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

WRIT PETITION NO. 6916 OF 2006

IN THE MATTER OF:

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

-AND-

IN THE MATTER OF:

Atiqun Nessa and others.

..... Petitioner.

-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Law.

..... Respondents.

Mr. S.M. Munir Sharif, Advocate with
Mr. Md. Zakir Hossain, Advocate with
Mr. Belayet Hossain, Advocate
..... for the Petitioner.

Mr. Kazi Rehan Nabi, Advocate with
Md. S.R. Khoshnabish, Advocate
..... for the Respondent 3 and 10

Heard on 17.07.2011
Judgment on 21.07.2011.

Present:

Mrs. Justice Farah Mahbub.
and
Mr. Justice A.N.M Bashir Ullah

Farah Mahbub, J:

In this Rule, issued under Article 102 of the Constitution

Constitution and why the impugned order dated 16.7.2006 passed by the Artha Rin Adalat No.1, Dhaka in Miscellaneous Case No. 49 of 2006 arising out of Artha Execution Case No. 190 of 2005 should not be declared to have been passed without any lawful authority and hence, of no legal effect and also, as to why the proceeding and action taken in Artha Execution Case No. 190 of 2005 for recovery of possession through police force in favour of respondent no. 10 should not be declared to have been done without lawful authority and hence, of no legal effect.

At the time of issuance of the Rule all further proceedings of Artha Execution Case No. 190 of 2005 pending before the Artha Rin Adalat no. 1, Dhaka had been stayed by this court.

Facts, in brief, are that the respondent no. 3, Agrani Bank Ltd. instituted Title Suit No. 179 of 2002 in the Artha Rin Adalat No.-1, Dhaka impleading 5 (five) defendants for realization of Tk. 34,07,600/- contending, *inter alia,* that the defendant no. 1 took loan upon mortgaging the schedule properties as mentioned in the plaint. Since they did not adjust the loan money within the prescribed period of time consequently, legal notice was served upon the debtors. In spite of service of notice the defendants did not come forward to

Defendant no. 1 entered appearance by filing written statement denying the material averments so made in the plaint. The Adalat after hearing the contending parties ultimately decreed the suit on contest against the defendant no. 1 and *ex-parte* against the rest vide judgment and decree dated 19.8.2004 with direction upon the judgment debtors to pay up the decretal amount within the prescribed period of time. The judgment debtors having not complied with the said direction the respondent bank as the decree holder filed Artha Execution Case No. 190 of 2005 for realization of the decretal amount. The executing Adalat duly initiated process for auction sale of the mortgaged property so had been attached in connection with the said execution case. Ultimately, the mortgaged property had been auction sold to the respondent no. 10. The sale deed had also been executed and registered through Adalat in his favour. Pursuant to the said deed respondent no. 10 took initiatives to recover possession of the property in question through the law enforcing agency.

At this stage, the petitioners being 3rd parties filed application on 16.07.2006 under Order XXI Rule 58 of the Code of Civil Procedure (in short, the Code) read with section 32 of the Artha Rin Adalat Ain, 2003 (in short, the Ain) which was registered as

Matber who died on 31.03.1988 leaving behind two sons named Md. Sawkat Ali and Liakat Ali, two daughters named Atikunnessa and Fatema Begum and one grand daughter named Zahera Khatun, who were enjoying the possession of the case property in *ejmali*. It has further been contended that the respondent Bank created a loan account in the name of M/s. Islam Trade Point of A.N.M Shamsul Ikram showing Ayub Ali, Sawkat Ali and Liakat Ali as guarantors who alleged to have mortgaged the properties in question as security to the loan. It has also been contended that the respondent Bank instituted the suit for realization of the defaulted loan amount against dead person and that it did not implead the present petitioners as parties to the said suit. Moreover, they did not have knowledge whatsoever about the institution of the said Artha Rin suit. They came to learn for the first time on 13.7.2006 at about 10.30 a.m. while the law enforcing agency made an attempt to evict the petitioners from the case properties. Because of the resistance of the local residents, the auction purchaser (the added respondent 10) could not take possession of the same.

The executing Adalat after hearing the petitioners and considering the application rejected the same vide impugned order

2003 (Annexure-G). Being aggrieved by and dissatisfied with the same the petitioners had preferred the instant application and obtained the present Rule.

