

**IN THE SUPREME COURT OF
BANGLADESH
HIGH COURT DIVISION
(CRIMINAL REVISIONAL
JURISDICTION)**

CRIMINAL REVISION NO. 189 OF 2014.

Md. Nuruzzaman, J	Hasan Ali
Abdur Rob, JPetitioner
	Vs
Judgment on 09.08.2015.	The State and another Opposite-Parties.
<i>For the opposite- party No. 1-State</i>	<i>Ms. Anwara Shajahan, D.A.G.</i>
<i>For the opposite- party No. 02.</i>	<i>Mr. Md. Forrukh Rahman, Advocate,</i>

Terms, Issues and Phrases:

Cheque dishonor case, challenging proceeding under section 138 of NI Act in 561A application, undisputed signature in a cheque.

Main Legal Issue:

Issue-1:

Whether a proceeding under section 138 of the Negotiable Instruments Act can be quashed while the proceeding is under trail or not.

Issue-2:

Whether in a case under section 138 of the Negotiable Instrument Act, 1881 other documents except cheque are relevant for the purpose of the case or not.

Main Findings:

Finding-1:

We are of respectful agreement with the above observations of the Hon'ble Appellate Division that after examination of P.Ws. in trial in a case of Negotiable Instrument Act proceeding cannot be stopped or quashed unless it is necessary to prevent the abuse of process of the Court or to secure the ends of justice.....(para-20).

Finding-2:

We have perused the application dated 09.07.2013 calling for documents which is annexure "G" to the application. On perusal of the same it appears that there is no nexus in between the cheque in question and documents called for. It also appears to us that the documents sought in this case have no relevancy with case under section 138 of the Negotiable Instrument Act, 1881.....(para-14).

Negotiable Instrument Act, 1881: Section 138:

Code of Criminal Procedure, 1989: Section 561A:

After commencement of trial an application under section 561A for quashing criminal Proceeding is deprecated:

We are of respectful agreement with the above observations of the Hon'ble Appellate Division that after examination of P.Ws. in trial in a case of Negotiable Instrument Act proceeding cannot be stopped or quashed unless it is necessary to prevent the abuse of process of the Court or to secure the ends of justice.....(para-20).

Negotiable Instrument Act, 1881: Section 138: Signature in a cheque when undisputed:

It has also been held to the case of *Abdul Alim vs. Biswajit Dey and another* reported in 59 DLR (HCD)-236.

"Another striking fact is that accused petitioner at no point of time denied his signature on the cheque. Since the accused did not deny his signature, as such the accused must have to discharge the onus as to why he signed the cheque when the cheque was delivered/given to the complainant. A legitimate claim of the complainant cannot be frustrated on mere technicality".....(para-17).

Cases cited and/or relied on:

Om Prakash Sharma Vs. Central Bureau of Investigation, Delhi AIR-2000 (SC) 2335;

Abdul Alim vs. Biswajit Dey and another 59 DLR (HCD)-236

Anti-Corruption Commission vs- Dr. Md. Rezaul Haque Chowdhury alias Dr Md. Rezaul Karim and another reported in 19 BLC (AD) 160.

JUDGMENT

MD. NURUZZAMAN, J:

1. The instant Rule was issued calling upon the Deputy Commissioner, Chittagong and opposite-party No. 02 to show cause as to why the impugned order No. 11 dated 09.07.2013 passed by the 5th Additional Metropolitan Sessions Judge, Chittagong, in

Session Case No. 2620 of 2012, arising out of C.R. Case No. 786 of 2012 (Panchlaish Zone), rejecting the application filed by the accused-petitioner calling for production of the original documents from the possession of the opposite-party No. 02 should not be quashed.

2. The prosecution case, in short, are that, the opposite-party No. 02 as petitioner being a Managing Director of the Company namely "Seven Star Properties Limited" 04.07.2012 filed the C.R. Case No. 785 of 2012 (Panchlaish) in the Court of the Metropolitan Magistrate; Cognizance Court No. 04, Chittagong under Section 138 of the Negotiable Instrument Act, 1881 against the accused petitioner, alleging, that the complainant and accused had a business and out of the business transaction the complainant had outstanding dues at Tk. 25,000.00/- to the accused-petitioner. Therefore, the accused petitioner to adjust the claim money of the complainant issued a cheque being cheque No. 4437823 of the same amount on 30.04.2012 the complainant in due course of time on 02.05.2012 deposited the same through his bank for collection which was dishonored by the Bank with endorsement that "fund is insufficient". Thereafter the complainant on 28.05.2012 as per provision of law as contemplated under section 138 of the Negotiable Instrument Act, 1881, served a legal notice with Registered A/D in the name of the accused petitioner which was receipt by the complainant on 31.05.2012. However, the accused-petitioner upon receiving the notice neither reply the same nor paid the money. Hence, the complainant was compelled to file the instant case.

