IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 2498 OF 2026

In the matter of:

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

And

In the matter of:

Mr. Touhidul Islam Chaudhury, son of late Tariq Ahmed Choudhury and Mrs. Nurjahan Begum of House-27/E, Road-10, Banani Model Town, Dhaka-1213 and also at House No. 348, Road No. 05, DOHS, Baridhara-1212, Banani, Dhaka represented by his constituted lawful attorney- Md. Mostafizur Rahaman Saikot.

… Petitioner

-Versus-

The learned Artha Rin Adalat No. 5, Dhaka and others.

… Respondents

Mr. Taisir Hoque, Advocate

…For the petitioner

Mr. Margub Kabir with
Mr. Taisir Mahmud, Advocates

…For the respondent no. 2

Heard on 02.07.2026 and 08.07.2026.
Judgment on 09.07.2026.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Rezaul Karim

Md. Mozibur Rahman Miah, J.

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh by the defendant no. 7 of Artha Rin Suit No. 337 of 2025 (which was renumbered as Artha Rin Suit No. 343 of 2025), a Rule Nisi was issued calling upon the respondents to show cause as to why the order no. 11 dated 18.11.2025 passed by the respondent no. 1 in Artha Rin Suit No. 343 of 2025 allowing the application dated 08.07.2025 and 18.08.2025 respectively filed by the respondent no. 2 under order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure, 1908 for attaching the petitioner's personal land measuring an area of 9.45 decimals of land described in the schedule to the said application before pronouncement of judgment 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 to this Court may seem fit and proper.

At the time of issuance of the rule, this court also stayed the operation of the impugned order no. 11 dated 18.11.2025 passed by the respondent no. 1 in Artha Rin Suit No. 343 of 2025 for a period of 2(two) months. Subsequently, on an application filed by the respondent no. 2 for discharging the rule and vacating the order of stay, this court vide order dated 28.04.2026 allowed the said application in-part and the order of stay granted at the time of issuance of the rule was vacated. Subsequent thereto, at the instance of the petitioner an application was filed for review of the said order dated 28.04.2026 and this court then vide order dated 16.06.2026 allowed the said application for review, and set aside the order dated 28.04.2026 sustaining earlier order of stay dated 08.03.2026.

Subsequently, the petitioner filed applications, one for addition of party and another for correction when the respondent no. 2 filed an application for discharging the rule and vacating the order of stay which were all kept with the record to be considered at the time of hearing of the rule fixing it on 02.07.2026. Ultimately, we have heard the learned counsels for the petitioner and that of the respondent no. 2 at length and are going to pass the following judgment:

The salient facts leading to issuance of the instant rule are:

The present respondent no. 2 as plaintiff originally filed a suit being Artha Rin Suit No. 337 of 2025 which was on transfer to the Artha Rin Adalat No. 5, Dhaka renumbered as Artha Rin Suit No. 343 of 2025 claiming an amount of taka 148,19,02,809/42 against the present petitioner who was made as defendant no. 7 in the Suit and other 7(seven) making them as defendant nos. 1-8. In the plaint of the suit, the property mortgaged with respondent no. 2 has been appended as schedule-‘B’ series. The present petitioner who is defendant no. 7 as well as another defendant no. 2 entered appearance in the suit and to contest the same filed written statement separately denying all the material statements made in the plaint. After that, the plaintiff-bank filed two applications dated 08.07.2025 and 18.08.2025 both under order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure for attaching their properties before passing judgment making averment of its apprehension both in paragraph no. 7 of those two applications respectively. Against those two sets of applications, the present petitioner as defendant no. 7 filed written objection denying all the material averments made in the application particularly, in paragraph no. 12 to the

written objection. The defendant no. 2 also filed written objection against the application filed against him. However, the said applications so filed by the respondent no. 2 was taken up for hearing by the learned Judge and vide impugned order dated 18.11.2025 allowed the same holding that the approximate value of the properties mortgaged with the bank is taka 42,16,00,000/- and the said defendants had never denied of taking loan from the bank and there has been every possibility of decreeing the suit against the defendants.

It is at that stage, the defendant no. 7 as petitioner came before this court and obtained rule and order of stay as has been stated hereinabove.

Mr. Taisir Hoque, learned counsel appearing for the petitioner upon taking us to the writ petition as well as the affidavit-in-reply filed against the application for discharging the rule and vacating the order of stay filed by the respondent no. 2, at the very outset submits that the provision provided in order XXXVIII, rule 5 of the Code of Civil Procedure has not at all been adhered to by the learned Judge while passing the impugned order and therefore, the said order cannot be sustained in law.

By taking us to rule 5 (1) of order XXXVIII of the Code of Civil Procedure, he further submits that there have been two conditions set out in clause (a) and clause (b) to the said rule which was supposed to be asserted by the plaintiff-bank while filing the application but nothing sort of these has been there in the entire application.

