 5 of the Artah Rin Adalat, 2003 which is *malafide*, unlawful and arbitrary and as such the impugned order dated 30.03.2023 is liable to be declared to have been made without lawful authority and was of no legal effect.

The learned advocate next submits that the plaint itself shows that a large number of properties being schedule "Kha" to the plaint have been mortgaged in favour of the plaintiff bank by mortgagors who are defendant Nos.4 and 5 of the suit. As per provision of the proviso of Section 6(5) of the Artha Rin Adalat Ain, 2003, the property mortgaged by the lonee is to be sold out at first and if the decree is not satisfied then only the property mortgaged by the mortgagor can be sold in auction and then the properties of the third party guarantor shall be attracted if so required for satisfaction of the decree. In the instant case, the suit is pending wherein the petitioner has been shown as third party guarantor and as such the application for attachment of his property has no manner of application under Order-XXXVIII, Rule-5 of the Code of Civil Procedure read with Section 44 and 57 of the Artha Rin Adalat Ain, 2003. The Artha Rin Adalat without considering the above stage of the suit as well as the

existing position of the mortgaged properties passed the impugned order.

The learned advocate further submits that while passing the impugned order the Artha Rin Adalat totally failed to consider that there are mortgaged properties in the suit by selling which the decree can be satisfied, the decree if passed in future and execution case is filed in pursuant to that, because, the plaintiff bank after assessing the valuation of the mortgaged properties on being satisfied had given loan to the defendant Nos.1-3.

He lastly submits that it is settled principle of law that when there is mortgaged property in any Artha Rin Suit it will be sold out in auction at first for satisfaction of the decree by the executing court. The petitioner being third party, as alleged, his property will be attracted for satisfaction of the decree, if any, after selling the property of the lonee and the mortgagors' property. In support of his submissions he cited some decisions reported in 71 DLR 24, Nasrin Akter Vs. Judge, Artha Rin Adalat No.1, Chittagong; 23 BLC 944, Reliance Finance Limited Vs.Judge, Artha Rin Adalat No.4, Dhaka and others; 21 BLC (AD) 203, One Bank Ltd. Vs. Chaya Developer (Pvt.) Limited and 21 BLC 01, Mohammad Ali Vs. Judge, Artha Rin Adalat.

On the other hand Mr. Ziaul Haque Sarker, the learned advocate appearing for the Respondent No.4 Bank submits that the principal borrower (son of the petitioner, respondent No.7) availed loan of Tk. 95,00,000/-on 15.02.2012 which was enhanced from time to time and lastly on 02.04.2015 for the amount of Tk. 8,50,00,000/-. The Petitioner provided personal guarantee against the loan. The Artha Rin Suit No. 395 of 2018 was filed on 28.11.2018 against the defaulter borrower, mortgagors and the guarantor-petitioner for the amount of Tk. 10,06,66,719/- as on 26.11.2018. As the loan amount was significantly

enhanced the petitioner provided his personal guarantee as per the sanction letter (Annexure- 1B, page 19 of the Affidavit in Opposition) to secure the lending. As the property documents of the petitioner were within the custody of the lender bank, thereafter, on 04.07.2022 an application was filed before the learned Court to attach the property under Order-38, Rule-5 of the Code of Civil Procedure read with section 44 and 57 of the Artha Rin Adalat Ain, 2003; otherwise the petitioner would transfer the property to frustrate the decree, although he is also liable as a guarantor to secure the repayment of the loan money.

The learned advocate then submits that in the application for attachment it was clearly stated that none of the petitioner’s property was mortgaged against his son's loan. The documents of the scheduled property of the petitioner which are in the possession of the bank against his personal loan which was fully settled by the petitioner the scheduled property may be transferred if it is handed over by the bank. Therefore, the bank filed an application for the attachment of the petitioner’s property before judgment so that the decree does not get frustrated eventually.

