

বীকৃত ইসলামি পদ্ধতি অনুসরণপূর্বক মালামাল বা পণ্য ক্রয়, বিক্রয় বা বিনিময়ের ক্ষেত্রে এই ধারার কোন কিছুই প্রযোজ্য হইবে না।

ব্যাখ্যা—এই ধারার উদ্দেশ্য পূরণকল্পে ‘পণ্য’ অর্থ আদায়যোগ্য দাবী, ষ্টক, শেয়ার টাকা পয়সা, স্বর্ণ-রৌপ্য ও অন্যান্য ষাটু এবং ধারা ৭ এর উপ-ধারা (১) এর দফা (গ), (ঘ), (ছ) ও (জ) এ উল্লিখিত সকল দলিল দস্তাবেজ ব্যতীত সকল প্রকারের অস্থাবর সম্পত্তি।’

23. It transpires from a plain reading of the above mentioned provisions of law, as relied upon by the petitioners, that the Act of 1991 does not bar the respondent Bank to impose any requirement to deposit security for loans granted by it. It also does not create any statutory legal obligation on the respondent Bank to take undated/post dated cheques as security against any loan.

24. Therefore, any requirement to deposit cheques as security does not relate to the Act, of 1991 at all. It is simply a requirement by private banks cannot be challenged in the writ jurisdiction as it is well settled that writ petitions are not maintainable against the private banks. In the case of *Muzibul Haque vs Bangladesh* 65 DLR 138 the High Court Division has categorically held that:

25. The question whether writ petition is maintainable against the private bank is a settled issue. The question is no longer a res integra. Holding this view in the decisions referred to above this Division has decided that the writ petition is not maintainable against the private Bank and the respondent No.1 Government has been inducted in the petitioner only to attract Article 102 of the Constitution as a method of cunning device.....” (Emphasis Added).

26. On overall analysis as it has been made hereinabove we are of the view that in no way by bringing this sort of analogy and only construing a few sections of Bank Companies Act, 1991, a proceeding under section 138 of the Act can be given a go by. Both the Acts are independent in

their own arena.

In the result, all the Rules are discharged without any order as to cost. The orders of stay granted earlier by this Division are hereby recalled and vacated.

Communicate at once.

Ed.

High Court Division (Admiralty Jurisdiction)

AFM Abdur Rahman J	First Security Islami Bank Ltd.....Plaintiff
	vs
Judgment December 6th, 2016	MV Javed and others....Defendants*

Admiralty Court Act (XLIII of 2000) Section 3(2)

A suit for the purpose of realization of investment/loan amount against a maritime or inland vessel or any navigable device is squarely maintainable under section 3(2) of the Act against which the provision of section 5 of the Artha Rin Adalat Ain 2003 is not applicable. The suit, filed in the Admiralty Jurisdiction for realization of invested money on the vessels is squarely maintainable.(48)

ICICI Ltd vs MFV SHILPA, AIR 2002 Bombay 371 ref.

Rafiqul Haque, Senior Advocate with Rokanuddin Mahmud, with Md Ziaul Haque, Advocates—For the Defendants-Applicant.

Ajmalul Hossain QC, with Mohammad Ohiullah, with Forrukh Rahman, Advocates—For the Plaintiff-Opposite-Party.

Judgment

AFM Abdur Rahman J : By this application, dated 27-11-2016, the defendant No. 8 Mr. Rana Kaiser Siddique, prays for dismissal of the instant suit as not maintainable on the ground of lack of jurisdiction of this court and on the other ground stated therein.

2. It has been stated in the instant application that the plaintiff Bank asserted that it runs on the principle of Islamic Sharia and has instituted the instant suit under the Admiralty Jurisdiction for realization of loan of Taka 8,38,60,000 including/interest on account of M/s Integrity Business Company against investment of the bank on HPSM (Transport) basis for procuring two Inland vessel, namely MV JAVED-4 and MV MARIA TASNIM-1 upon the ground that the plaintiff being the banking company engaged in business of financing different enterprise on the basis of Islami Shariah and accordingly it has allowed an investment facility to the defendant Nos. 7 and 8 for procuring the aforesaid two vessels MV JAVED-4 and MV MARIA TASNIM-1, for an amount of Taka 4,00,00,000 and 3,00,00,000 respectively, pursuant to loan agreement dated 2-2-2011 and 12-4-2010 respectively. The proportionate investment of the parties were at the ratio of 60/40 as against the plaintiff and the loanee the defendant No. 8. The defendant No. 8 in reimbursing the loan money paid installment up to 30-12-2012 for an amount of Taka 1,09,73,000 and Taka 2,31,48,000 totaling Taka 3,41,21,000 as per the statement of the plaintiff bank. The plaintiff bank has filed the instant suit and prayed for a decree for realizing an outstanding amount of Taka 8,38,60,000 as on 31-7-2015 with an interest @ 20% per annum till realization.