The learned counsel by taking us to the said rule also contends that there have been two mandatory provisions to be complied with by the court itself while passing an order of attachment by asking the defendant whose

property will be attached either to furnish security on the estimated value of the property or to show cause as to why such security will not be furnished providing time frame but in the impugned order there has been no such reflection.

The learned counsel by referring to rule 6(1) and (2) of order XXXVIII of the Code of Civil Procedure next contends that the consequence of above legal requirement to be followed by the court, has clearly been stated in those rules making it mandatory, when admittedly the respondent no. 1 has failed to comply so having no scope to sustain the impugned order.

The learned counsel in response to the submission so placed by the learned counsel for the respondent no. 2 then contends that in spite of describing apprehension in paragraph no. 7, the said apprehension is very evasive one having no clear assertion backed by any material document yet the learned Judge is found to be oblivious on that legal requirement and passed the impugned order which is without any basis.

However, in support of his submission, the learned counsel cited 3(three) decisions reported in 69 DLR (HCD) 245; 27 DLR (HCD) 256 as well as 77 DLR (HCD) 229 and submits that in all those decisions, it has been fortified the mandatory provision provided in rule 5 and 6 of order XXXVIII to be followed by the trial court while passing an order of attachment before judgment and those very decisions are squarely applicable in the facts and circumstances of the instant case and finally prays for making the rule absolute on setting aside the impugned judgment and order.

By contrast, Mr. Margub Kabir, learned counsel appearing for the respondent no. 2 very robustly opposes the contention taken by the learned

counsel for the petitioner and at the very outset submits that all the requirements provided in order XXXVIII, rule 5 of the Code of Civil Procedure has clearly been complied with by the learned Judge while passing the impugned order warranting no interference by this Hon'ble court.

To supplement his said submission, the learned counsel further contends that since in paragraph no. 7 of the application filed by this respondent to attach the property of the petitioner who is the defendant no. 7, clear assertion of apprehension is there in disposing of the apartment of the defendant no. 7, so the requirement provided in rule 5 of order XXXVIII of the Code of Civil Procedure has explicitly been complied with while passing the impugned order.

The learned counsel further contends that since the defendant no. 2 and the defendant no. 7 (herein the petitioner) are related as son and father, so they in collusion with each other tried to dispose of their respective properties sensing that a decree might be passed against them and since they both stand as guarantors to the loan having no scope to absolve them from the liability in paying the loan to the respondent no. 2-bank and hence, the learned Judge has perfectly passed the impugned order.

The learned counsel also contends that in obtaining rule and order of stay, the petitioner has practiced fraud upon this Hon'ble court as though the present petitioner who is defendant no. 7 in the suit does not belong to the landed property but at the time of obtaining order of stay, he very mischievously obtained the same in regard to the landed property of the defendant no. 2 and therefore, in a well-motivated way he obtained the order

of stay and on that sole ground of practicing fraud, the rule is liable to be discharged.

The learned counsel further contends that this petitioner as well as the defendant no. 2 availed huge amount of loan from several banks and financial institutions which became default loan and therefore, there has been every possibility to dispose of the property by the petitioner to evade the loan liability towards those creditors including the present respondent no. 2 and hence the impugned order is justified one.

The learned counsel goes on to submit that though the learned Judge of the Artha Rin Adalat while passing the impugned order has not discussed about the written objection filed by the present petitioner but considering the averments of the case of the respective parties, the learned Judge has rightly passed the impugned order which is liable to be sustained.

Insofar as regards to the decisions cited by the learned counsel for the petitioner, the learned counsel for the respondent no. 2 contends that though in those decisions the provision of order XXXVIII, rule 5 of the Code of Civil Procedure has been fortified, still if this Hon'ble court considers, the overall activities of the petitioner and his son made as defendant no. 2 in regard to outstanding dues lying against the respondent no. 2 and other creditors, then this Hon'ble court might be impressed that the order of attachment has rightly been passed else, the bank will be deprived of getting its rightful claim levelled against the present petitioner and other defendants of the suit and finally prays for discharging the rule.

Be that as it may, we have considered the submission so advanced by the learned counsel for the petitioner and that of the learned counsel for the

respondent no. 2. Together, we have also taken into account of the writ petition, applications, affidavit-in-opposition, affidavit-in-reply and all other documents placed before us.

Since a particular order has been called in question before us in the instant writ petition, so we will only dwell on the propriety of the said order in the light of the respective provision of law and no other extraneous aspects.

To do so, we at the first instance, feel it expedient to reproduce the provision of order XXXVIII, rule 5 and 6 of the Code of Civil Procedure in verbatim which runs as follows:

> *"**Order XXXVIII***
>
> ***5. (1)** Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intend 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.

