

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Present:

Ms. Justice Nazmun Ara Sultana
and

Mr. Justice Md. Ruhul Quddus

Writ Petition No.6819 of 2010

Fatema Begum

...Petitioner

-Versus-

The Artha Rin Adalat, Narayangonj and others.

... Respondents

Mr. Abdur Razzaq with
Mr. Shahjada Al-Amin Kabir, Advocates
... for the Petitioner

Mr. M. Shafiullah, Advocate
... for Respondent No.2

Mr. M.A. Samad with
Mr. M.G.H. Ruhullah, Advocate
... for Respondent No.4

Heard on 10-11.11.2010

Judgment on 11.11.2010.

Md. Ruhul Quddus, J.

This Rule *Nisi* was issued to examine the validity of order No.76 dated 10.3.2010 (annexe-C to the writ petition) passed by the Artha Rin Adalat, Narayangonj summarily rejecting Miscellaneous Case No. 3 of 2010 filed under Order XXI rule 58 of the Code of Civil Procedure and section 57 of the Artha Rin Adalat Ain, 2003 in Mortgage Decree

Execution Case No.25 of 2001 (arising out of Mortgage Suit No. 72 of 1996).

The petitioner's case in short is that her father late Dudu Mian was the lawful owner in possession of 8.04 decimals of land out of 20 decimals appertaining to C.S. Khatian No. 278, Dag No. 354 corresponding to S.A. Khatian No. 333, Dag No. 490 and R.S. Khatian No. 218, 226 and 371 Dag No. 459 under Mouza Dewbhoge of Police Station and District Narayanganj (more particularly described in schedule-1 of the writ petition). The petitioner, her brother and sisters inherited the said property after the demise of their father Dudu Mian and have been enjoying and possessing the same for more than twelve years without any interruption. She (petitioner) came to know from a reliable source on 18.2.2010 that their land would be auctioned in execution of a mortgage decree passed by the Artha Rin Adalat, Narayangonj in Mortgage Suit No. 72 of 1996. She rushed to the Court on 23.2.2010 and obtained an information slip, from which she specifically learnt that respondent No.2 (I F I C Bank Ltd., B B Branch, Narayanganj) had obtained a mortgage decree against respondent No.3, Alhaj Abul Hossain in Mortgage Suit No. 72 of 1996 from the Artha Rin Adalat, Narayangonj in respect of unspecified 7 (seven) decimals of land from the same plot. The decree holder bank put the decree in execution by filling Mortgage Decree Execution Case No. 25 of 2001, which is still pending.

Under the above circumstances, the petitioner, her brother and sisters filed an application for release of their property from the schedule of the mortgage suit as well as the Mortgage Decree Execution Case and also prayed for staying all further proceedings in the Mortgage Decree Execution Case till disposal of the application, which was numbered as Miscellaneous Case No.3 of 2010. The learned Judge heard the Miscellaneous Case on maintainability and rejected the same by the impugned order dated 10.3.2010 on the ground that the petitioners did not

deposit 25% of the decretal amount according to section 32 (2) of the Artha Rin Ain, 2003 (in short “the Ain, 2003”).

The petitioner’s further case is that the land in question is situated vertically from north to south. They have been possessing the same from the south-east side and the judgment debtor was possessing from the extreme north side. But as the petitioner’s land is developed one in comparison to the land of the auction purchaser, he has already broken the fence around the land in order to take possession over the land in question. Since the land was never partitioned and demarcated, she instituted Title Suit No.145 of 2008 in the First Court of Joint District Judge, Narayanganj against the decree holder bank and others for partition of the said land and filed an application for injunction therein. The learned Joint District Judge on hearing the said application passed an order on 22.7.2009 directing to maintain status quo (vide annexe-D to the writ petition). She, however, has no objection if respondent No.2 (bank) realises its loan by selling the land of respondent No.3. She is not a “third party” within the meaning of section 32(2) of the Ain, 2003.

Respondent No.2 i.e., the decree holder bank and respondent No.4, the auction purchaser contested the Rule by filing two separate affidavits-in-opposition. Respondent No.2 in its affidavit-in-opposition did not specifically deny the material facts of the writ petition except the statement that “the petitioner is not a third party of the Mortgage Decree Suit (Mortgage Decree Execution Case) No. 25 of 2001...” as stated in paragraph 8 of the writ petition. However, respondent No.2 denied the material facts of the writ petition in an evasive manner.