3. The accused-petitioner appeared before the Court below and obtained the bail. Thereafter, the case was transferred to the Court of the Metropolitan Sessions Judge,

Chittagong who fixed the date on 25.10.2012 for appearance of the accused-petitioner. On the date fixed by the learned Sessions Judge transferred the instant case to the Court of Additional Metropolitan Session Judge, 5th Court Chittagong fixing the same on 25.10.2012 for charge hearing. The accused-petitioner surrendered before the Additional Metropolitan Sessions Judge, 5th Court Chittagong and obtained bail wherein the case was re-numbered as Sessions Case No. 2620 of 2012. The learned Additional Sessions Judge, 5th Court, Chittagong fixed the case for hearing and then the accused Petitioner filed an application under section 265C of the Code of Criminal Procedure for discharging him from the charge.

4. The learned Additional Metropolitan Sessions Judge after hearing both the parties fixed the date on 14.01.2013 for order. However, ultimately on 6.6.2013 the order was passed rejecting the application under section 265C of the Code of Criminal Procedure and the case was fixed on 09.07.2013 for P.Ws. The accused-petitioner on 09.07.2013 filed an application for adjournment of the case and also filed an application for production of the original deeds lying with the complainant. The court after hearing the parties rejected the application for time as well as production of documents and examined the P.W. 01 who was cross-examined by the learned Petitioner.

5. The accused-petitioner preferred the instant Criminal Revisional application before this Division seeking redress against the order dated 09.07.2013 passed by the Additional Metropolitan Sessions Judge, 5th Court, Chittagong.

6. The instant case has been posted in the list for few months ago with the name of the

learned Advocates. However, on the last occasion the learned Advocate for the opposite-party No. 02 was present. On the other hand none was present press the Rule when the matter was taken up for hearing.

7. The opposite-party No. 02 contested the case by filing counter affidavit, denying all material allegations made in the application. In the counter affidavit it also alleged that the grounds set forth in the application all are factual grounds and there is nothing in the application relating to stay the proceeding of the case under section 138 of the Negotiable Instrument Act.

8. On perusal of the application it appears that the learned Advocate for the accused-petitioner has taken some grounds challenging the order dated 9.7.2012 wherein he alleged that the impugned order is non-speaking order and application filed before the Court below for production of original documents in accordance with law, but the Court has failed to consider the same and, as such, the accused-petitioner has suffered substantial cause which is liable to be set aside.

9. On the other hand Mr. Md. Forrukh Rahman, the learned Advocate appearing for the opposite-party No. 02 submits that the application filed by the accused-petitioner praying for production of the documents is totally misleading and clearly against the documentary evidence of the present case. He further adds that the documents called for, for production in no way connected with in relation to the case of section 138 of the Negotiable Instrument Act. However, according to Mr. Rahman, the accused petitioner has filed the application only for dragging the instant case after framing of charge on the date of examining the P.W.s. He further adds that the Court below rightly

rejecting the application for production of documents examined the P.W. 01 in accordance with law. The learned Advocate for the accused-petitioner as of right of defence cross-examined the p.w. No. 01 on the same day, waiving the right of defence of the order of rejection of the application. If that not be so in that case after examination of P.W. 01 he could have filed an application for adjournment for the cross examination of the P.W. 1 and took time for preferring revisional application in the higher Court.

10. However, he could not do so in the trial Court, later on the accused after thought preferred the instant revisional application and obtained the stay of the case. It appears that the time of hearing learned Advocate for the accused petitioner was not present in Court. So, it is crystal clear that this case had been preferred only to drag the proceeding of the Sessions Case. Learned Advocate appearing for the opposite-party No. 02 lastly prayed for discharging the Rule.

11. We have heard the learned Deputy Attorney General and the learned Advocate for the opposite-party No. 02 Considering the submissions advanced by them it appears that on 9.7.2013 P.W. No. 01 was examined and cross-examined by the defence.

12. On that date the accused petitioner had filed an application for production of some documents which was rejected by the Courts on the impugned order.

13. First of all we have to see whether in a case under section 138 of the Negotiable Instrument Act, 1881 except cheque other documents are relevant for the purpose of the case.

14. We have perused the application dated 09.07.2013 calling for documents which is annexure "G" to the application. On perusal of the same it appears that there is no nexus in between the cheque in question and documents called for. It also appears to us that the documents sought in this case have no relevancy with case under section 138 of the Negotiable Instrument Act, 1881.

15. Therefore, filing an application for production of the original documents in the Court by the accused at the time of hearing of the case is not at all necessary, if the accused petitioner had any defence plea he could have taken any such accusation or defence to the prosecution 'witnesses at the trial in cross-examination.

16. In respect of production of documents it has been held to the case of *Om Prakash Sharma Vs. Central Bureau of Investigation, Delhi* reported in AIR-2000 (SC) 2335, runs thus:

"Therefore, it is to be only seen as to whether the Trial Court has judiciously and practically exercised its discretion. The Trial Court as also the High Court seem to have judiciously applied their minds by going into the nature of the documents sought to be summoned, their bearing and relevance for the nature of consideration to be made at that stage of the proceedings before the Special Judge as well as the necessity and desirability whereof. The consideration so made by the Courts below in rejecting the claim of the appellant could not be held to be either condemnable or constitute any gross or improper failure to exercise their jurisdiction and consequently it does not call for any inteterference in our

hands. Therefore, the appeal fails and shall stand dismissed."