3. As against the claim of the plaintiff the defendant Nos. 1, 2, 4, 6, 7 and 8 contesting the suit by filing written statement, stating *inter-alia* that the suit is not maintainable in its present

form and the same is not maintainable due to lack of jurisdiction of this court. The plaintiffs claim involves realization of disputed loan amount which is triable by the Artha Rin Adalat under the Artha Rin Adalat Ain 2003 and, as such, the instant suit is a harassment to the defendants. The ultimate result of the suit will be fruitless on this point of lack of jurisdiction of this court and, as such, the suit is required to be buried at the initial stage to save the valuable time of the court and to save the parties from unnecessary harassment and therefore the suit is required to be heard on preliminary issue of maintainability, for which the defendant No. 8 has filed the instant application.

4. It has been further stated in the application that the claim of the plaintiff Bank is highly disputed and jurisdiction of getting such kind relief absolutely lie before Artha Rin Adalat as per Artha Rin Adalat Ain 2003. The plaintiff Bank lodged false complaint to the Bangladesh Bank showing fictitious liability against the vessels in question, consequent to which the Bangladesh Bank removed the defendant No. 8 from the Directorship of the commerce Bank Ltd. against which the defendant No. 8 and Bangladesh Bank are now litigating in different proceedings. These facts were not disclosed by the plaintiff in this suit. The honorable court has already framed issue in this suit and since the court framed issue on maintainability of the suit, the same is required to be decided as preliminary issue upon considering whether the suit is barred by sections 2 and 5 of the Artha Rin Adalat Ain 2003 and whether the Admiralty Court has got jurisdiction to entertain such a suit as framed by the plaintiff for recovery of loan, despite specific provision for filing suit for recovery of loan according to the mandatory provisions of Artha Rin Adalat Ain 2003."

5. The learned senior Advocate Mr. Ajmalul Hossain QC opposed the application.

6. Upon examination of the record it

appears to this court that the defendant No. 8 earlier on 3-11-2016 filed similar application titled an application under Order XIV, rule 2 of the Civil Procedure Code, 1908, praying for dismissal of the suit on this issue of maintainability against which the plaintiff has filed a written objection on 4-12-2016. Later, the defendant No. 8 made the said application dated 3-11-2016 as not pressed. Now the learned Advocate Mr. Ajmalul Hossain QC appearing on behalf of the plaintiff prayed that the written objection as has been filed earlier on 4-12-2016, is required to be treated as a written objection filed against the instant application. That being a cogent prayer this court has taken the said written objection dated 4-12-2016 into consideration, wherein it has been stated that the instant Admiralty Suit is fully maintainable in its present form and manner and the suit is not barred by lack of jurisdiction and the Admiralty Court has the jurisdiction to entertain the instant Admiralty Suit.

7. It has also been stated in the said written objection that the claim of the plaintiff, in the instant Admiralty Suit, relates to claim as to the possession or ownership of the ship or any share thereof or for recovery of documents of title and ownership of the ship including registration certificate, log book and such other certificates as may be necessary for the operation or navigation of the ship; or question arising between the co-owners of the ship as to the possession, entitlement to income of that ship; any claim in respect of mortgage or charges over the ships, for which jurisdiction has been imposed upon this court under the provision of section 3 of the Admiralty Court Act, 2000. The plaintiff since invested money on the vessels, the res, in question itself and the loanee has defaulted in paying back the loan money which has been invested upon the vessel itself, has entitled the plaintiff to initiate proceeding in rem in the Admiralty Court and not in the Artha Rin Adalat and accordingly the plaintiff has drawn the plaint and filed the instant

suit for realization of the invested money which has been invested on the vessels and not with the proprietor of the enterprise who is only an applicant for the investment.

8. It has been further asserted that the instant suit being maintainable under the provision of section 3(2) of the Admiralty Court Act 2000 and not specifically barred under any other statute, the issue of maintainability is not to be considered separately, which has been framed to be decided on full length hearing of the suit, for which the application praying for hearing the suit on preliminary issue of maintainability is required to be rejected.

9. We have heard the learned senior Advocate Mr. Rafiqul Hoque on behalf of the defendant No. 8 applicant and the learned senior Advocate Mr. Azmalul Hossain QC on behalf of the plaintiff.

10. The learned senior Advocate Mr. Rafiqul Haque, appearing on behalf of the defendant No. 8, while drew the attention of this court to the prayer portion of the plaint, strenuously argued that the instant suit being a simple suit for realization of loan money on the ground of failure to repay the loan, allowed to the defendant No. 8, the same is required to be filed in the Artha Rin Adalat in accordance with the provision of Artha Rin Adalat Ain, 2003.