He next submits that as per section 5chha of the Bank Companies Act, 1991 the guarantor is also included as the defaulter borrower which runs as follows:

> ৫। বিষয় অথবা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে,-
>
> (ছ) "দেনাদার" অর্থ ঋণ ও অগ্রিম গ্রহণ, লাভ-ক্ষতির ভাগাভাগি, খরিদ বা ইজারার ভিত্তিতে বা অন্য কোনভাবে আর্থিক সুযোগ-সুবিধা গ্রহণকারী ব্যক্তি, কোম্পানী বা প্রতিষ্ঠান এবং কোন জামিনদারও ইহার অন্তর্ভুক্ত হইবে।

He further submits that the petitioner was a guarantor of the principal borrower. Consequently, his property was only attached by the Adalat as per law before judgment in order to secure the loan against which he provided his guarantee and to refrain him from transfer of

the same before Judgment of Artha Rin suit. There was no illegality to attach the guarantor's property as security while having the mortgaged property of the borrower. As the Petitioner is a guarantor, provided additional security for the enhanced loan his property was attached for being a guarantor of the loan of the principal borrower. The application for attachment before judgment is allowed by the Adalat after hearing of both the parties and consideration of documents filed by both the parties regarding the value of the mortgage properties and comparison with the suit value of the suit concerned as well as relevant laws relating to attachment before Judgment of the property of guarantor and as such there was no illegality in passing the impugned order by the learned Judge and acted within the jurisdiction.

He further submits that the reason for attachment before judgment was rightly given by the learned court and there was no illegality as the law allows the attachment at any stage of the suit; that is to prevent the decree from being infructuous and to give assurance to the plaintiff that his decree, if made, will be satisfied. The learned advocate relied on the following paragraph of the book **"The Law of Civil Procedure,** Vol.2, P-1537" wherein Mr. Mahmudul Islam explains the rationale for attachment before judgment as: "The provision for attachment before judgment has been made to prevent any attempt on the part of the defendant to defeat the realization of the decree that may be passed against him. The sole object behind the order levying attachment before judgment is to prevent the decree from being infructuous and to give assurance to the plaintiff that his decree, if made, will be satisfied."

His next contention is that there is no bar under section 6(5) of the Artha Rin Adalat Ain, 2003 as it describes the sequence at the time of recovery of the guarantor's property which is obviously at the time of

disposal of the decree. The proviso of section 6(5) of the Ain, 2003 runs as: "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:" and he relied on the decision of a larger bench in the case of Md. Jahirul Hoque vs. Judge, Artha Rin Adalat, Chattogram and others reported in 17 SCOB [2023] HCD, page-32, para- 34' wherein it is observed: “Privilege of a guarantor to become liable to repay after borrower's default, remains only before instituting the suit. In other words, on failure to repay by the principal borrower, the guarantor had to pay the liability on demand. But both being failed to repay, the matter has been brought before the Court seeking relief against both of them liable and under section 6(5) of the Act, the decree being passed, both of them are liable jointly and severally and execution case shall proceed simultaneously against both of them. However, due to 1st proviso to section 6(5) of the Act, only guarantor's property shall be attracted after the property of the principal borrower." And submits that the petitioner-guarantor's contention that his property cannot be attached before judgment without disposing the Borrower and mortgagor's property is misconceived and wrong. As per section 6(5) of the Ain, 2003 this sequence will only be followed at the time of execution of a decree i.e. "in case of recovery of claim by execution of a decree the Court shall, as far as possible, attach the properties of the principal debtor-defendant at first and, thereafter, respectively, of the third party mortgagor and the third party guarantor."

The learned advocate finally submits that the petitioner filed the writ of Certiorari but could not show any illegality in the impugned order of the learned judge of the Artha Rin Adalat. Therefore, the Rule is Liable to be discharged.

We have heard the learned Advocates appearing for both the parties, perused the applications, affidavit in opposition and all the documents annexed there with.

The respondent no.4 as plaintiff filed the instant suit before the Artha Rin Adalat for realization of loan money along with interest against the defendant borrower nos.1-3 (respondent no.5-7), 3rd party mortgagors (defendant no.4-5) and the present petitioner as 3rd party guarantor showing him as defendant no.6 in the year 2018. At one stage of the suit the plaintiff filed an application before the Artha Rin Adalat (hereinafter referred to as the Adalat) for attachment of the property of the defendant no.6-petitioner before the judgment under Rule-5 of Order-XXXVIII of the Code of Civil Procedure (hereinafter referred to as the Code) read with section 44 and 57 of the Artha Rin Adalat Ain, 2003 (hereinafter referred to as the Ain, 2003). The petitioner contested the same by filing written objection wherein he denied that he was a guarantor of the said loan. However, after hearing both the parties the learned Judge of the Adalat was pleased to allow the application for attachment before judgment of the property of the petitioner (defendant no.6) by his impugned order dated 30.03.2023. Being aggrieved by and dissatisfied with the impugned order the defendant no.6-petitioner moved this Court and obtained the Rule *nisi* and order of stay as stated at the very outset.

