

Section 33 (5) of Artha Rin Adalat Ain, 2003

3rd party mortgage is also under consideration for loan realisation

High Court Division :
(Special Original Jurisdiction)

JBM Hassan J

Md Khairul Alam J

Rupali Bank LimitedPetitioner

vs

Judge, Artha Rin Adalat No.4, Dhaka and others.....Respondents

Artha Rin Adalat Ain (VIII of 2003)

Section 33(5)

Since, no property was mortgaged by the principal borrower, direction is not in any way put any embargo upon the Adalat to sell the properties mortgaged by the 3rd party mortgagors including the properties of the respondents Nos. 2-10 in auction and to issue certificate under Section 33(5) of the Ain, 2003 in favour of the petitioner. (13)

Md Khairul Alam J : At the instance of the .petitioner, Rupali Bank Limited, this Rule Nisi was issued calling upon the respondents to show cause as to why the impugned order dated 13-11-2014 passed by the learned Judge, Artha Rin Adalat No.4, Dhaka in Artha Rin Execution Case No. 28 of 2012 allowing an application filed by the judgment-debtor respondents No. 2-10 under Section 151 of the Code of Civil Procedure (shortly, the Code) for removing the 'B' scheduled mortgaged properties from the certificate issued in favour of the petitioner under Section 33(5) of the Artha Rin Adalat Ain, 2003 (Annexure-F) should not be declared to be without lawful authority and of no legal effect.

2. Relevant facts for disposal of the Rule, in short, are that the respondent No. 11, a limited company, took loan from the petitioner, Rupali Bank Limited, Motijheel Branch, Motijheel, Dhaka (shortly, the Bank). Since the borrower failed to repay the loan, the Bank as plaintiff instituted Artha Rin Suit No. 65 of 2006 before the Artha Rin Adalat No.4, Dhaka (shortly, the Adalat) impleading the present respondents Nos. 2-26 as defendants for realization of the loan amounting to Taka 28144478.24. Ultimately, the suit was decreed on 25-4-2007 and the Bank put the decree in execution by filing Execution Case No. 167 of 2007. During pendency of the execution case respondents Nos. 2-10 as petitioners filed Writ Petition No. 4792 of 2008 before this Court praying for a direction not to sell B scheduled mortgaged properties in auction before selling the mortgaged properties of the principal borrower. This Court without issuing any Rule by the order dated 23-7-2008 gave a direction to the Adalat not to sell the mortgaged properties of those petitioners (respondents Nos. 2-10 herein) before selling the mortgaged properties of the principal borrower, if any at all. Artha Execution Case No. 167 of 2007 was dismissed for default on 3-7-2011 and subsequently the Bank filed second execution case being Execution Case No. 28 of 2012. In second execution case it was tried to sell the mortgaged properties in auction as per provision of Section 33 of the Artha Rin Adalat Ain, 2003 (shortly, the Ain, 2003) but it could not be sold in auction due to non-participation of the bidder. Thereafter, the Bank filed an application under Section 33(5) of the Ain, 2003 praying for issuance of certificate in respect of all mortgaged properties including the properties of B scheduled mortgaged by the

predecessor of the respondents Nos. 2-10 (petitioner of the writ petition No. 4792 of 2008) in its favour. Ultimately, the said application was allowed by the order dated 11-11-2014 and thereby certificate as per Section 33 (5) of the Ain, 2003 was issued in favour of the Bank and the Artha Execution Case No. 28 of 2012 was disposed of finally. After issuance of the certificate under Section 33(5) of the Ain, 2003 in favour of the Bank and disposing of the Artha Execution Case No. 28 of 2012 finally on 11-11-2014, the respondents No. 2-10 filed an application under Section 151 of the Code praying for removing the B scheduled properties from the certificate issued under Section 33(5) of 'the Ain, 2003 in favour of the Bank. The Bank filed written objection against the said application but the Adalat allowed said application on 5-1-2015 and thereby removed the B scheduled properties from the certificate issued earlier. Being aggrieved by and dissatisfied with the said order the petitioner moved before this Court and obtained the present Rule and an interim order of stay.