11. The learned senior Advocate Mr. Rafiqul Haque further drew the attention of this court to the relevant provision of Artha Rin Adalat Ain, 2003 and argued that the plaintiff Bank is a financial institution run on the Islamic Sharia principle and, as such, its disbursement of money on any principle to any applicant for loan, be it a company or person, shall be, treated as 'loan' pursuant to the provision of section 2(Ga) of the Artha Rin Adalat Ain 2003. Further the plaintiff is mandated only to institute suit in the Artha Rin Adalat to recover any such loan it advanced and to

no other court since by the non-obstinate clause, as provided in section 5 of the Artha Rin Adalat Ain, 2003, the jurisdiction of all courts including this court has been barred to adjudicate a suit filed for realization of loan amount made to any loanee by any financial institution. The plaintiff being a financial institution conducting its business on Islami Shariah, the same comes under the provision of Artha Rin Adalat Ain, 2003 and accordingly the instant suit is not maintainable in this Admiralty Jurisdiction.

12. The learned senior Advocate Mr. Rafiqul Haque further argued that although so many words have been stated in the plaint as to joint partnership, investment on the vessel etc. but the facts remain that money advanced to the defendant No. 8 to purchase inland vessels is a 'loan' pursuant to the definition provided in section 2(Ga) of the Artha Rin Adalat Ain 2003, which was sanctioned by the plaintiff Bank to the human person, the defendant No. 8, to purchase three vessels, which are apparent on the face of the sanction letter and the ultimate object of the instant suit is for realization of the loan amount which has been received by the defendant No. 8 and not by the vessels, who is the owner of two vessels and that being simple dispute regarding the realization of loan amount, the Admiralty Court lacks jurisdiction for adjudication of the same and therefore the instant suit is required to be rejected in limine.

13. The learned senior Advocate Mr. Rafiqul Haque finally argued that the issue of maintainability of a proceeding is deep rooted in the suit and this being a legal issue is required to be considered as a preliminary issue on the point of law and, as such, upon finding that the suit is not maintainable, the same is required to be dismissed in limine at this preliminary stage.

14. On the other hand the learned senior Advocate Mr. Ajmalul Hossain QC, while taken this court through the provision of section 3(2) of

the Admiralty Court Act, 2000 argued that the provision of sections 3(2)(ka) and 3(2)(ga) of the Admiralty Court Act, 2000 entitles and only entitle the plaintiff to file the instant suit in this court on the ground of dispute upon ownership of maritime or inland vessels and also for realization of outstanding investment amount and charge upon the vessel. The investment was made not to the defendant No. 8, but the same was an investment on the two vessels, named MV JAVED-4 and MV MARIA TASNIM-1 and the object of the instant suit being the realization of the balance of invested money on the vessel, the instant Admiralty suit is squarely maintainable under the provision of section 3(2) of the Admiralty Court Act, 2000.

15. The learned senior Advocate Mr. Ajmalul Hossain QC upon referring the sanction letter issued by the plaintiff bank argued that the investment made by the plaintiff bank upon those inland vessels was on the Islamic Sharia principle of "Hire Purchase under Shirkatul Melk" i.e. HPSM (Transport). This method of investment made the plaintiff Bank a joint owner of the vessel, till the bank transfers its share to the other owner of the vessels, since this mode of investment involve three legal principle (i) Partnership-(shirkat), (ii) Lease (Ijara) and (iii) Sale i.e. transfer of Banks ownership to the other owner. This concept of HPSM (transport) is not identical with simple Hire purchase loan, advanced by the commercial Banks. Therefore any suit filed in Admiralty Court for realization of outstanding invested money, made on the maritime or inland vessel either or not on the Islamic Sharia Principle is not barred under the provision of section 5 of the Artha Rin Adalat Ain 2003, since simple disbursing a loan and taking mortgage of the vessels is not the case here, rather joint investment of equity, joint ownership of the vessel and ultimately transfer of the part ownership of the Bank to the loanee company by way of sell is the case here, which is totally

different in mode than simple loan disbursement by the commercial Banks. Even if the commercial Bank disburse loan for the purchase of maritime or inland vessels or any navigable device that will be treated as investment upon the vessel and accordingly section 5 of the Artha Rin Adalat Ain 2003 will not be applicable.

16. The learned senior Advocate Mr. Ajmalul Hossain QC next argued that the plaintiff has drawn its plaint in accordance with the provision of the section 6 of the Admiralty Court Act, 2000 and all the suits to be filed in Admiralty Court being money suits, the plaintiff was bound to draw its prayer portion in the plaint in a manner apparently as a prayer for money decree. But the same is practically a prayer to be submitted before the Admiralty Court in order to realize the invested money, advanced upon the vessel and therefore this suit, being a proceeding in rem, meaning thereby against the vessels, is squarely maintainable before the Admiralty Court.