To adjudicate the issue and the points of law raised at the bar it would be profitable if we go through the relevant law first. Order-XXXVIII, Rule-5 of the Code provides-

> "(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

From plain reading of the above provision it appears that the provision for attachment before judgment has been made to prevent any attempt on the part of the defendant to defeat the realization of the decree that may be passed against him. In order to obtain an order of attachment before judgment, the plaintiff shall have to satisfy the court the following conditions-

(a) that the defendant is about to dispose of the whole or any part of his property; or

(b) that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; and

(c) that the defendant is intending to do so to cause obstruction or delay in the execution of any decree that may be passed against him.

For getting an order of attachment before judgment the plaintiff must satisfy the court in terms of the requirement laid down in rule-5 as stated above. Vague and general allegation that the defendant is about to dispose of the property or remove it beyond the jurisdiction of the court will not do; the allegation must be supported by particulars. The essential requirement for an order for attachment before judgment is the *mala fide* or dishonest intention of the defendant in disposing of property or removing it from the jurisdiction of the court and a mere bald averment that the defendant is contemplating to alienate the property is not sufficient.

The principles, object, conditions and procedure of attachment of property before judgment have been settled by a catena of decisions of our Supreme Court as well as by the Supreme Court of India and Pakistan which are summarized in the following paragraphs. In the case of Unimarine SA Vs. Bangladesh reported in 31 DLR (AD) 112 and in the case of Transcontinental Imex Vs. Formentors Maritime reported in 10 BLC (AD) 148 the Appellate Division observed that the court must be satisfied not only that the defendant is about to dispose of his property or remove it from its jurisdiction but also that this disposal or removal is with the object of obstructing or delaying the execution of the decree that may be passed against him. This satisfaction is to be judicial satisfaction based on some materials which are to be found in the affidavit filed by the party or otherwise. The court is to insist upon the proof of the allegation in the petition of attachment before judgment by an affidavit or other mode of proof. The court can look at the admission made in the written

statement or written objection and may take note of any fact disclosed in the plaint or other papers or documents on record. The court will be justified in dismissing the application if the plaintiff has failed to make out a prima facie case that the defendant, with the intent to obstruct or delay the execution of the decree which may be passed in his favour, is doing or is about to do the acts specified in rule-5. Though it is difficult to produce any conclusive evidence before the court to prove the intention of the defendant which is secretly conceived and sought to be surreptitiously executed, there must be some concrete allegations before the court about the actions of the defendant and some materials in support thereof. The mere allegation, without anything more, that acquisition of certain properties in the past in the benami of others and a gift of some properties in favour of the wife leaving no property with the defendant and that the defendant is trying to encash the bills and withdraw security money cannot justify an order of attachment before judgment. A man is not debarred from dealing with his property only because a suit has been filed against him and an attempt to sell a small portion of a large estate does not warrant an inference that the defendant intends to obstruct or delay the execution of a decree when passed. A big company could not be and should not be prevented from drawing its bills disrupting its business merely on a vague allegation that the defendants were trying to close down their business or that they, have been trying to withdraw the bills to defraud the plaintiff [50 DLR (AD) 21]. An attachment practically take away the power of alienation and interferes with the undoubted right of ownership and it should not be ordered except upon some clear and convincing proof that it is needed to protect the interest of the plaintiff. This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms. In the

absence of the requisite intention, the court is not justified in passing an order of attachment simply because of the resourcefulness of the defendant [29 DLR 384].

The facts stated in the application for attachment before judgment must be affirmed by an affidavit. Order-XIX, Rule-1 prescribes the mode of verification and such affidavit is not acceptable if it does not comply with the requirement of Order-XIX [27 DLR (AD) 156]. Thus where the affidavit in support of the allegation made in the application is affirmed on the basis of information, but the source of information is not disclosed, it was held that the affidavit, could not be read in evidence and the application cannot be allowed. When an affidavit is inadmissible in evidence because of want of proper verification, an order of attachment under this rule based on such affidavit is not legal [AIR 1986 All 87].