3. None appears to oppose the Rule.

4. Mr Imam Hasan, the learned Advocate appearing for the petitioner submits that the respondent No. 1, the Adalat passed the impugned order by misinterpreting the judgment and order dated 23-7-08 passed by this Court in Writ Petition No. 4792 of 2008 inasmuch as in the said judgment no direction was given upon the respondent No. 1 to remove the B scheduled properties from attachment or certificate issued under Section 33(5) of the Ain, 2003. He further submits that the respondent No. 1 passed the impugned order without taking into consideration that after taking steps under Sections 33(1) and 33(4) of the Ain, 2003 the Adalat has no alternative but to issue certificate under Section 33(5) of the Ain, 2003. He also submits that the respondent No.1 failed to take into consideration that Section 33(5) of the Ain, 2003 has authorized the Adalat to issue certificate vesting the right of possession and enjoyment of mortgaged property upon the decree holder with the authority to transfer/sell the mortgaged property by the decree holder as per provisions of Sections 33(1) to 33(4) of the Ain, 2003 to satisfy the loan complying with provision of Section 6(5) of the Ain. Therefore, removal of B scheduled properties from the certificate issued under Section 33(5) of the Ain is beyond the directives given in the judgment and order dated 23-7-2008 passed in Writ petition No. 4792 of 2008 and also beyond the provisions of Sections 6(5) and 33(5) of the Ain, 2003. Mr Hasan also submits that the respondent No. 1 passed the impugned judgment and order without taking into consideration that after issuance of certificate under Section 33(5) of the Ain, 2003 in favour of the Bank, Artha Rin Execution Case has finally been disposed of and there is no provision to reopen the Execution Case under the Ain, 2003. He also submits that the respondent No. 1 passed the impugned order without taking into consideration that the Ain, 2003 is a special law, there is no scope to entertain an application filed under Section 151 of the Code of Civil Procedure. He further submits that the application which was allowed by the Adalat is neither signed and executed by the applicant nor said application is supported by any affidavit or verification and, as such, impugned order entertaining said application is illegal. He also submits that defendant No.1, Fashion Trust (Pvt) Limited, a limited company is the principal borrower but the said company did not have any mortgaged property and that C and D scheduled properties were the personal properties of the Managing Director and Directors of the company and they mortgaged the same in personal capacity. Therefore, all the mortgaged properties stand on same footing. In support of submission he relies upon the decision of *Bakul Aktar vs Bangladesh 16 BLC (AD) 4*. He lastly submits that the respondent No. 1 took attempts for auction on 10-7-2012 and 28-3-2013 to sell the mortgaged properties but due to non participation of the bidder the properties could not be sold in auction and, as such, respondent No. 1 rightly issued the certificate and

thereby the impugned order removing the B scheduled properties from the certificate is illegal.

5. We have gone through the writ petition and perused the documents annexed thereto.

6. In the case of Mohiuddin (SK) vs Joint District Judge and Artha Rin Adalat No.3, Dhaka reported in 13 MLR (AD) 356 the apex Court observed as follows:

"Mr AJ Mohammad Ali, the learned Counsel for the petitioner submits that the certificate issued under Section 33(5) of the Artha Rin Adalat Ain, 2003 in favour of the decree-holder bank is only for possession and enjoyment of the mortgaged property and it did not mean final disposal of the execution case for which further action for disposal of the suit property is necessary under Section 33(7) of the said Act. but the High Court Division misconstrued the provision of Section 33(9) in holding that the execution case was finally disposed of and thereby erred in summarily rejecting the writ petition. He lastly submits that the decree being preliminary form, the suit remained pending and thus the Artha Rin Adalat had the jurisdiction to consider the application for stay under Section 44 of the Act and to grant installment payment under Section 49 of the Act, but the Artha Rin Adalat failed to exercise its jurisdiction on the erroneous view of law that it became functus officio and had no jurisdiction to decide the application on merit.