Respondent No.4 filed his affidavit-in-opposition stating, *inter alia*, that the auction notices were published in two dailies namely “The Daily Amar Desh” and “The Daily Shitalakkha” on 2.2.2010 and 4.2.2010 respectively. In response thereto he participated in the auction bid quoting

Taka 26'80'000/= and became the highest bidder. He deposited Taka 6'70'000/= on 28.2.2010 (wrongly typed as 28.10.2010 in the affidavit-in-opposition) and paid rest of the consideration (Taka 20'10'000/=) on 8.3.2010 and thereafter the Artho Rin Adalat executed and registered the "Boinama" on 6.4.2010 and delivered part possession of the auctioned land to him on 2.6.2010. The petitioner was fully aware of the mortgage suit and she has no interest in the land of respondent No.3 (judgment debtor). In the said affidavit-in-opposition respondent No.4 (auction purchaser) also disputed the right and title of the writ petitioner as well as her co-sharers over the land in question.

Mr. Abdur Razzaq, the learned Counsel appearing with Mr. Shahjada Al-Amin Kabir, the learned Advocate in support of the Rule submitted that the land in question is the only homestead belongs to the petitioner. She is neither a borrower nor a guarantor or a party in the suit. She does not claim the auctioned property, that has been sold to the auction purchaser. But the auction purchaser in collusion with the police force, was trying to dispossess the petitioner from her land, for which the cause of action for moving the application under section 57 of the Ain, 2003 has arisen. The learned Counsel further submitted that since the land is not clearly and specifically mentioned in the schedule of the decree showing boundaries and location of the 7 (seven) decimals of land, that has been sold to the auction purchaser, its possession cannot be delivered in the execution proceedings without partition and demarcation of the land in question. In such circumstances, the petitioner is not required to deposit 25% of the decretal amount and section 32 (2) of the Ain, 2003 would not apply in this case. Section 57 of the said Ain gives inherent power to the Artha Rin Adalat to pass necessary order to meet the ends of justice and therefore, the impugned order rejecting the petitioner's application without deposition of 25% of the decretal amount was illegal and without lawful authority.

He also submitted that the plaint in the mortgage suit with no specification of the mortgaged land was not in conformity with section 8 (2) (Kha) of the Ain, 2003 and the decree foreclosing an unspecified land is itself an abuse of the process of the Court. Moreover, according to section 33 (7) (Kha) of the Ain [as amended by Artha Rin Adalat (Amendment) Ain, 2010] the executing Court is under legal obligation to make sure that a specified land was attached before giving delivery of possession to a decree holder.

In support of his submission, Mr. Abdur Razzaq cited one unreported judgment passed in Writ Petition No. 5180 of 2010 (Victor Rodrix and others Vs. The 4th Artha Rin Court, Dhaka and others), wherein a Division Bench of the High Court Division presided over by Justice Nazmun Ara Sultana under similar facts and circumstances held:

“In a case like the present one the petitioners are not required to file an application under section 32 of the Artha Rin Adalat Ain and as such they are not required to deposit security money under the said section. Since the application filed by the petitioners under Order 21 Rule 58 of the Code of Civil Procedure read with section 57 of the Artha Rin Adalat Ain, 2003 was very much maintainable, the Adalat below ought to have accepted the same for consideration on merit. Thus we are inclined to dispose of this writ petition without issuance of the Rule directing upon the Artha Rin Adalat below to accept the application dated 8.3.2010 filed by the petitioners and to consider the same on merit without requiring the petitioners to deposit any security money.”

On the other hand, Mr. M. A. Samad, the learned Counsel appearing with Mr. M. G. H. Ruhullah, the learned Advocate for respondent No.4 submitted that the application under Order XXI rule 58 of the Code of Civil Procedure (in short “the Code”) before the executing Court was not maintainable inasmuch as the sale certificate in respect of the auctioned land had already been executed and registered and the

matter reached in finality. Section 57 of the Artha Rin Adalat Ain, 2003 will also not apply because of having specific remedy under the law. However, the writ petitioner had remedy under Order XXI rule 90 of the Code, which she did not avail. In support of his submission, the learned Counsel cited one unreported decision of the Appellate Division passed in Civil Appeal No. 151 of 2008 and also cited the case of Md. Delwar Hossain –Vs- Bangladesh and others reported in 24 BLD (HC) 323. In course of his submission, Mr. Samad very honestly admitted that the writ petitioner and her co-sharers are in possession of 8.04 decimals of land of the same plot, but he denied their title over the same.

