

**HIGH COURT DIVISION**  
**(Special Original Jurisdiction)**

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| M. A. H. Rahman<br>M. A. H. Chowdhury J<br>M. A. H. Hoque J<br><br><b>Judgment</b><br>30th, 2015. | Abdul Jalil (Md) & others<br>.....Petitioners<br><br>vs<br><br>Judge, Artha Rin Adalat,<br>2nd Court, Dhaka, &<br>another.....Respondents* |
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Code of Civil Procedure (V of 1908)

Section XXI, rule 37

Artha Rin Adalat Ain (VIII of 2003)

Section 34(1)

Bank without taking recourse to provisions of law directly filed an application praying for issuance of warrant of arrest and order of detention which is palpably illegal and contrary to the provisions of law. The Order shows that the Adalat in issuing warrant of arrest and detaining the petitioners for six months in civil jail has assigned the reason only stating that judgment-Debtor failed to appeal before the court and to show cause in spite of public notice under section 30 of the Ain in the Ain but the Ain does not say so. ....(8)

Ullah Master vs Bangladesh, 61 DLR 760 and

Monir vs Subordinate Judge, 14 BLC 716

*Hasuddin Ahmed with Faisal Reza—For Petitioners.*

*Forrukh Rahman—For the Respondents.*

**Judgment**

**Mahmudul Hoque J:** In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the Order

No. 4 dated 4-3-2008 passed by the Artha Rin Adalat, 2<sup>nd</sup> Court, Dhaka in Artha Execution Case No. 27 of 2012 issuing warrant of arrest and order of detention against the petitioner as reproduced in paragraph No. 9 of the writ petition should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this Rule, in brief, are that the Respondent No. 2, First Security Islami Bank Limited as plaintiff instituted Artha Rin Suit No. 29 of 2007 in the 2<sup>nd</sup> Court of Artha Rin Adalat, Dhaka for recovery of Taka 1,93,54,953.29 against the petitioners as defendants. The said suit was decreed *ex parte* on 19-8-2007 against the petitioners. Thereafter the Respondent No. 2 Bank put the said decree into execution by filing Artha Rin Execution Case No. 217 of 2007 on 25-10-2007. The Respondent No. 2 Bank in the said Execution Case filed an application under section 34(1) of the Artha Rin Adalat Ain, 2003 (“Ain”) on 4-3-2008 for issuing order of warrant of arrest against the present judgment-debtors petitioners. The Artha Rin Adalat heard the said application and upon hearing vide its Order No. 4 dated 4-3-2008 issued warrant of arrest giving them detention for six months in the civil jail. It is in this backdrop, the petitioners filed this application challenging the validity and propriety of the said order and obtained the present Rule and order of stay.

3. The Respondent No. 2 Bank contested the Rule by filing an Affidavit-in-Opposition and supplementary Affidavit-in-Opposition denying all the material allegations made in the application contending, *inter alia*, that the judgment-debtor-petitioners furnished no security against loan in the form of mortgage and no property in the name of the petitioners was found after making search. In these circumstances the Respondent Bank has no other alternative other than detention of the petitioners in the civil jail to compel them to make

payment of the Bank's dues. It is also stated that the instant Execution Case was filed in the year 2007, but the Petitioners did not come forward to settle the Bank's claim, cunningly avoiding arrest adopting various foul play. It is also stated that in the absence of any mortgage property, the order of arrest was rightly passed by the Artha Rin Adalat with a view to compelling the Petitioner for making payment of the decretal amount and, as such, the present writ petition is not maintainable.

4. Mr Julhasuddin Ahmed with Mr Faisal Reza, the learned Advocates appearing for the petitioners submit that before passing the order of detention and issuance of warrant of arrest, no show cause was issued and served upon the petitioners as provided under Order XXI, rule 37 of the Code of Civil Procedure ("Code"). It is also argued that the order of detention was passed in violation of principles of natural justice and without giving an opportunity of being heard to the petitioners. Mr Ahmed further submits that the order of detention and arrest was passed by the Artha Rin Adalat also in violation of section 34 (9) of the Ain as no auction was held before issuance of such order of detention and warrant of arrest. As such the impugned order is illegal and unlawful. He further submits that the application filed by the Respondent No. 2 Bank praying for issuance of warrant of arrest against the petitioner is not followed by any affidavit and sufficient statement necessitating issuance of warrant and order of detention against the Petitioners. It is also argued that the loan in question has been insured with the Sadharan Bima Corporation ("SBC"). Under the insurance policy, SBC undertook payment of the loan to the Respondent No. 2 Bank in the event of failure of the borrower to repay of the loan amount. In such a situation, the Bank, without exhausting process of recovery from SBC and adjustment of the amount to be received against the policy and finding any shortfall thereof, issued warrant of arrest detaining petitioners for six months in the civil jail.

5. Mr Forrukh Rahman, the Advocate appearing for the Respondent No. 2 Bank submits that the petitioners before the Court are fugitive in law and, as such, they cannot be granted relief in this application seeking any relief against issuance of warrant of arrest. In support of his submission, he referred to the case of *Ullah Master vs Bangladesh* reported in 14 DLR 760. It appears that the said judgment was based on the decisions relating to criminal law. He further submits that the loan in question was not secured by any mortgage of the property of the borrower found available for being placed in auction. As such the Bank has no other alternative other than detention of judgment-debtors in civil jail. He also submits that in the absence of any security and any other property owned by the judgment-debtor the Court on the prayer of the Decree Holder rightly passed the Impugned Order and the same is not illegal. It is also argued that the Respondent No. 2 Bank tried to settle the dispute in various ways but the Petitioners were not at all willing to settle the Bank dues. Consequentially, as a last resort the Bank has compelled to file an application for warrant of arrest and for detention of petitioners in civil jail, accordingly, the Court rightly passed the order. He further submits that the Bank in several correspondences requested SBC for the claim under policy and forwarded the required documents as desired by them and that plea SBC refrained from payment of the money. In these circumstances, there is no other way the Court at the instant case. Decree-Holder Bank issued and passed the impugned order.