The sole object behind the order levying attachment before judgment is to prevent the decree from being infructuous and to give assurance to the plaintiff that his decree, if made, will be satisfied. The power under the rule is an extraordinary power whereby a party in the suit may be prevented from use and enjoyment of his own property before any decree has at all been passed against him and when there has been no certainty that a decree will at all be passed against him. The power of attachment before judgment being a power to interfere with a party’s right to enjoy his own property, the court should be circumspect in allowing the prayer for such attachment, otherwise it may become an instrument of oppression. This remedy being an extraordinary remedy should be sparingly used and the court should exercise the power with utmost care and caution so that it does not become an engine of oppression. The court would not be justified in issuing an order for attachment before judgment or security merely because it thinks that no harm would be done thereby or that the defendant to come

to terms or that the defendant would not be prejudiced. Before ordering attachment before judgment, the court must first ask the defendant to furnish security or to show cause as to why security should not be furnished. In Chandrika Prasad Singh Vs. Hira Lal reported in AIR 1924 Pat 312, it is observed-

> "The power given to the court to attach defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before a defendant's liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit. Such power is only given when the court is satisfied not only that the defendant is about to dispose of his properties or remove it from the jurisdiction of the court, but also that his object in doing so is to obstruct or delay the execution of a decree that may be passed against him, and so deprive the plaintiff, successful, of the fruits of victory."

No order of attachment could be passed on an application which does not disclose full particulars of the property to be attached. In a suit for recovery of loan secured by the mortgage of property, the question of attachment before judgment does not normally arise. But where there is a reasonable probability of the mortgaged property being insufficient to discharge the mortgage debt and the mortgagee being entitled to get a decree in his favour for the balance, properties of the mortgagor other

than those covered by the mortgage may be attached if the conditions for such attachment are fulfilled.

When an application is filed and the court is prima facie satisfied about the conditions to be fulfilled, the court may direct the defendant, within the time fixed by it, to furnish security in such sums as may be specified in the order or to show cause why he should not furnish the security. An order of attachment of the defendant's property before asking him to show cause against attachment is not legal and cannot be upheld. Where the defendant fails to show cause or fails to furnish security, the court may under Rule-6 order that the property specified or portion thereof be attached. The order of attachment should be passed after notice to the defendant. Valid attachment is made under rule-6 after serving of notice under rule-5 specifying the terms in Form 5, App-F and not a general notice merely directing the defendant to show cause. If an order of attachment is made without directing the defendant to furnish security or to show cause why he should not furnish security, such attachment shall be void. Thus where the court did not call upon the defendant to furnish security or to show cause as to why security should not be furnished, order of ad-interim attachment till the hearing of the application for attachment before judgment was illegal. The condition of such attachment is that it lasts until the required security is furnished or cause is shown against the order of attachment. Where conditional order of attachment is passed, it is not necessary to issue fresh notice or serve a fresh order of attachment after the conditional order is made absolute. If the defendant show cause against furnishing the security which was required of him under rule 5(1) or does actually furnish the required security, then no order of unconditional attachment is made; on the contrary the attachment of property already made has to be withdrawn.

The Pakistan Supreme Court in Mohiuddin v. East Pakistan reported in 14 DLR (SC) 112 made certain observation from which it can be urged that the court has power to order attachment before judgment outside the purview of Order-XXXVIII, Rule-5. In United Venture Navigation Vs. SS Lines reported in 28 DLR 231 before the High Court Division, it was contended on the authority of Mohiuddin that the court can order attachment before judgment in exercise of inherent power, but the High Court Division distinguished Mohiuddin as in Mohiuddin judgment had already been passed, but no execution case was competent and the High Court Division observed-

> "although the inherent power of a Court to do justice, as has been mentioned in section 151 of the Code of Civil Procedure, is certainly very wide, but it is now well settled that the Court itself has, in course of long line of decision, set down certain restrictions in the exercise of its inherent power and one of the restrictions is that if the exercise of such power is provided by some positive provision of the Civil Procedure Code it should be exercised only in accordance with the said provision of Order-38 of the Code the conditions as have been mentioned therein cannot be ignored or avoided by taking recourse to the inherent power."

According to Mr. Mahmudul Islam the observation of the High Court Division is correct and the observation in Mohiuddin must be confined to the facts of the case.