17. The learned senior Advocate Mr. Ajmalul Hossain QC relied upon the case reported in AIR 2002 Bombay 371.

18. The learned senior Advocate Mr. Ajmalul Hossain QC further argued that the question of ownership and charge upon the vessel cannot be adjudicated by the Artha Rin Adalat, having no jurisdiction of the Artha Rin Adalat under the Artha Rin Adalat Ain 2003, to adjudicate such a question which is the exclusive jurisdiction of this court. Therefore, the issue of maintainability of the suit is not required to be heard at this preliminary stage, since the court has already framed issue upon different disputes in the suit, which requires full length hearing of the evidence by this court and upon that hearing the entire suit can be disposed off.

19. The learned senior Advocate Mr. Ajmalul Hossain QC prays for rejection of the instant application.

20. We have heard the learned Advocates and perused the materials on record.

21. As the prayer portion of the instant suit has been referred to by the learned senior Advocate Mr. Rafiqul Haque, this court has perused the prayer portion of the plaint which appears to have been drawn in the following terms;

"The plaintiff Bank has prayed for a decree for an amount of Taka 8,38,60,000 (eight crore thirty eight lac sixty thousand) only as of 31-7-2015 with damages/interest @ 20% per annum till realization."

22. Apparently the instant poorly drafted prayer shows that a money decree has been sought for. The plaintiff has stated in the body of the plaint, which has been supported by the uncontroverted documents, as have been filed by way of list of documents, that an amount of BD Taka 8,00,00,000 (Eight crore) have been allowed on HPSM (Transport) basis to M/s Integrity Business company, the defendant No. 7 for the purpose of purchasing two inland vessels on Hire purchase partnership basis and thereafter to engage the said vessels on charter and subsequently to realize the portion of investment, made by the bank, upon selling the ownership portion of the bank to the said M/s Integrity Business Company. The relevant portion of the object of the investment has been mentioned in the sanction letter dated 2-2-2011, which runs as follows;

"1. MV MARIA TASNIM (capacity 1,700 MTs) 2. MV MARIA TASNIM-7 (capacity 18000 MTs) and 3. MV JAVED-4 (capacity 2000 MTs) নামক তিনটি Cargo Vessel যৌথ অংশদারী ভিত্তিতে ক্রয় করে গ্রাহকের নিকট বিক্রয়ের বা জাড়ায় খাটানো এবং পর্যায়ক্রমে ব্যাংক বিনিয়োগকৃত অংশ গ্রাহকের নিকট বিক্রয়ের মাধ্যমে মালিকানা হস্তান্তর।"

23. It further appears from the said sanction letter that the security for such investment has

been taken from the said applicant for investment, on the following terms;

“প্রাথমিক জ্ঞানানত ক্রয়তব্য ভেসেল তিনটি ফার্স্ট সিকিউরিটি ইসলামী ব্যাংক লিমিটেড, ঢাকা শাখা ও মেসার্স ইন্টিগ্রিটি বিজনেস কোম্পানির যৌথ নামে রেজিস্ট্রেশন করে ব্যাংকের নিকট হাইপোথিকেশনে দায়বদ্ধ থাকিবে।”

24. It further appears that the said sanction letter also bears special condition to the effect that;

“কার্গো ভেসেল তিনটি বিনিয়োগ পরিশোধ না হওয়া পর্যন্ত জাহাজের সমুদয় freight ব্যাংকের অনুকূলে Assign রাখা হবে এই মর্মে আপনাদেরকে undertaking দিতে হবে।”

25. From the aforesaid sanction letter it appears that the plaintiff has invested money on the vessel MV MARIA TASNIM-7 and MV JAVED-4 and another one vessel, by way of a method known in Islamic Sharia Principle as “Hire purchase under shirkatul melt” [HPSM (Transport)] to the defendant No. 7 M/s Integrity Business Company. Under the said method both the investor and the account holder owns the property jointly, herein that ratio is on 60:40 basis respectively. Moreover the vessels in question were also mortgaged to the investor and all the prospective freight to be fetched by those vessels were assigned to the investor, the plaintiff Bank.