6. Heard the learned Advocates for the Respondent No. 2 Bank, perused the Application, Affidavit in Opposition, Supplementary Affidavit in Opposition along with the annexures thereto.

7. In the instant case the question arises whether the petitioner's lawyer regarding issuance

provided under Order XXI, rule 37 of the Code is not acceptable in the present case as the law has already decided by this court in the case of *Artha Rin Adalat Ain*, 2003 is a special law. The provisions of Artha Rin Adalat Ain shall prevail over the Code. As such the said provisions under Order XXI, rule 37 of the Code is not identical to the provisions laid down under section 34 of the Code. The Artha Rin Adalat is empowered to issue a warrant of arrest and order of detention against the judgment-debtor subject to other provisions contained in sub-sections 2 to 13. Sub-section 34 provides that before issuance of a warrant of arrest and order of detention at least one day the debtor is to be held once and it is the *sine qua non* for the issuance of order of detention but in the present case no property was mortgaged by the debtor as security against loan to be sold in the event of failure of the borrower judgment-debtors. It appears that the Respondent No. 1 has taken certain initiatives for recovery of the loan under Insurance Policy but the Respondent-Bank could not show any paper to prove that SBC refused to pay the claim under the Insurance Policy rather it appears from the letter dated 13/11/2013 written by SBC to the Bank asking the Bank to provide with some information regarding the loan taken by the Bank for recovery of the loan from the Petitioners. It means that the process is not complete. In other words, if we consider the Respondent-Bank as beneficiary of the Insurance Policy is the Respondent-Debtors in that case section 36 of the Code provides provision for recovery of decretal amount from the persons from whom the amount is due and owing to the judgment-debtor. In the present case appreciation of the matter section 36 of the Code may be looked into which runs thus:-

৩৬। (১) যদি ডিক্রীদার আদালতকে দরখাস্ত দ্বারা

অবহিত করে যে, কোন একজন ব্যক্তির নিকট হইতে দায়িক টাকা পাওনা আছে, তাহা হইলে আদালত, উক্ত ব্যক্তিকে শুনানী অস্ত্রে যথার্থ মনে করিলে, তাহার নিকট হইতে দায়িক যে টাকা প্রাপ্য হন, উহা হইতে ডিক্রীকৃত টাকার সমপরিমাণ টাকা আদালতে জমাদানের জন্য লিখিতভাবে আদেশ প্রদান করিবে এবং আদালত, উক্ত টাকা আদায় হওয়ার পর ঐ বাবদ একটি রশিদ প্রদান করিবে; এবং উক্ত রশিদ দ্বারা ঐ ব্যক্তি দায়িকের নিকট ঐ পরিমাণ অর্থের জন্য দেনা হইতে আইনতঃ মুক্ত হইবেন।

(২) প্রচলিত অন্য কোন আইনে ভিন্নরূপ বিধান থাকিলে, উপ-ধারা (১) এর বিধানে উল্লেখিত মতে বিবাদী-দায়িক কোন পোস্ট অফিস, ব্যাংক, আর্থিক প্রতিষ্ঠান বা ইনসিওরার এর নিকট হইতে কোন টাকা পাওনা হইলে, আদালত উক্ত পোস্ট অফিস, ব্যাংক, আর্থিক প্রতিষ্ঠান বা ইনসিওরার এর নিকট ডিক্রী পরিতুষ্ট করার জন্য শুনানী করিয়া সন্তুষ্ট হইলে, উক্ত টাকা ক্রোক করিয়া আদায় করিতে পারিবে; এবং এক্ষেত্রে কোন পাস বই, ডিপোজিট রশিদ, পলিশি কাগজ, অন্য কোন প্রকার দলিল, এন্ট্রি, ইনডোরসমেন্ট বা অনুরূপ অন্য কোন ইনস্ট্রুমেন্ট আদালত কর্তৃক পেশ করা আবশ্যিক হইবে না।

(৩) উপ-ধারা (১) ও (২) এর অধীনে আদালত কর্তৃক প্রদত্ত আদেশ অমান্য করিলে অমান্যকারী ব্যক্তি বা প্রতিষ্ঠানের দায়ী ব্যক্তির নিকট হইতে সমপরিমাণ অর্থ জরিমানা হিসাবে আদায়যোগ্য হইবে, এবং একই আদালত প্রথম শ্রেণীর ম্যাজিস্ট্রেট গণ্য এবং তৎসংশ্লিষ্ট ক্ষমতাবলে উক্ত টাকা জরিমানা হিসাবে আদায় করিবে।

8. In the present case admittedly loan of the Bank was secured by a Policy with SBC a statutory body corporate. Under the said Policy SBC undertook payment of the outstanding dues to the Bank. In the event of failure of the loanee the Bank as Decree-Holder is legally empowered to compel SBC to make payment of the money under the policy by filing an application before the Artha Rin Adalat and after receiving the money under policy and adjustment of the same with the decretal amount, if there be any short fall, the Decree-Holder Bank can proceed with the other properties of the judgment-debtors and finally by filing an application for arrest and order of detention. But in the instant case the Bank