We have perused the writ petition and affidavits–in-opposition with the annexes, considered the submissions of the learned Counsels for both the parties and have gone through the decisions cited by them. It appears from the judgment of the Appellate Division passed in Civil Appeal No.151 of 2008 that the case was between the judgment debtor and decree-holder, wherein after issuance of certificate under section 33(5) of the Ain, 2003 and registration of the same and also mutation of the record in favour of the decree holder, the judgment-debtor filed an application under section 57 of the Ain, 2003 read with section 151 of the Code in the decree execution case to pay the entire decreetal amount by selling the mortgaged property. It also appears that there was no controversy over the location of the land. In that case the Appellate Division held that after attainment of the decree in finality the judgment debtor has no right to redeem the mortgaged property and, that the power under section 57 is only available when the other provisions of the Ain are not exhaustive.

In the present case the writ petitioner is not claiming the auctioned land. She was not a party to the suit and was neither a borrower nor a guarantor to the decree holder bank. The executing Court is still in seisin of the matter and the petitioner filed her application on 28.2.2010 i.e

before issuance of the sale certificate and also before payment of the full consideration (bid money).

In 24 BLD (HC) 323, vires of section 32 (2) of the Ain, 2003 with an order passed by Artha Rin Adalat rejecting an application under Order XXI rule 58 of the Code were challenged, wherein the parties were fighting over the same land and the application was filed after the mortgaged property was sold out. In the said case, the petitioner did not invoke section 57 of the Ain, 2003. But in the present case the land of the respective parties are under claim of separate ownership, but without partition or demarcation. The application has been filed before issuance of the sale certificate and section 57 of the Ain, 2003 is invoked. Therefore, the facts and circumstances of the cases as cited by the learned Counsel for respondent No.4 are distinguishable.

A plain reading of the petitioner's application under Order XXI rule 58 of the Code read with section 57 of the Ain, 2003 (annex-B to the writ petition) suggests that it arises out of a cause of action, which is very peculiar and uncommon. The petitioner may be a third party, but since she does not claim the auctioned property and the decree as well as the auction notice do not show that the mortgaged property is specified or clearly identified or demarcated and can easily be separated out of total land in the dag in question, section 32 (2) of the Ain, 2003 is therefore not attracted and section 57 of the said Ain will come into play to pass necessary order to meet the ends of justice. The Respondent Nos.2 and 4 have failed to show that 7 (seven) decimals of land, that has been auctioned, is clearly identified or demarcated. On the other hand, the petitioner has proved that a suit for partition of the scheduled land is pending between the writ petitioner and the decree holder bank and others before a competent civil Court, wherein the learned Judge has passed an order of status quo in her favour (vide annex-D to the writ petition). In such circumstances, the decree passed in a suit for

foreclosure in respect of an unspecified land, cannot be fully satisfied without partition or demarcation of the decretal land. The dispute between the parties over the title and possession of the land, can be determined in proper forum, but her (petitioner's) right to property guaranteed under the Constitution can not be taken away without giving her any opportunity to prove her claim.

In deciding the point of controversy, the object of law is also to be looked into. The preamble, sections 2(Ga), 6(5) and other provisions of the Ain, 2003 strongly suggest that the law is enacted for recovery of loan from the defaulter loanee, i.e., the borrower, guarantor, mortgagor and the persons placed in similar position. In the present case the petitioner is in no way connected with the loan, she does not claim the auctioned land and there is no cause of realisation against her. Such a person is not intended by the law to bear extra financial burden of 25% of the decretal amount as a pre-requisite to get relief.

In view of the above we find substance in the Rule. Accordingly, the Rule is made absolute. The impugned order dated 10.3.2010 passed by the Artha Rin Adalat, Narayangonj summarily rejecting Miscellaneous Case No.3 of 2010 in Mortgage Decree Execution Case No.25 of 2001 (arising out of Mortgage Suit No.72 of 1996) is hereby declared to have been passed without lawful authority and is of no legal effect.

The learned Judge of the Artha Rin Adalat, Narayangonj is directed to consider/dispose of the petitioner's application being Miscellaneous Case No.3 of 2010 in Mortgage Decree Execution Case No.25 of 2001 on merit without deposition of 25% of the decretal amount.

The learned Advocate for respondent No.4 is permitted to take back annexes-1, 2, 3 and 4 from his affidavit-in-opposition substituting photo copies there for.

The office is directed to send a copy of this judgment to the Artha Rin Adalat, Narayangonj at once.

Nazmun Ara Sultana, J.

I agree.