26. Apparently this transaction appears to be a loan transaction and comes under the provision of section 2(Ga) of the Artha Rin Adalat Ain 2003, the said provision runs as follows;

অর্থ ঋণ আদালত ২০০৩—

ধারা ২(গ)। সংজ্ঞা বিষয় বা প্রসঙ্গের পরিপন্থি কোন কিছু থাকিলে, এই আইনে,

ঋণ অর্থ—

১. অগ্রিম, ধার, নগদ ঋণ, গুজার ড্রাফট, ব্যাংকিং ক্রেডিট, বাটাকৃত বা ক্রয়কৃত বিল, ইসলামী শরীয়া মোতাবেক পরিচালিত আর্থিক প্রতিষ্ঠান

কর্তৃক বিনিয়োগকৃত অর্থ বা অন্য যে কোন আর্থিক আনুকূলে বা সংযোগ সুবিধা, যে নামেই হউক না কেন;

২. গ্যারান্টি, ইনডেমনিটি, ঋণপত্র বা অন্য কোন আর্থিক বন্দোবস্ত যাহা কোন আর্থিক প্রতিষ্ঠান ঋণ গ্রহীতার পক্ষে প্রদান বা জারী করে বা দায় হিসাবে গ্রহণ করে;
৩. কোন আর্থিক প্রতিষ্ঠান কর্তৃক উহার কোন কর্মকর্তা বা কর্মচারীকে প্রদত্ত কোন ঋণ; এবং
৪. পূর্ববর্তী ক্রমিক (১) হইতে (৩) এ উল্লিখিত ঋণ, বা, ক্ষেত্রমত ইসলামী শরীয়া অনুযায়ী পরিচালিত আর্থিক প্রতিষ্ঠান কর্তৃক বিনিয়োগকৃত অর্থ এর উপর বৈধভাবে আরোপিত সুদ, দণ্ড সুদ বা মুনাফা বা ডাড়া।

27. Although the aforesaid provision is a loan, but practically it has been an investment upon the vessels and not a simple loan to the defendant No. 8, who may be the owner of the proprietorship concern the defendant No. 7, because of the fact that the object of the loan is to purchase inland vessels on partnership basis, known in the Islamic Sharia as HPSM (transport). Therefore this court holds the concrete view that the plaintiff bank, being run on Islamic sharia principle, has made an investment on the vessels and not advanced a simple loan alike the commercial banks, either to the defendant No. 7, the said business enterprise or to its proprietor, the defendant No. 8. This sort of transaction is different from the transaction of loan upon mortgage of property, taken as security by the commercial Banks or other financial institutions other than the Banks, running on Sharia principle. Even if any financial institution, running on commercial basis or any other person advance money either as loan or investment, the object of which is to purchase, repair, modify etc., of a vessel or to supply necessary, bunker etc. to the vessel, the same shall always be treated as an investment on the res, i.e. the vessel itself and not to any person or company who received the investment as applicant.

28. It appears from the plaint that the plaintiff has filed the instant suit praying for decree for realization of outstanding amount of the said invested money, which stands outstanding as on 31-7-2015, at an amount of Taka 8,38,60,000. It appears from the admitted sanction letter, issued by the plaintiff Bank in favour of the defendant No. 7, that the loanee undertook to repay the investment of the plaintiff Bank, in the following manner;

সমবয় পদ্ধতি/ভাড়াঃ

কিস্তি ভিত্তিক প্রতিটি কিস্তি ২৫.৩৬ লক্ষ (টাকা পঁচিশ লক্ষ ছত্রিশ হাজার) [আসল ১৯.০০ লক্ষ + গড় ভাড়া ৬.৩৬ লক্ষ ক্রয়দ্রব্যমান পদ্ধতিতে] টাকা করে ৪২টি মাসিক কিস্তিতে পরিশোধ করতে হবে, যা বিনিয়োগ বিতরণের ৬ মাস পর পরবর্তী মাসের ১-৭ তারিখের মধ্যে পরিশোধ করতে হবে। অসমবিত দায় (যদি থাকে) শেষ কিস্তির সাথে সমবয় করতে হবে।

29. It has been alleged that the defendant No. 8 has failed to repay the said installment after payment of some of it, for which the plaintiff filed the instant suit for recovery of the outstanding balance.

30. Whether this suit of the plaintiff comes under the purview of Admiralty Court Act, 2000, or not, this court has examined the provision of section 3(2) of the Admiralty Court Act, 2000, wherefrom it appears that the provision of section 3(2)(a) (in bangla-ka) provides the following terms;

এডমিরালটি কোর্ট আইন ২০০০

ধারা ৩(২)(ক)

জাহাজের দখল বা মালিকানা বা উহার শেয়ারের মালিকানা বা নিবন্ধন সার্টিফিকেট, লগবুক বা জাহাজ চলাচল ও নৌপরিবহন ক্ষেত্রে প্রয়োজনীয় সকল সার্টিফিকেটসহ জাহাজের স্বত্ব মালিকানা দলিল পুনরুদ্ধার সংক্রান্ত দাবী।

[English Translation of the above Bangla Provision:

Admiralty Court Act 2000

Section 3(2)(a)

Any claim to the possession of ownership or a ship or to the ownership of any share thereof or for recovery of documents of title and ownership of a ship, including registration certificate, log book and such certificates as may be necessary for the operation or navigation of the ship.]