17. It has also been held to the case of *Abdul Altm vs. Biswajit Dey and another* reported in 59 DLR (HCD)-236.

"Another striking fact is that accused petitioner at no point of time denied his signature on the cheque, Since the accused did not deny his signature, as such the accused must have to discharge the onus as to why he signed the cheque when the cheque was delivered/given to the complainant. A legitimate claim of the complainant cannot be frustrated on mere technicality"

18. However, from the record it appears that the accused petitioner did not annex deposition copy of the P.W. 01. Therefore, we are unable to see and comment regarding what suggestion was given to the P.W. 01 regarding document called for.

19. It was held by the Appellate Division to the case of *Anti- Corruption Commission vs- Dr. Md Rezaul Haque Chowdhury alias Dr Md. Rezaul Karim and another* reported in 19 BLC (A.D)-160 that:

"Trial had already commenced before the filing of the application for quashing the proceedings and 18 (eighteen) witnesses were already examined. The filing of the application before the High Court Division for quashing the proceedings does not appear to us bona fide".

20. We are of respectful agreement with the above observations of the Hon'ble Appellate Division that after examination of

P.Ws. in trial in a case of Negotiable Instrument Act proceeding cannot be stopped or quashed unless it is necessary to prevent the abuse of process of the Court or to secure the ends of justice.

21. Therefore, we are of the view that the instant Rule has no substance. Thus, the Rule having no merit, it fails.

22. In the result, the Rule is discharged without any order as to cost.

23. The order of stay passed earlier by this Court is hereby recalled and vacated.

24. The office is directed to communicate the judgment to the concerned Court below at once.

25. Send down the L.C. records to the concerned Court below at once.

Abdur Rob, J

I agree.

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

WRIT PETITION NO. 1650 OF 2009.

Md. Ruhul Quddus, J Bhishmadev Chakraborty, J	Chowdhury Ataur Rahman Azad.Petitioner.
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Vs

Judgment on
07.09.2015.

Government of Bangladesh and others.Respondents.
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For the petitioner:	Mr. M. M. Nuruzzaman, Advocate
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For the respondent No. 1:	Mr. Ahmed Sohel, Advocate
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Terms, Issues and Phrases:

ACC matter, Notice to appear before ACC under section 19, Fact finding process.

Decision:

Rule discharged. Notice under section 19 of the ACC Act compelling appearance of any person as a fact finding process is lawful.....(Para 14).

Main Legal Issue:

Issue-1:

Whether a notice issued by the ACC under section 18 to appear before the Commission to give statement and submit relevant records over the of acquisition of wealth disproportionate to one's known

legal source of income is a valid notice or not.

Issue-2:

Whether a notice issued by the ACC under section 18 to appear before the Commission to give statement and submit relevant records over the of allegation of income is considered to be a proceeding before the Commission or a proceeding before any court or not.

Main Findings:

Finding-1:

A notice issued by the ACC under section 18 to appear before the Commission to give statement and submit relevant records over the of acquisition of wealth disproportionate to one's known legal source of income is a valid notice because such notice is not related to any proceeding, rather it is a part of fact finding process.....(Para 18).

Finding-2:

A notice issued by the ACC under section 18 to appear before the Commission to give statement and submit relevant records over the of allegation of income is considered to be a proceeding before the Commission and not a proceeding before any court or not.....(Para 12).

ACC Act, 2004: Section 19:

Notice under section 19 is a fact finding process and is valid:

Under section 18 and 19 of the Ain, 2004 the Commission is empowered to compel the appearance of any person to give statement with regard to the allegation of corruption. The power of the Commission to issue notice for appearance covers both scheduled and non-schedule

offence. The authority of the Commission to direct any person to appear before it to give statement in connection with 'inquiry' or 'investigation' has been embedded in the Ain, 2004.....(Para 13).

ACC Act, 2004: Sections 18 and 19:

Proceeding before the Commission and proceeding before any court:

According to section 19(1) and (2) of the Ain, 2004 the Commission is empowered to direct any person to supply information within his knowledge and documents in his possession in relation with inquiry or investigation.....(Para 11).

Under the Ain, 2004 inquiry is a fact finding process being adopted by the Commission either on its own motions or on receipt of complaint in order to find out the correctness of the allegations so brought against. Here the person (the petitioner) has been called upon by the Commission to interrogate only not in connection with any criminal proceeding, but to find out the truth whether there is any basis of the allegation so brought.....(Para 12).

Cases cited and/or relied on:

A.K.M. Khurshid Hossain and others -vs- A.C.C. 2 CLR 406

Md. Shahidullah Miah v. The Bangladesh and others, 1 CLR 331

JUDGMENT

BHISHMADEV CHAKRABORTTY, J:

1. In this Rule Nisi issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the initiation of proceeding against the petitioner by Anti Corruption Commission, District Co-ordinate Office, Sylhet in E.R No.03 of 2009 should not be declared to have been made without lawful authority and is of no legal effect.