We have heard the learned Advocate and perused the connected papers including the impugned judgment. We do not find any substance in the points raised.

The High Court Division upon correct assessment of the legal position and materials on record arrived at a correct decision. We therefore find no reason to interfere with the same."

(underlined)

7. As the mortgaged properties could not be sold in auction due to non-participation of the bidder in the bid, the Adalat, on the prayer of decree holder Bank, issued a certificate under Section 33(5) of the Ain, 2003 and the execution case was disposed of accordingly on 11-11-2014 and the executing Adalat became functus officio on that very day as settled by our Apex Court by the above ratio. Therefore, the Adalat misconstrued the provision of law in allowing the application filed under Section 151 of the Code by the impugned order dated 13-11-2014 removing the B scheduled mortgaged properties from the certificate issued in favour of the petitioner under Section 33(5) of the Ain, 2003 after final disposal of the execution case on 11-11-2014.

8. In the case of Bakul Aktar vs Bangladesh, 16 BLC (AD) 4 the apex Court observed as follows: "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 properties. 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.

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 hold, nothing more than that. But if he guarantees repayment of the loan, enjoyed by the company or mortgages his property to creditor, to ensure repayment of the loan by the company, then on the failure of the company to make such repayment, he becomes liable, not as a share-holder but as a guarantor or mortgagor or both as the case may be."

9. Fashion Trust (Pvt.) Limited, a limited company, is the principal borrower and admittedly, no property was mortgaged by the principal borrower. C and D scheduled properties were the personal property of the Managing Director and Directors of the company and they mortgaged the same in personal capacity and, as such, said properties of C and D scheduled also stand on same footing with the B scheduled properties mortgaged by the predecessor of the respondents Nos. 2-10 as because of all said properties are the properties of the 3rd. party mortgagors as per the above ratio.

10. In the case of Abdus Sattar Miah vs. Bangladesh reported in 14 BLC 412 the issue of Section 6(5) of the Ain, 2003 was involved and this Court settled the issue in the following manner:

"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 realise the decretal amount. Therefore, the Adalat was bound to sell the mortgaged property which was included in the schedule of the plaint/ decree."

11. In absence of any property mortgaged by the principal borrower, the Adalat rightly tried to sell the properties mortgaged by the 3rd party mortgagors including the properties of the respondents Nos. 2-10 in auction. Being failed to sell the mortgaged properties in auction the Adalat rightly issued certificate under Section 33(5) of the Ain, 2003 in favour of the petitioner.

12. Present respondents Nos. 2-10, as petitioners, earlier filed Writ Petition No. 4792 of 2008 before this Court and this Court without issuing any Rule by the order dated 23-7-2008 gave a direction in the following manner:

"Considering the facts and, circumstances we direct the Artha Rin Adalat concerned not to sell the mortgaged properties of those petitioners before selling the mortgaged properties of the principal borrower, if any at all"

13. Since, no property was mortgaged by the principal borrower, said direction is not in any way put any embargo upon the Adalat to sell the properties mortgaged by the 3rd party mortgagors including the properties of the respondents Nos. 2-10 in auction and to issue certificate under Section 33(5) of the Ain, 2003 in favour of the petitioner.

14. Therefore, the subsequent removal of the B scheduled mortgaged properties from the certificate issued in favour of the petitioner under Section 33(5) of the Artha Rin Adalat Ain, 2003 is illegal and without jurisdiction.

15. Considering the facts and circumstances stated hereinbefore, we find merit in the Rule.

16. Accordingly, the Rule is made absolute.

17. The impugned order dated 13-11-2014 passed by the learned Artha Rin Adalat No.4, Dhaka in Artha Rin Execution Case No. 28 of 2012 'removing the B scheduled mortgaged properties from the certificate issued in favour of the petitioner under Section 33(5) of the Artha Rin Adalat Ain, 2003 (Annexure-F) is hereby declared to have been passed without lawful authority.

18. The order of stay granted earlier by this Court is hereby recalled and vacated.