31. Further the provision of section 3(2)(c) (in bangla-ga) of the said Act runs as follows;

এডমিরালটি কোর্ট আইন ২০০০

ধারা ৩(২)(গ)ঃ

কোন জাহাজ বা উহার শেয়ারের বন্ধক বা চার্জ (charge) সংক্রান্ত দাবী;

[English Translation of the above Bangla Provision:

Admiralty Court Act 2000

Section 3(2)(c)

“any claim in respect of a mortgage of or charge on a ship or any share therein”.]

32. These are two of the several provisions to be considered for the purpose of maintainability of a suit in the Admiralty Jurisdiction, wherefrom it appears that the plaintiff has institute the instant proceeding in rem, meaning thereby against the vessels in order to realize the money which was invested on the vessels, and, as such, the same comes under the purview of section 3(2)(a) and 3(2)(c) of the Admiralty Court Act, 2000.

33. It appears from the provision of section 4 of the Admiralty Court Act 2000 that any suit falls under the provision of section 3(2)(a)-(c) of the said Act shall be proceeded as ‘action in rem’. The said provision runs as follows;

এডমিরালটি কোর্ট আইন ২০০০

ধারা ৪ঃ এডমিরালটি কোর্টরূপে হাইকোর্ট বিভাগের এখতিয়ার প্রয়োগের পদ্ধতিঃ

১) ধারা ৫ এর বিধান সাপেক্ষে, হাইকোর্ট বিভাগের এডমিরালটি এখতিয়ার সকল ক্ষেত্রে action

in personam এর মাধ্যমে প্রয়োগ করা যাইবে।

(4)(8)

২) ধারা ৩ এর উপ-ধারা (২) এর দফা (ক) হইতে (গ) এবং (দ) তে উল্লেখিত দাবীর ক্ষেত্রে এ্যাডমিরালটি কোর্ট বিভাগের এ্যাডমিরালটি একতিয়ার সংশ্লিষ্ট জাহাজ বা সম্পত্তির বিরুদ্ধে action in rem এর মাধ্যমে প্রয়োগ করা যাইবে।

৩) যদি দাবীকৃত অর্থ এমন কোন জাহাজ, বিমান বা অন্য কোন সম্পত্তি সংক্রান্ত হয় যাহার উপর সামুদ্রিক পূর্ববৃত্ত (maritime lien) বা অন্যবিধ চার্জ থাকে, তাহা হইলে উক্ত জাহাজ, বিমান বা সম্পত্তির বিরুদ্ধে এ্যাডমিরালটি কোর্ট হিসাবে হাইকোর্ট বিভাগের এ্যাডমিরালটি একতিয়ার action in rem এর মাধ্যমে প্রয়োগ করা যাইবে।

৪)(৮).....

Admiralty Court Act 2000

Section 4: Mode of exercise of admiralty jurisdiction:

- (1) Subject to the provision of section 5, the admiralty jurisdiction of the High Court Division may in all cases be exercised in personam.
- (2) The Admiralty Jurisdiction of the High Court Division as the Court of Admiralty may in the cases of claims mentioned in clauses (a) to (c) and (r) of sub-section (2) of section 3 be exercised in rem against the property in question.
- (3) In any case where the amount claim relates to any ship, aircraft or other property over which there is a maritime lien or other charge, the Admiralty Jurisdiction of the High Court Division as the Court of Admiralty may in such a case be exercised by an action in rem against that ship, aircraft or property.

34. From the narrative of the plaint it appears that the plaintiff has filed the instant suit primarily as a 'proceeding in rem' against the defendant No. 1 vessel and prayed for decree jointly and severally against all the defendants. Therefore it appears that the instant suit is maintainable, so far these sections are concerned.

35. But a very important question of public importance has been raised by the learned senior Advocate Mr. Rafiqul Haque, who assailed the maintainability of the instant suit on the ground that the provision of section 5 of the Artha Rin Adalat 2003 bears a non obstanti clause, which barred the jurisdiction of this court in order to entertain any suit, the object of which is to realize the loan amount advanced by a financial institution, including the instant plaintiff, which run on Islamic Sharia Principle.

36. Upon such argument this court has considered the provision of section 5 of the Artha Rin Adalat Ain, 2003, which runs as follows;

অর্থ ঋণ আদালত আইন ২০০৩

ধারা ৫

আদালতের একক একতিয়ারঃ—(১) অন্য কোন আইনে যাহা কিছুই থাকুক না কেন উপ ধারা (৫) ও (৬) এর বিধান সাপেক্ষে, আর্থিক প্রতিষ্ঠানের ঋণ আদায় সম্পর্কিত যাবতীয় মামলা ধারা ৪ এর অধীন প্রতিষ্ঠিত, ঘোষিত বা গণ্য হওয়া অর্থ ঋণ আদালতে দায়ের করিতে হইবে এবং উক্ত আদালতেই উহাদের নিষ্পত্তি হইবে।

(২)-(১১).....