2. After issuance of the Rule on an application filed by the petitioner all further proceedings in or arising out of E.R No.03 of 2009 against the petitioner was stayed by this Court on 06.07.2009. This court was further pleased to stay Memo No. দৃদক/বিকা/সিলেট/৪৫২ dated 16.06.2009 (Annexure-E), i.e., the notice for submitting wealth statement of the petitioner, his family members and other relatives for a period of 3(three) months. Eventually the said order of stay was extended till disposal of the Rule.

3. It has been stated in the writ petition that a Deputy Assistant Director, Anti Corruption Commission District Co-ordinate Office, Sylhet on 04.02.2009 issued a notice upon the petitioner under section 19 of the Anti Corruption Commission Ain, 2004 (briefly the Ain, 2004) to appear him before the Commission on 10.02.2009 to give statement and submit relevant records over the allegation that he had acquired wealth disproportionate to his legal source of income. After receiving the said notice the petitioner on several occasions applied to the concerned authority for supplying him some documents which were related to submit statements in compliance of the notice. The respondents did

not give any reply to those but proceeded with the matter which gives rise to the petitioner to invoke writ jurisdiction before this Court and upon which the present Rule has been issued.

4. Mr. M. M. Nuruzzaman, learned Advocate for the petitioner submits that the notice has been issued upon the petitioner on a vague term as in the Act there is nothing about the authority or process for declaring any asset disproportionate to one's legal source of income, and as such the proceeding initiated vide E.R No.03 of 2009 is liable to be declared to have been made without lawful authority and is of no legal effect. The learned Advocate further submits that before making declaration of one's asset under section 26 of the Ain, 2004 no one can be charged for having assets disproportionate to his legal source of income. He further submits that the Commission has no authority to investigate or inquire into the allegation as well as an offence relating to non-payment of income tax, and as such any proceeding initiated vide ER No.03 of 2009 is liable to be declared have been made without lawful authority and is of no legal effect.

5. Mr. Ahmed Soheli, learned Advocate appearing for respondent No. 1, the Anti Corruption Commission (briefly the Commission), filed an affidavit-in-opposition controverting the statements of the writ petition and submits that the Commission received specific allegation against the petitioner, started inquiry and issued notice upon him under section 19 of the Ain, 2004 as a fact finding process. It has neither been issued in the context of any proceeding initiated against him nor he has been made an accused. It is mere an information collecting process at the preliminary stage and there is no such practice to supply the copy of allegations to the petitioner made by any

person to the Commission. There is no bar in the eye of law to conduct such an inquiry by the Commission. The petitioners' contention regarding the authority of the Commission is not sustainable in law and the analogy in the case of *A.K.M. Khurshid Hossain and others -Vs- A.C.C.* 2 CLR 406, empowers the Commission to initiate any proceeding independent of the proceedings by the Court.

6. The notice under section 19 of the said Ain, 2004 has been issued in accordance with law and there is no bar for the Commission to proceed with the complaint being E.R No.03 of 2009 to ascertain the truth, and as such the Rule is liable to be discharged.

7. We have heard the learned Advocates on behalf of the respective parties, perused the contents of the writ petition, the annexures and consulted with the relevant provisions of law.

8. It appears from Annexure-A to the writ petition that a Deputy Assistant Director of A.C.C. District Co-ordinate Office, Sylhet issued the said notice to the petitioner under section 19 of the Ain, 2004 requesting him to appear before the Commission to submit statements and other records of his assets for inquiry to the allegation made against him that he had acquired huge wealth in his name, in the name of his family members and other relatives which were disproportionate to his legal source of income. The said notice was issued on the basis of ER. No.03 of 2009.

9. At our instance Mr. Soheli, the learned Advocate for the A.C.C., has produced the original record of the Commission before to this Court. On perusal of the same it appears that the said notice was issued to the petitioner by the Commission on the basis of series of allegations made against him in writing.

10. Section 19 of the Ain, 2004 reads as follows:

১৯. অনুসন্ধান বা তদন্তকার্যে কমিশনের বিশেষ ক্ষমতা - (১) দুর্নীতি সম্পর্কিত যে কোন অভিযোগের অনুসন্ধান বা তদন্তের ক্ষেত্রে, কমিশনের নিম্নরূপ ক্ষমতা থাকিবে, যথাঃ