In the case of premraj Mundra Vs. Maneck Gazi reported in AIR 1951 Cal 156 which has been referred by our Appellate Division with approval in the case of Unimarine SA Vs. Bangladesh reported in 31 DLR (AD) 112, the following principles regarding the exercise of the power to order attachment before judgment have been stated-

1. An order under Order-38, rr.5 and 6 can only be issued if circumstances exist as are stated therein.
2. Whether such circumstances exist is a question of fact which must be proved to the satisfaction of the court.
3. The court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendant would not be prejudiced.
4. The affidavits in support of the contentions of the applicant must not be vague, and must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, and the grounds for belief should be stated.
5. A mere allegation that the defendant was selling off his properties is not sufficient. Particulars must be stated.
6. There is no rule that transaction before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.
7. Where only a small portion of the property belonging to the defendant is being disposed of, no interference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff’s claim.
8. The mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed. There must be additional circumstances to show

that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the court to look to the conduct of the parties immediately before the institution of the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward.

9. The fact that the defendant is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstances, but not by itself sufficient.

10. In case of running business, the strictest caution is necessary and the mere fact that the business has been closed, or that its turnover has diminished, is not enough.

11. Where, however, the defendant starts disposing of his properties one by one, immediately upon getting the notice of the plaintiff's claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in embarrassed financial condition, these were grounds from which an inference could legitimately be drawn that the object of the defendant was to delay or defeat the plaintiff's claim.

12. Mere removal of properties outside jurisdiction is not enough, but where the defendant with notice of the plaintiff's claim, suddenly begins removal of his properties outside jurisdiction of the appropriate court, and without any satisfactory reason, an adverse

inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened.

13. The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is claim pending against him. Mere neglect or suffering execution by other creditors is not a sufficient reason for an order under Order-38 of the Code.

14. The sale of properties at a gross undervalue, or benami transfer, are always good indications of an intention to defeat the plaintiff's claim. The court must, however, be very cautious about the evidence on these points and not rely on vague allegations.

These are the principles, object, conditions and procedure of attachment of property before judgment settled by our apex court as well as by the apex courts of this sub-continent. Now, let us examine the present case in the light of the above principles settled by the highest courts of the sub-continent. In the application for attachment of the petitioner's property before judgment the plaintiff respondent no.4 bank stated in paragraph no.3 as under-

"অত্র মামলার ৬নং বিবাদী তর্কিত ঋনের বিপরীতে গ্যারান্টর এবং মূল ঋন গ্রহীতা জনাব মোঃ শফিকুল ইসলাম সোহেল এর পিতা। তাহার মালিকানাধীন কোন স্থাবর ও অস্থাবর সম্পত্তি তর্কিত ঋনের বিপরীতে বন্ধক হিসাবে বাদী ব্যাংকের অনুকূলে দায় বদ্ধ নাই। কিন্তু উক্ত ৬নং বিবাদীর মালিকানাধীন নিম্ন তফসিল বর্ণিত সম্পত্তির মালিকানা সংক্রান্ত দলিল, বায়া দলিল, পর্চা, খতিয়ান, ঢাকা সিটি জরিপের খতিয়ান এবং খাজনা পরিশোধের রশিদ ইত্যাদি বাদী ব্যাংকে সংরক্ষিত আছে যাহার বিপরীতে বর্তমানে কোন দায় দেনা বিহীন অবস্থায় উক্ত বিবাদীর নামীয় সম্প্রতি পরিশোধকৃত ঋনের বিপরীতে বন্ধক আকারে বাদী ব্যাংক শাখায় সংরক্ষিত আছে। যাহা অবমুক্ত হওয়া সাপেক্ষে উক্ত বিবাদী কর্তৃক অন্যত্র হস্তান্তর করিয়া দেওয়ার সমূহ সম্ভাবনা রহিয়াছে। ৬নং বিবাদী তাহার মালিকানাধীন নিম্ন তফসিল বর্ণিত সম্পত্তি অন্যত্র হস্তান্তর করিয়া দিলে অত্র মোকদ্দমার সম্ভাব্য ডিক্রিকৃত টাকা তথা জনগণের আমানতের বিপুল পরিমান অনাদায়ী পাওনা টাকা আদায় করা অনিশ্চিত হইয়া পড়িবে, ফলশ্রুতিতে বাদী ব্যাংকের সমূহ আর্থিক ক্ষতি হওয়ার সম্ভাবনা বিদ্যমান আছে। এহেন অবস্থায় অত্র মোকদ্দমার দাবীকৃত ও সম্ভাব্য ডিক্রিকৃত টাকা সম্পূর্নরুপে আদায়/পরিশোধ না হওয়া/করা পর্যন্ত ৬ নং বিবাদী যাতে তাহার মালিকানাধীন নিম্ন তফসিল বর্ণিত