[English Translation of the above Bangla Provision:

Artha Rin Adalat Act, 2003

Section 5: Exclusive jurisdiction of this court:—(1) Notwithstanding anything contained any other law for the time being in force, subject to the provision of sub-sections 5 and 6, the suit for realization of loan,

advanced by the financial institution, shall be filed in loan recovery court, established under the provision of section 4 of the said Act and the same shall be disposed off in the said court.]

37. Apparently the non-obstanti clause “অনা কোন আইনে যাহা কিছুই থাকুক না কেন” appears to be applicable against any suit, the object of which is to realize the loan amount advanced by a financial institution. Whether this restriction is also applicable against any suit filed in the Admiralty Jurisdiction by any financial institution, either running on (1) Islamic Sharia Principle or (2) general commercial basis, the object of which is to realize the outstanding dues of the invested money upon a vessel, is required to be ascertained.

38. The plaintiff in the instant suit, runs on the principle of Islami Shariah and the sanction letter shows that the amount which was advanced by the plaintiff has been termed as an investment on ‘Hire purchase under Shirkatul Melk’ [(HPSM) (Transport)] basis. The commercial Banks in sanctioning loan to any person or company on Hire purchase basis of a transport takes mortgage of the property i.e. the vehicle, in securing the loan. Normally the liability of the loan does not directly extend to the mortgaged property, but the mortgaged property is liable to be sold for the purpose of satisfying the decree obtained in a suit for recovery of outstanding loan amount. This is the same in the case of “Hire Purchase of any transport” through the disbursement of loan. The investment made on principle of Islami Sharia ‘Shirkatul Melk’ and the disbursement of loan by the commercial Banks are not identical. Under this mode of ‘Shirkatul Melk’, a Bank run on sharia principle may supply implements/ equipment/goods on rental basis. The ownership of the implements/ equipment/goods will remain jointly with the Bank and the client, albeit the portion of the client

will remain to the Bank as mortgage, until the closure of the investment account by way of repayment, but the client will be authorized to possess the equipment (the mortgaged property) for certain period. The client, after completion of payment of the installments, will be the owner of the implements/equipment/goods and the mortgage shall come into end.

39. It appears that the two vessels in question, out of three vessels, were purchased in the joint name of the plaintiff bank and the loan applicant, to operate the same on HPSM (Transport) basis. This Hire purchase under Shirkatul Melk [HPSM (Transport)] is a Special type of contract which has been developed through practice in Bangladesh as elsewhere in the world. Actually, it is a synthesis of three contracts (i) Shirkat, (ii) Ijarah and (iii) Sale. The Cambridge English-Arabic dictionary shows that the literal Arabic word Shirkat means partnership. Shirkatul Melk means share in ownership. When two or more persons supply equity, purchase an asset, own the same jointly and share the benefit as per agreement and bear the loss in proportion to their respective equity, the contract is called Shirkatul Melk contract.

40. The term Ijarah has been derived from the Arabic words (Air) and (Ujrat) which denotes consideration, return, wages or rent. This is really the exchange value or consideration, return, wages, rent of service of an asset. Ijarah has been defined in Cambridge English-Arabic dictionary as a contract between two parties, the Hire and Hirer, where the Hirer enjoys or reaps a specific service or benefit against a specified consideration or rent from the asset owned by the Hire. It is a hire agreement under which a certain asset is hired out by the Hire to a Hirer against fixed rent or rentals for a specified period.

41. In order to apprise us as to method of Islamic banking, this court perused the famous book on Islamic Banking by Brian Kettel, titled

"Introduction to Islamic Banking and Finance". Wherefrom it appears that according to the majority of Fuqaha, there are three general and six detailed elements of Ijarah.

1. The wording: This includes offer and acceptance.
2. Contracting parties: This includes a Hire, the owner of the property, and a Hirer, the party that benefits from the use of the property.
3. Subject matter of the contract: This includes the rent and the benefit.

42. Thus, in Hire Purchase under Shirkatul Melk mode both the Bank and the Client supply equity in equal or unequal proportion for purchase of an asset like land, building, machinery, transports etc. and purchases the asset with that equity money, own the same jointly, share the benefit as per agreement and bear the loss in proportion to their respective equity. The share, part or portion of the asset owned by the Bank is hired out to the Client partner for a fixed rent per unit of time for fixed period. Lastly the Bank sells and transfers the ownership of its share/part portion to the Client against payment of price fixed for that part either gradually part by part or in lump sum within the hire period or after the expiry of the hire agreement.