(ক) স্বাক্ষর প্রতি নোটিশ ও উপস্থিতি নিশ্চিতকরণ এবং স্বাক্ষরকে জিজ্ঞাসাবাদ করা।

(খ) কোন দলিল উদঘাটন এবং উপস্থাপন করা।

(গ) সাক্ষ্য গ্রহণ।

(ঘ) কোন আদালত বা অফিস হইতে পাবলিক রেকর্ড বা উহার অনুলিপি তলব করা।

(ঙ) স্বাক্ষর জিজ্ঞাসাবাদ এবং দলিল পরীক্ষা করার জন্য নোটিশ জারী করা এবং

(চ) এই আইনের উদ্দেশ্য পূরণকল্পে, নির্ধারিত অন্য যে কোন বিষয়।

(২) কমিশন, যে কোন ব্যক্তিকে অনুসন্ধান বা তদন্ত সংশ্লিষ্ট বিষয়ে কোন তথ্য সরবরাহ করিবার জন্য নির্দেশ দিতে পারিবে এবং অনুসন্ধানের নির্দেশিত ব্যক্তি তাহার হেফাজতে রক্ষিত উক্ত তথ্য সরবরাহ করিতে বাধ্য থাকিবেন।"

11. According to section 19(1) and (2) of the Ain, 2004 the Commission is empowered to direct any person to supply information within his knowledge and documents in his possession in relation with inquiry or investigation.

12. Under the Ain, 2004 inquiry is a fact finding process being adopted by the Commission either on its own motions or on receipt of complaint in order to find out the correctness of the allegations so brought against. Here the person (the petitioner) has

been called upon by the Commission to interrogate only not in connection with any criminal proceeding, but to find out the truth whether there is any basis of the allegation so brought.

13. Under section 18 and 19 of the Ain, 2004 the Commission is empowered to compel the appearance of any person to give statement with regard to the allegation of corruption. The power of the Commission to issue notice for appearance covers both scheduled and non-schedule offence. The authority of the Commission to direct any person to appear before it to give statement in connection with 'inquiry' or 'investigation' has been embedded in the Ain, 2004.

14. In the above facts and circumstances and settled principle of law decided in the case of *Md. Shahidullah Miah v. The Bangladesh and others*, 1 CLR 331; *A.K.M. Khurshid Hossain and others v. ACC*, 2 CLR 406, we are of the view that the Commission by issuing the impugned notice Annexure-A and E to the petition on the basis of E.R No. 03/09 has not violated any provisions of law. Moreover, by the said notice the provisions of chapter-III of the Constitution have not been infringed.

15. In view of the above facts, circumstances and provisions of law this *Rule Nisi* merits no consideration.

16. In the result, the Rule is discharged. However, without any order as to costs. The order of stay granted earlier by this Court stands vacated.

17. Communicate the judgment at once.

Md. Ruhul Quddus, J
I agree.

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

WRIT PETITION NO. 4559 of 2006.

Zinat Ara, J	Md. Sanaullah.
Petitioner
A.K.M. Abdul Hakim, J	Vs
	Government of Bangladesh and others.
Judgment on 16.07.2009.Respondents.

For the Petitioner. Mr. Md. Abdul Awal

For the Respondent Nos. 2. Mr. Md. Basir Uddin
Zindigir

For the Respondent Nos. 3. Mrs. Nasrin Ferdous

Terms, Issues and Phrases:

Artha Rin case, setting aside auction sale in writ jurisdiction, third party application for setting aside auction sale, auction sale completed- physical delivery given, executing court becoming functus officio.

Decision: Rule discharged.

The executing court did not commit any error in entertaining the application filed by the 3rd Party-Respondent No.2....(para-31).

Main Legal Issue:

Issue-1:

Whether the Execution Court was wrong in entertaining the application of the

respondent No. 2 i.e. 3rd party for setting aside the auction sale or not.

Issue-2:

Whether after disposal of the execution case the executing court has become functus officio and has no authority/jurisdiction to entertain the application of 3rd party respondent No.2 for setting aside the auction sale and proceeding of the execution case is without lawful authority and whether the provisions as contained in the Rules of the Civil Procedure Code will be applicable or not.

Main Findings:

Finding-1:

The Execution Court was not wrong in entertaining the application of the respondent No. 2 i.e. 3rd party for setting aside the auction sale.....(Para 31).

Finding-2:

Thus, It is evident that the Adalat has rightly entertained the application filed by the 3rd party on 15.9.2005 for setting aside the auction sale dated 4.6.2005. So, the Adalat by exercising its discretion under order XXI Rule 100 and 101 of the Code entertained the application and after delivery of possession of the schedule property to the petitioner-auction- purchaser, the Adalat has not become functus-officio.....(para-28).

Therefore we find that the executing court did not commit any error in entertaining the application filed by the 3rd Party-Respondent No.2.....(Para 31).

Artharin Adalat An, 2004: Auction sale:
Code of Civil Procedure, 1098: Rule 100
Order 21: Setting aside auction sale and
remedy for possession:

- *Rule 101 requires of an executing Court to investigate in order to be satisfied as to whether the applicant was in possession of the property as complained of and secondly, if such claimant was in possession of his own account or on account of some person who was not the judgment-debtor. When the Court finds the answer in the affirmative, it becomes the duty of the Court to put the claimant back into possession at once. The proceedings under the rules are no doubt summary in nature and the wrong done to a party by the executing Court at the instance of the decree-holder without any fault of such party, must be remedied by the executing Court without any further delay.....(Para 25).*

So, the Adalat by exercising its discretion under order XXI Rule 100 and 101 of the Code entertained the application and after delivery of possession of the schedule property to the petitioner-auction- purchaser, the Adalat has not become functus-officio.....(Para 28).