স্থাবর সম্পত্তি অন্যত্র হস্তান্তর না করিতে পারে এবং বাদী ব্যাংক যাতে বিজ্ঞ আদালতের মাধ্যমে নিলামে বিক্রয় পূর্বক সম্ভাব্য জনগণের আমানতের ডিক্রিকৃত টাকা হাল নাগাদ মুনাফাসহ আদায় করিতে পারে তাহা নিশ্চিত করিবার নিমিত্বে অত্র দরখাস্তের তফসিলে বর্ণিত স্থাবর সম্পত্তি রায়ের পূর্বে অগ্রীম ক্রোকাবদ্ধ করত: অত্র মোকদ্দমার ‘‘খ’’ তফসিলে অন্তর্ভূক্ত করিবার আদেশ প্রদান করা আবশ্যক, অন্যথায় ক্ষতির কারন বটে।’’

Considering the said application we do not find any cogent reason stated by the plaintiff that how the defendant No. 6 (present petitioner) was about to dispose of the whole or any part of his property; or that he was about to remove the whole or any part of his property from the local limits of the jurisdiction of the court and that he was intending to do so to cause obstruction or delay in the execution of any decree that may be passed against him while all the title documents relating the property was in the possession of the plaintiff bank. The circumstances as stated in Rule-5 of Order-XXXVIII do not exist in the present suit and has not been asserted in the application. Mere allegation and assumption that the property might be transferred is not sufficient to attach the property before judgment. It is not enough, since nobody can be prevented from dealing with properties simply because a suit has been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff’s claim. It is open to the court to look to the conduct of the parties immediately before the institution of the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward. Admittedly all the title documents of the petitioner’s property sought for attachment are in the custody of the plaintiff bank though there is no liability of the petitioners to the plaintiff bank exists. The petitioner stated that the principal borrower of this suit availed loan by sanction letter dated 15.02.2012 and the petitioner availed loan amount of Tk.

30.00 lac from the same bank and same branch by sanction letter dated 27.05.2015 and admittedly paid all the liabilities of his loan. The guarantor document as has been claimed by the plaintiff bank was shown executed on 02.04.20215 thus the petitioner apprehend that the said guarantor document has been made up at the time of processing his personal loan and the petitioner strongly denied any such execution of the said guarantor document in his written objection. The allegation of the petitioner that only to retain all those valuable documents of the petitioner with *malafide* intention to grab the property, the application for attachment was filed, cannot be ruled out. However, it is a question of fact and is to be determined by the trial court after taking evidence. Be that as it may, in the present application for attachment the plaintiff respondent no.4 bank totally failed to show the reason for attachment of the petitioner's property before judgment as contemplated under Rule-5 of Order-XXXVIII of the Code of Civil Procedure. In other words the requirement of law as laid down in Rule-5 of Order-XXXVIII has not been fulfilled in the present case. The provision of section 57, inherent power of the Adalat and section 44, to do complete justice under Artha Rin Adalat Ain, 2003 will not in any way help the plaintiff bank as in dealing with an application for attachment before judgment the Adalat must be satisfied that the requirement as stated under Rule-5 of Order-XXXVIII of the Code is fully complied with. Regard being had to the facts and circumstances of the case, we find sheer misconception of law by the judge of the Artha Rin Adalat who allowed the above application for attachment before judgment without applying his judicial mind and in violation of the position of law long settled by the higher courts.

In that view of the facts and circumstances of the case and the position of law as discussed above the order

passed by the trial Court warrants interference by this Court and we find substance in this Rule resultantly the Rule is made **absolute**, however, without any order as to cost.

The impugned order No. 35 dated 30.03.2023 (Annexure-G) passed in Artha Rin Suit No. 395 of 2018 and thereby allowing the application filed by the plaintiff-respondent bank under Order XXXVIII, Rule 5 of the Code of Civil Procedure read with sections 44 and 57 of the Artha Rin Adalat Ain, 2003 is hereby declared to have been passed without any lawful authority and was of no legal effect.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.

Mahfuza Nasrin
Assistant Bench Officer