43. Therefore it appears that the realization of invested money under Shirkatul Melk and the realization of loan advanced by the commercial bank are two different terminology. The non-obstanti clause, as aforesaid, is applicable against a suit, the object of which is realization of simple outstanding loan money. The non-obstanti clause provided in section 5 of the Artha Rin Adalat Ain, 2003 is applicable against the proceeding for realization of loan advanced by the commercial bank save and except investment on marine or inland vessels and has no application against a proceeding, the object of which is to realization of

outstanding HPSM (Transport) investment, made on maritime vessel and, as such, the same is not applicable against the proceeding initiated in the Admiralty Court.

44. Further if the commercial Bank, not running on the Islamic Sharia Principle, disburse loan for the purchase of any maritime or inland ship, vessel or any other navigable devise, the same principle, shall be applicable to such case and the provision of section 5 of the Artha Rin Adalat Ain 2003 shall have no application to that suit.

45. There is another important aspect of the matter. The authority of the Admiralty Court is being entrusted upon a bench of the High Court Division in accordance with the provision of section 8 of the Admiralty Court Act 2000. The Jurisdiction of the High Court Division is derived from the provision of article 101 of the Constitution which provides that "the High Court Division shall have such original, appellate and other jurisdiction and powers as are conferred on it by this constitution or any other law". Therefore this particular bench of the High Court Division, despite its identification as 'court (Admiralty Court)' is a bench of the High Court Division of the Bangladesh Supreme Court, which is being constituted under the Constitution of Bangladesh, having no essence of Civil Court constituted under the provision of 'Civil Court Act 1887. The restriction imposed by section 5 of the Artha Rin Adalat Ain 2003 is directed towards the Civil Court and not to any court constituted under the provision of the constitution of Bangladesh. If any restriction upon the jurisdiction of the High Court Division is to put, that has to be done by direct wording. No implied restriction shall bar the functioning the High Court Division and, as such, cannot be taken into consideration.

46. In the referred case of *ICICI Ltd vs MFV SHILPA*, reported in *AIR 2002 Bombay 371*, it was argued that recovery of debt due to Banks under

the banks and Financial Institution Act 1993 (Act 51 of 1993) of India through the provision of its section 17 and 2(g) barred the jurisdiction of the Admiralty Court to entertain a suit the object of which was to realize the loan amount advanced to the maritime vessel. There lordship Mr DK Deshmullah J refused to agree to the arguments on the ground that the said Act did not categorically barred the jurisdiction of the Admiralty court and, as such, outstanding loan amount against a vessel can be realized by way of Admiralty suit against the vessel (the res) and the said provision shall have no application against the Admiralty suit.

47. We are in humble agreement with his lordship since the similar question is involved in the instant application.

48. Therefore this court is in firm view that the provision of section 5 of the Artha Rin Adalat Ain 2003 is not applicable against the Jurisdiction of this bench of the High Court Division known as Admiralty Court, which has been imposed upon it through section 8 of the Admiralty Court Act 2000. A suit for the purpose of realization of investment/loan amount against a maritime or inland vessel or any navigable device is squarely maintainable under section 3(2) of the Admiralty Court Act 2000, against which the provision of section 5 of the Artha Rin Adalat Ain 2003 is not applicable. Therefore, this court finds that the instant suit, filed in the Admiralty Jurisdiction for realization of invested money on the vessels is squarely maintainable.

49. Accordingly, the issue as to the maintainability of the instant suit is although considered elaborately and disposed off, nevertheless it was not required to be adjudicated as a preliminary issue and, as such, this court finds no merit in the instant application which is required to be rejected. The issue as to maintainability, as framed, will remain open to be further adjudicated at the full length hearing.

Accordingly, the instant application is rejected.

Ed.

High Court Division (Special Original Jurisdiction)

Farah Mahbub J
Kazi Md Ejarul Haque
Akondo J

Ratan Kumar Saha.....
.....Petitioner
vs

Ministry of Energy and
Mineral Resources,
represented by the
Secretary and others.....
.....Respondents*

Judgment
May 24th, 2015

Constitution of Bangladesh, 1972
Articles 27 and 31

Inaction of the respondents concern in not giving gas connection to the petitioner is discriminatory; hence, is violative of it's fundamental rights as guaranteed under Article 27 and 31 of the Constitution.

In the instant case, pursuant to the application of the petitioner dated 2-1-2008 the respondent No.5 gave "স্বাক্ষরিত" vide office order dated 30-1-2008 (Annexure-B series). Ultimately, fulfilling all conditions and on obtaining necessary approval from the other government functionaries it was awaiting gas connection. In this regard, the Energy Regulatory Commission had also recommended to give gas connection to those CNG stations like that of the petitioner. The petitioner did not make a prayer to place its case before the said committee, rather from record it appears that after issuance of circular dated 21-7-2009 (stopping gas connection due to shortage of gas) 52 new CNG stations have been given gas connection (as has been found by the High Court Division in writ petition Nos.9681 and 9682 both of 2010 and that