Cases cited and/or relied on:

Abdul Hakim Vs. Goleda Begum and others 4 BLD (AD) 55.

Md. Abdul Kaiyum Vs. Krishnadhan Banik 17 BLD (AD) 167.

Sarder Jan-e-Alam Vs. Arab Bangladesh Bank and other 4 BLC (AD) 178.

Sultan Mia (Md.) Vs. Haji Md. Yusuf 53 DLR 555.

Delwar Hossain Khan vs. Alhaj Rustum Ali and other 54 DLR 328

JUDGMENT

A.K.M. ABDUL HAKIM, J:

1. In this application under Article 102 of the Constitution, the petitioner challenged the legality of the order No. 19 dated 15.09.2005 (annexure-D to the writ petition) passed by the learned Judge of Artha Rin Adalat No. 1, Chittagong in Artha Rin Jari Case No. 545 of 2004 (wrongly stated as Artha Rin Case No. 545 of 2004 in the Rule issuing order) for entertainment of an application filed by the respondent No. 2 for setting aside the auction sale dated 4.6. 2005.

2. Shortly, stated the facts in the writ petition are as under:

3. Respondent No. 4 Bangladesh Krishi Bank, Agrabad Corporate Branch, Chittagong (shortly, the Bank) as plaintiff instituted Artha Rin Suit No. 164 of 2004 in the Artha Rin Adalat No. 1, Chittagong (shortly the Adalat) impleading M/S. Piyal and Brothers, Md. Quiyam and Sirajuddoula as defendant Nos. 1 to 3 respectively for realization. The said suit was decreed in *ex-parte* in favour of the Bank by the judgment and decree dated 16.6.2004. The judgment-debtors having failed to pay the decretal amount the decree-holder-Bank put the decree in execution by filing Artha Rin Jari Case No. 545 of 2004 on 25.11.2004. In the said execution case mortgaged property was sold in auction and the present petitioner as highest bidder purchased 0.37 acres of land on 4.6.2005. Then petitioner duly deposited the auction Money and the same was confirmed by order No. 15 dated 5.7.2005 and

sale certificate was issued to the petitioner on 28.7.2005.

4. Thereafter, writ of delivery of possession was issued and the land was physically delivered to the auction purchaser i.e. the petitioner on 14.9.2005. In the said Execution case respondent No.2 Md. Sultan Mahmud as a third party filed an application on 15.9.2005 for setting aside the auction sale held on 4.6.2005 and the Adalat entertained the said application of the third party and fixed 28.9.2005 for hearing of the application subject to deposit of 25% of the decretal amount.

5. In this back drop this writ petition has been filed and Rule was obtained.

6. Mr. Md. Bashir Uddin Zindigir, the learned advocate filed a Vokalatnama on behalf of respondent No. 2, Sultan Mahmud to contest the Rule. However, he did not file any affidavit-in-opposition but contest the same on the legal ground.

7. Respondent No. 4, Bangladesh Krishi Bank contested the Rule by filing affidavit-in-opposition contending, inter-alia, that the respondent-Bank filed Artha Rin Suit No. 164 of 2004 in the Artha Rin Adalat No. 1 Chittagong which was decreed for Tk. 8,44,593 on 16.06.2004. Since the judgment-debtors respondent Nos. 5 to 7 failed to repay the decretal amount within the stipulated period, the decree-holder Bank filed the Artha Rin Jari Case No. 545 of 2004 in the Artha Rin Adalat No.1, Chittagong. After observing all the legal formalities mortgaged land measuring an area of 0.37 acres was put in auction for sale and the writ petitioner as the highest bidder purchased the said 0.37 acres of lands on 4.6.2005 and the sale was confirmed by order dated 5.7.2005 and accordingly sale

certificate was issued to the petitioner. Thereafter, the auction land was delivered to the writ petitioner. It is further stated that the writ petitioner has acquired right, title and interest in the land by virtue of the auction purchase. After disposal of the execution case, entertainment of the application filed by respondent No.2 and re-opening of the execution case is an abuse of process of the Court. Since the Adalat did not pass any order for setting aside the auction sale, the present writ petition is premature and not maintainable.

8. Mr. M.A. Awal, the learned advocate for the petitioner submits that Execution Case was ended after delivery of possession of the land to the auction purchaser i.e. the petitioner on 14.9.2005. Thereafter, entertaining of the application filed by the respondent No.2 i.e. the third Party on 15.9.2005 for setting aside the auction sale of the land is unlawful. He further submits the executing court became *functus officio* after giving physical delivery of possession of the auction purchased land to the petitioner on 14.9.2005.

9. In support of his contention, the learned advocate for the petitioner referred to a case *Abdul Hakim Vs. Goleda Begum and others* reported in 4 BLD (AD) 55.