The added respondent no. 10 entered appearance by filing affidavit-in-opposition stating, *inter alia,* that this respondent was the highest bidder in auction who purchased the case property for an amount of Tk. 20,28,000.00 (Taka twenty lacs twenty eight thousand) only through Adalat vide registered deed of sale bearing no. 7 dated 7.3.2006 registered at the Sub-Registry Office, Sutrapur, Dhaka and that because of the pendency of the present Rule along with the ad-interim order of stay of the execution proceedings the possession of the case property could not be recovered.

Mr. S.M Munir Sharif the learned Advocate appearing with Mr. Md. Zakir Hossain and Mr. Md. Belayet Hossain, the learned Advocates for the petitioners at the very outset of his submission contends that he will not press the first part of the Rule so far vires of section 32(1) and (2) of the Ain, 2003 is concerned. However, upon placing section 32 of the Ain, 2003 he goes to argue that the legislature has created forum for the 3rd parties, who are not parties to the suit, to place their grievance over the mortgaged property which

submits that on every occasion the legislature has clearly expressed its intention to the effect that without deposit of the security along with the application it can not be maintained, whereas section 32 is silent about that. Moreover, he contends that with the use of the words "....আদালত প্রাথমিক বিবেচনাu উক্ত দাবী সরাসরি খারিজ না করিলে,....." goes to construe that when an application is filed the executing Adalat has to decide primarily whether there is any *prima facie* materials to bring in the decree-holder Bank and to hear the claim of the contending parties. If the application is not rejected at the first instance, i.e., if found substance therein, then question of depositing security money comes, which may be deposited at any time as the executing Adalat may prescribe in this regard. In other words, the Adalat without giving any *prima facie* findings on the merit of the application cannot reject the same on the date of it first hearing on the ground of not-depositing the security money. Accordingly, he submits that since in the present case the Adalat has turned down the prayer of the petitioners filed under Order XXI Rule 58 of the Code on the very 1st date of its hearing for not depositing the security money it is liable to be struck down for having been passed without any lawful authority and hence, of no legal effect.

in connection with Writ Petition No. 7696 of 2006 (Annexure-X to the affidavit-in-opposition) submits that over the case property the brothers of the petitioners have preferred the said writ petition challenging the vires of section 19(3) of the Ain, 2003 along with the judgment and decree dated 19.8.2004 which was passed *ex-prate* against them. Ultimately, vide judgment and order dated 04.08.2010 the Rule was discharged, which clearly goes to depict the delatory tactics being adopted by the petitioners to prevent the recovery of possession of the case property which has been purchased by this respondent on payment of bid money and that sale deed has also been executed and registered through Court in his favour on 7.03.2006. He further goes to argue that so far depositing security money with the application is concerned it is abundantly clear from section 32(2) of the Ain for having used the words ".....দাবী পেশ করিবার ক্ষেত্রে....."Accordingly, he submits that the Adalat has committed no illegality in rejecting the application on the ground of maintainability for not depositing 25% of the decretal amount as security.

Mr. Kazi Rehan Nabi, the learned Advocate appearing on behalf of the respondent Bank supported the contentions so have been advanced by the added respondent no. 10

to be deposited as security at the time of filing the application under section 32 of the Ain; or to be deposited within the time frame, so will be fixed by the Adalat if the application under section 32 of the Ain is not rejected at its 1st instance.

Admittedly, the petitioners are the 3rd parties whose claim is that the case property, shown to have been mortgaged as security to the loan, belonged to one Haji Ayub Ali, their predecessor who along with 2 (two) other brothers of the petitioners were impleaded as defendant nos. 3-5 in the Artha Rin Suit no. 179 of 2002 before the Artha Rin Adalat no. 1, Dhaka. The suit was decreed on contest against defendant no. 1 and *ex-parte* against the rest vide judgment and decree dated 19.8.2004. The said decree was ultimately put to execution in Artha Execution case no. 190 of 2005. Towards realization of the decretal amount, the mortgaged property, claimed to have belonged to the petitioners in *ejmali*, were auction sold to the added respondent 10 under section 33 of the Ain, 2003 and that sale deed had also been executed and registered in his favour on 7.3.2004 through court. At this juncture, the petitioners had preferred application under Order XXI Rule 58 of the Code on 16.7.2006 (Annexure-F) with prayer to release the case property in their favour