***6. (1)** where the defendant fails to show cause why he should not furnish security, of fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.*

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or nay portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such order as it thinks fit."

On going through clause (a) and clause (b) of rule 5(1) of order XXXVIII of the Code of Civil Procedure, we clearly find that there must be an assertion of apprehension of the plaintiff herein the respondent no. 2 about disposing of the property by the defendant which is supposed to be attached by the plaintiff. Though in paragraph no. 7 of the application for attachment, the bank has expressed its apprehension but that expression does

not conform the satisfaction of the court as enshrined in clauses (a) and (b) to rule 5(1) of order XXXVIII of the Code of Civil Procedure. So, until and unless, a strong assertion about disposing of the property by the defendant is made in the application, the court has got no scope to pass any order of attachment.

On top of that, since there has been a mandatory provision in rule (5) asking the defendant either to show cause as to why he or she should not furnish a security or directly ask the defendant to furnish security on the estimated value of the property to be attached when admittedly it has not been complied with by the trial court even we don't find any approximate value of the property of defendant no. 7 and defendant no. 2 has ever been asserted in the said application. So invariably, rule 6 of order XXXVIII of the Code of Civil Procedure has been violated because consequence of not complying rule (5) has been laid out therein. So in absence of performing those legal requirements, the impugned order cannot be sustained in law.

When we pose a question to the learned counsel for the respondent no. 2 as regards to non-compliance of those very legal requirements by the trial court, the learned counsel then contends that perhaps in previous orders prior to passing impugned order, such kind of show cause notice might be passed. But on going through the record, we don't find any such order before passing of the impugned order.

Then again, if we take a glance of the impugned order what we find it totally absurd and absolutely far from to what has been set out in rule 5 and 6 of order XXXVIII of the Code of Civil Procedure and how a learned Judge

could pass such kind of frivolous order without consulting the respective provision of law is totally incomprehensible to us.

The above view of us has also been echoed by this court in a judgment passed in Civil Revision No. 85 of 2021 dated 27.02.2022 where one of us (Md. Mozibur Rahman Miah, J) is the author Judge of that judgment where it has been found:

> *"However, it is the prerogative of the trial court either to pass an order asking the defendant to show cause why the property, sum or value of such property should not be placed at its disposal as a security* ***or*** *may direct to furnish the security. And only in case of failure to comply with the above two options, the court then may pass an order of attachment however if the defendant shows cause or furnishes required security and if any property of the defendant is attached, be withdrawn and those very clear proposition has clearly been enshrined in rule 6(1)(2) of order XXXVIII of the Code of Civil Procedure."*

Furthermore, it has also been held in the said judgment that:

> *"On top of that, on the face of the impugned order, it is crystal clear that, the learned Joint District Judge even has not bothered to consult to the provision of order XXXVIII, rule 5 and 6 of the Code of Civil Procedure nor he felt is urge to go through the application filed for attachment to find that, whether the ingredients required to get remedy under order XXXVIII, rule 5 exists there rather very halfheartedly passed the impugned order, even though it is the sole responsibility of*

the trial court to dispose of such application on sifting the materials place before him which lacks in the impugned order."

The learned counsel for the petitioner has rightly brought to our notice of the relevant paragraphs of three decisions he cited as mentioned above where *ratio* has been settled fortifying the provision provided in order XXXVIII, rule 5 of the Code of Civil Procedure which we find equally applicable in the facts and circumstances of the instant case.

Before parting, since we at the very outset stated that we would only examine the propriety of the impugned order so the submission placed by the learned counsel for the respondent no. 2 about practicing fraud upon the court in obtaining order of stay does not stand given the fact that subsequently by admitting the mistake, the petitioner filed an application for correction as well as an application for adding the defendant no. 2 as respondent to the writ petition which clearly demonstrates the honest intention of the petitioner. But since we find the impugned order is totally unsustainable in law then obtaining the interim order staying the operation of the impugned order is not that material here.

Regard being had to the above facts, circumstances of the case and that of discussion and observation made thereof, we are convinced that the impugned order lacks any material or legal basis which can never be sustained.

Accordingly, the rule is made absolute however without any order as to costs.

The impugned order no. 11 dated 18.11.2025 passed by the respondent no. 1 in Artha Rin Suit No. 343 of 2025 allowing the application

dated 08.07.2025 and 18.08.2025 filed by the respondent no. 2 under order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure, 1908 is hereby struck down.

However, the respondent no. 2 is at liberty to file application afresh if so advises.

The order of stay granted at the time of issuance of the rule thus stands recalled and vacated.

Let a copy of this judgment and order be communicated to the respondents forthwith.

Rezaul Karim, J.

I agree.

*Abdul Kuddus/**.B.O.***