10. In reply, Mr. Bashir Uddin Zindigir, the learned advocate for the respondent No. 2 submits that the petitioner on total misconception filed the present writ petition as no order has been passed for setting aside for the auction sale dated 4.6.2005 rather by the impugned order, the learned Adalat entertained the application and fixed on 28.9.2005 for hearing of the same subject to deposit of 25% of the decretal amount. Since, no order was passed by the Adalat for setting

aside the auction sale, the present writ petition is premature one and not maintainable. He next submits that since the execution case has not yet been finally disposed of, so the question of becoming *functus officio* of the Adalat does not arise at all.

11. He next submits that even after confirming of the sale the Adalat has the authority to set-aside the auction sale under order XXI, Rule 90 of the Code of the Civil Procedure (shortly, the Code) if any material irregularity was committed in conducting and publishing the sales in question. Adalat has authority for a summary investigation of the matter at the instance of the third party in possession only under Rule 100 of order 21 after he was dispensed by the auction purchaser and not before in the Course of execution. The executing court can direct to restore possession to the respondent No.2 i.e. third party under Rule 101 of the Code.

12. In support of his argument, Mr. Zindigir has relied to the decisions of the following cases:

- (1) *Md. Abdul Kaiyum Vs. Krishnadhan Banik* reported in 17, BLD (AD) 167;
- (2) *Sarder Jan-e-Alam Vs. Arab Bangladesh Bank and other* reported in 4 BLC (AD) 178;
- (3) *Sultan Mia (Md.) Vs. Haji Md. Yusuf* reported in 53, DLR 555;
- (4) *Delwar Hossain Khan vs. Alhaj Rustum Ali and other* reported in 54 DLR 328.

13. In view of the above submission made by the learned advocate for the contending

parties, the moot question to be decided in the present Rule is whether after disposal of the execution case the executing court has become *functus officio* and has no authority/jurisdiction to entertain the application of 3rd party respondent No.2 for setting aside the auction sale and proceeding of the execution case is without lawful authority and whether the provisions as contained in the Rules of the Civil Procedure Code will be applicable or not.

14. We have examined writ petition, affidavit-in-opposition and other materials on record and the decisions cited by the learned advocates of both the parties.

15. It appears from the writ petition that the writ petitioner as highest bidder purchased 0.37 acres of land on 4.6.2005 and he deposited the entire auction price of TK. 9,25,000/- and the sale was confirmed on 5.7.2005. Accordingly sale certificate was issued to the auction purchaser i.e. the petitioner on 28.7.2005 (Annexure-A to the writ petition) then writ of delivery of possession was issued to the auction purchaser. Thereafter the land was physically delivered to the auction purchaser on 14.9.2005 (Annexure-B to the writ petition).

16. It further appears from the impugned order dated 15.09.2005 that after return of service of notice of the writ of delivery of possession one Sultan Ahamed as 3rd party tiled an application on 15.9.2005 in the Execution case for setting aside the auction sale. Adalat entertained the application without registered it as Miscellaneous case and fixed the application for hearing on 28.9.2005 subject to deposit of 25% of the

decretal amount. Accordingly, the 3rd party deposited Tk. 2,25,500/-, 25% of the decretal amount by pay order and also filed an application on 26.09.2005 for stay of delivery of possession to the auction purchaser and Adalat fixed the hearing of the application on the date already fixed for hearing subject to supply of the copy of the application to the judgment debtor.

17. It appears from the order dated 28.9.2005 passed by the Executing Court (Annexure-E to the writ petition) that the application filed by the 3rd party dated 15.9.2005 was taken up for hearing. On that date auction purchaser i.e. present petitioner Md. Sanaullah filed written objection against the application filed by the 3rd party. After hearing of the application Adalat passed order directing the 3rd party-decree-holder to file all the documents in support of his claim and fixed the execution case on 9.10.2005 for filing documents and further hearing of the application. Ultimately the Adalat heard the matter at length on 8.11.2005 and fixed on 23.11.2005 for passing order. On that date 3rd party filed an application alongwith an heirship certificate issued by the local ward commissioner of 24 No. Uttar Agrabad, Chittagong City Corporation. That it appears from the heirship certificate that the father of judgment-debtor No.3, Late Nowab Ali died leaving twenty persons as his legal heirs but the property was mortgaged by the judgment-debtor No.3 alone. In such circumstance Adalat directed the Decree-holder-bank to file another heirship certificate and fixed the case on 4.1.2006 for hearing.

18. Thereafter on 15.3.2009 the entire matter was taken up for hearing and Adalat fixed the case on 7.5.2006 for further hearing.

That on 7.5.2006 Auction purchaser prayed for adjournment and Adalat then fixed the case on 28.5.2009 for further hearing.

19. In this backdrop the auction purchaser challenged the order dated 15.09.2005 against the entertainment of an application file by the 3rd party for setting aside the auction sale.

20. Now, issue before us is, whether the Execution Court was wrong in entertaining the application of respondent No. 2 i.e. 3rd party for setting aside the auction sale and whether the Execution case can proceed in exercise of discretion under order XXI, Rule 100 of the Code or it as become *functus-officio* after delivery of possession to the auction purchaser.