"শুনিলাম। অত্র মিস মামলার দরখাস্ত ও নথি পর্যালোচনা করিলাম। দরখাস্তকারীগন তৃতীয় পক্ষ হিসাবে জারীর দরখাস্তের বিরুদ্ধে অপত্তি স্বরুপ অত্র মিস মামলা দাখিল করিয়াছে। অর্থঋণ অদালত আইন-২০০৩ এর ৩২(১)(২) ধারায় বর্ননা হইয়াছে জারী মামলায় তৃতীয় পক্ষ দেওয়ানী কার্যবিধি আইনের বিধান অনুসারে দাবী পেশ করিলে দরখাস্তকারীকে ডিক্রীকৃত অর্থের ২৫% এর সমপরিমান জামানত দাখিল করিতে হইবে এবং অনুরুপ জামানত দাখিল না করিলে জারী অগ্রাহ্য হইবে। কিন্তু দরখাস্তকারী তৃতীয় পক্ষ জারীর বিরুদ্ধে আপত্তি দাখিল করিলেও ৩২ (২) ধারার অনুসারে জামানত দাখিল করে নাই। সেহেতু অত্র মিস মামলা ৩২(২) ধারার অনুসারে রক্ষনীয় নহে। এমতাবস্তায় অত্র মিস মামলা অর্থঋণ আদালত আইন ২০০৩ এর ৩২ (২) ধারা অনুসারে জামানত দাখিল না করায় সরাসরি খারিজ করা হইল।"

The categorical assertion of the petitioners is that under section 32(1) of the Ain the legislature having used the words, "আদালত প্রাথামিক বিবেচনা উক্ত দাবী সরাসরি খারিজ না করিলে" provides option to decide the application on merit and that depositing 25% of the decretal amount as security will come to play if the application is not rejected at the first instance.

For proper appraisal of the said contention section 32 of the Ain is required to be look into, which runs as under:

"**জারীর বিরুদ্ধে আপত্তি ঃ**

(১) অর্থ ঋণ আদালতের ডিক্রী বা আদেশ হইতে উদ্ভুত জারী মামলায় কোন তৃতীয় পক্ষ দেওয়ানী কার্যবিধি আইনের বিধানমতে দাবী পেশ করিলে, আদালত প্রাথমিক বিবেচনায় উক্ত দাবী সরাসরি খারিজ না করিলে, ডিক্রীদার অনূর্ধ্ব ৩০ (ত্রিশ) দিবসের মধ্যে উহার বিরুদ্ধে লিখিত আপত্তি দায়ের করিয়া শুনানী দাবী করিতে পারিবেন।

(২) উপরোক্ত মতে দাবী পেশ করিবার ক্ষেত্রে দরখাস্তকারী, ডিক্রীকৃত অর্থের ২৫% সংশ্লিষ্ট সমপরিমাণ জামানত দাখিল করিবে, এবং অনুরূপ জামানত দাখিল না করিলে, দাবী অগ্রাহ্য হইবে।

(৩) অর্থ ঋণ আদালত উপধারা (১) এর অধীনে কোন দাবী

The said provision has undergone an amendment vide "Artha Rin Adalat (সংশোধন) Ain, 2010" (Act no. 16 of 2010), which runs as follows:

> ''২০০৩ সনের ৮ নং আইনের ধারা ৩২ এর সংশোধন।-- উক্ত আইনের ধারা ৩২ এর--
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> (ক) উপ-ধারা (২) এর পরিবর্তে নিম্নরূপ উপ-ধারা (২) প্রতিস্থাপিত হইবে, যথাঃ--
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> '(২) উপরোক্ত মতে দাবী পেশ করিবার ক্ষেত্রে, দরখাস্তকারী , ডিক্রীকৃত অর্থের, অথবা ডিক্রীকৃত অর্থের আংশিক ইতিমধ্যে আদায় হইয়া থাকিলে অনাদায়ী অংশের, ১০% এর সমপরিমান জামানত বা বন্ড দাখিল করিবে, এবং অনুরূপ জামানত বা বন্ড দাখিল না করিলে উক্ত দাবী অগ্রাহ্য হইবে।'
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> (খ) উপ-ধারা (৩) এর ''দরখাস্তটি'' শব্দের পরিবর্তে ''লিখিত আপত্তি'' শব্দগুলি প্রতিস্থাপিত হইবে;
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> (গ) উপ-ধারা (৩) এর পর নিম্নরূপ নূতন উপ-ধারা (৪) সংযোজিত হইবে, যথাঃ--
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> '(৪) উপ-ধারা (৩) এর অধীন দাখিলকৃত লিখিত আপত্তি নিষ্পন্ন করিয়া আদালত যদি অবধাবন করিতে পারে যে, উপ-ধারা (১) এর অধীন দাবী সম্বলিত দরখাস্তটি ডিক্রীদারের পাওনা বিলম্বিত বা প্রতিহত করিবার অসাধু উদ্দেশ্যে দায়ের করা হইয়াছিল, তাহা হইলে আদালত উক্ত দরখাস্ত খারিজ করিবার সময় একই আদেশ দ্বারা উপ-ধারা (২) এর অধীন দাখিলকৃত জামানত বা বন্ড বাজেয়াপ্ত করিবে এবং ডিক্রীকৃত টাকা যে পদ্ধতিতে আদায় করা হয়, বাজেয়াপ্ত জামানত বা বন্ডের অধীন টাকা একই পদ্ধতিতে আদালত আদায় করিবে এবং আদায়কৃত অর্থ ডিক্রীদারকে প্রদান করিবে।''

In both the occasions, under sub sections (1) and (4) of section 32, the executing Adalat may reject the application, but there is difference of stages in rejecting the same. Under section 32 (1) the Adalat may reject the prayer at its first instance if found no substance therein for consideration. Under section 32(4), the Adalat after hearing the applicant and the decree holder bank may reject the

frivolous ground and that it shall also forfeit the security at the time of its rejection.

Forum under section 32 of the Ain has been created by the legislature for the 3rd parties who are not parties to the suit, nor they are connected with the defaulted loan amount for the recovery of which the decree has been passed in Artha Rin Suit and has been put to execution in Artha Execution case. Vide the said forum they are entitled to ventilate their grievance with a view to release the mortgaged property which has been attached in connection with the execution case. In that view of the matter, if the Adalat does not reject the claim of the applicant at its preliminary consideration it is more reasonable that while issuing notice under section 32(1) upon the decree holder to appear and contest the application it shall direct the applicant to deposit the security under section 32(2) of the Ain within the period of time so has been fixed by it, and that the date so has been fixed must be before the appearance of the decree holder bank. If the applicant fails to comply with the said direction the Adalat shall reject the application under section 32 (2) of the Ain on the very next date.

It is to be remembered that imposing condition of giving

Memo of Appeal and revision respectively, is all together different from that of section 32. Under those provisions such imposition has been made by the legislature with a view to realize the decretal amount from the judgment debtor speedily to a certain extent. Under section 32 of the Ain a 3rd party is coming forward to protect his right to and interest in the property so has been attached in Artha Execution Case. The condition of depositing security has been imposed by the legislature to prevent frivolous claim so is generally made with a view to delay completion of execution proceeding. However, protection has been given to the decree holder under section 32(4) from such kind of claim. In this regard Mr. Md. S.R. Khoshnabish the learned Advocate submits that since 2006 till date the petitioners and their brothers, the defendant nos. 3 and 4 of Artha Rin Suit No. 179 of 2002, are repeatedly adopting different forums as provided under the law in order to delay the process of recovery of possession of the case property. However, if the petitioners prefer application under section 32 of the Ain in accordance with law and the Adalat is of the opinion that to delay the execution process frivolous claim has been made it may fall back under section 32 (4) of the Ain and forfeit the security.

32(1) of the Ain at the first instance for not depositing the security to the tune of 25% of the decretal amount vide order dated 16.7.2006 is not tenable in the eye of law.

Accordingly, the Rule is made absolute in part. The impugned order dated 16.07.2006 passed by the Artha Rin Adalat No. 1, Dhaka in Miscellaneous Case No. 49 of 2006 is hereby declared to have been passed without any lawful authority and hence, is of no legal effect.

The petitioners are hereby directed to file application afresh under section 32 of the Ain, if so desires, within 15 (fifteen) days from the date of receipt of the copy of the judgment and order. In default, the Executing Adalat shall proceed with the said execution case in accordance with law.

There will be no order as to costs.

A.N.M. Bashir Ullah, J:

I agree.