21. In order to appreciate the submission of the learned advocates, let us consider whether the Adalat was justified in entertaining the application filed by the 3rd Party-Respondent No.2. In this connection the provision of order XXI Rules 100 and 101 of the Code of Civil Procedure are relevant, which are reproduced below:

"100. (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession,

(2) The court shall fix a date for investigating the matter and shall summon the party against whom the

application is made to appear and answer the same.

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property."

22. Now, let us first examine the impugned order which reads as follow:

"নথল দেওয়ানী পরওয়ানা জারী আছে ফেরত আসিয়াছে। সুলতান আহম্মদ নীর মৃত আবদুল মন্সুর ইঞ্জিনিয়ার, উত্তর আশ্রাবাদ, মহরীপাড়া, থানা-হালিশহর, জিলা-চট্টগ্রাম দাবীকৃত এক ব্যক্তি অন্য অত্রজারী মামলার ওকালতনামা সহকারে হাজির হলফনামামুক্ত একখানা দরখাস্তমূলে তথ্য বর্ণিতকারণে অত্র জারী মামলার নিলাম রহিত করার প্রার্থনা করিয়াছে। দরখাস্তকারী সুলতান আহম্মদ ফিরিত্তি সহকারে কয়েক দলিলের ফটোকপি দাখিল করিয়াছে। অনুলিপি সঙ্গে প্রদান করা হইয়াছে। আগামী ২৮/৮/০৫ ইং তারিখ ডি৩৫৫র ২৫% ভাগ অর্থ জমাদানের জন্য (দেহআরমোহ) দ্বি-তারিখ উল্লেখিত অর্থ জমাদান স্বত্বপক্ষে দরখাস্ত ওদালীর জন্য।"

23. We have examined the above provisions in contradistinction from other provision under order XXI relating to delivery of possession of immovable property in execution of a decree, certain things must be noted. Firstly, no execution can proceed against a person who is not a judgment-debtor or who does not claim through any judgment-debtor. Secondly, no execution can validly proceed against any property other than immovable property and not covered by the decree.

24. Rule 100 has given a right to a person, who is not a judgment-debtor yet is

dispossessed of immovable property in execution of a decree to file an application complaining of such dispossession.

25. Rule 101 requires of an executing Court to investigate in order to be satisfied as to whether the applicant was in possession of the property as complained of and secondly, if such claimant was in possession of his own account or on account of some person who was not the judgment-debtor. When the Court finds the answer in the affirmative, it becomes the duty of the Court to put the claimant back into possession at once. The proceedings under the rules are no doubt summary in nature and the wrong done to a party by the executing Court at the instance of the decree-holder without any fault of such party, must be remedied by the executing Court without any further delay.

26. In the present case the 3rd party-Respondent No. 2 asserted that Nawab Ali, the father of the judgment-debtor No.3, Serajuddowla sold the schedule Property to the petitioner's grandfather late Abdur Rahman by Kabala No. 1444 dated 13.4.1963, who died leaving behind wife, 8 sons and 3 daughters. After his death the said properties were partitioned amongst his heirs by registered Deed of Partition No.15281 dated 09.12.1978. As per said Deed case land was devolved in the share of the late Abdul Mannan Engineer, father of Respondent No.2. After his death all the properties were amicably partitioned amongst his heirs and the case property fell in the share of the Respondent No.2 and he had been possessing the ancestral property for the last 42 years. Since the 3rd Party-Respondent No.2 in his application categorically made statement as to how he got the schedule property, it is incumbent upon the Adalat to hold an enquiry

as to whether the 3rd party can legally maintain an application or not under order XXI Rule 100 and 101 of the Code for setting aside the auction sale of his inherited property.

27. We have considered the decision as referred to by Mr. M.A. Awal, the learned advocate for the petitioner but the fact and circumstances of that case is distinguishable and the decision has no manner of application in the instant case.

28. Thus, it is evident that the Adalat has rightly entertained the application filed by the 3rd party on 15.9.2005 for setting aside the auction sale dated 4.6.2005. So, the Adalat by exercising its discretion under order XXI Rule 100 and 101 of the Code entertained the application and after delivery of possession of the schedule property to the petitioner-auction- purchaser, the Adalat has not become *functus-officio*.

29. The facts, circumstances and questions of law involved in the above referred cases as cited by Mr. Zindigir being similar the principles laid down in those cases are applicable in the instant rule.

30. In view of the facts and circumstances stated herein-before, we find no merit in the argument advanced by Mr. Awal, the learned advocate for the petitioner and we find substance in the arguments placed before us by Mr. Zindigir, the learned advocate for the respondent No.2.

31. Therefore we find that the executing court, did not commit any error in entertaining the application filed by the 3rd Party-Respondent No.2.

32. Thus we are of the view that learned Judge did not commit any illegality in passing the impugned order.

33. In the result the Rule is discharged without any order as to cost.

34. The order of stay granted earlier by this court stands vacated.

35. Communicate the judgment to the Judge of Artha Rin Adalat No. 1 Chittagong, at once.

Zinat Ara, J.

I agree.