16 SCOB [2022] HCD 217

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)
Writ Petition No. 6526 of 2013

The City Bank Limited, Kushtia Branch, Kushtia
.....Petitioner
-Versus-
Court of First Joint District Judge, Artha Rin Adalat, Kushtia and another
.....Respondents

Mr. Ahsanul Karim, with
Mr. Khairul Alam Choudhury, Advocates
...for the petitioner
Mr. Shasti Sarker, Advocate
...for the respondent No. 2
Heard on: 11.02.2021 and 25.02.2021
Judgment on: 02.03.2021

Present:
Mr. Justice Abu Taher Md. Saifur Rahman
And
Mr. Justice Md. Zakir Hossain

Editors' Note:
After obtaining decree in an Artha Rin case the petitioner- decree holder Bank got a certificate of ownership in respect of mortgaged property issued by the Executing Court. After registration of the certificate of ownership the executing Court disposed of the execution case. Thereafter, the judgment-debtor filed an application to get back the property by depositing the outstanding dues of the decretal amount. Upon hearing, the Executing Court allowed the petition. Challenging the legality and propriety of the said order, the petitioner-decree holder-Bank moved the High Court Division and obtained the Rule. The main argument for petitioner was that after disposing of the execution case the Executing Court has become *functus officio* and therefore, allowing the application submitted by the judgment-debtor to get back his property was an illegality. The High Court Division found that the execution case was not legally disposed of, as possession of the mortgaged property had not been made over to the decree holder, therefore, the Court had not become *functus officio* in entertaining the application filed by the judgment-debtor. Moreover, the petitioner-Bank did not file any mortgage suit to foreclose down the right of redemption of the mortgagor. In such case right of redemption exists unless the mortgaged property is sold on auction or that right is barred by limitation. In the instant case, auction was not held in accordance with law and the mortgaged property was not sold on auction, therefore, the right of redemption of the judgment-debtor was not extinguished. Thereafter, giving twelve points direction the High Court Division discharged the Rule.

Key Words:
Section 33(1) and 33 (4) of the Artha Rin Adalat Ain, 2003; mortgage property; auction sale; *functus officio; stare decisis*; *per* incuriam; Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003; Right of redemption; foreclosure;

Section 33(1) and 33 (4) of the Artha Rin Adalat Ain, 2003:
It transpires from the order sheets that the Executing Court did not comply with the provisions of section 33(1) of the Ain, 2003. It is a mandatory requirement to publish an auction notice in a widely circulated daily newspaper. The daily Destiny has not got no

existence at present and undisputedly, at the relevant time it was not a widely circulated daily newspaper. As the auction notice was not published in a widely circulated daily newspaper, therefore, prospective bidders could not participate in the bid. Moreover, the decree holder-Bank did not take any step under section 33(4) of the Ain, 2003 to sell out the mortgage property on auction and thereby, negated the provision of section 33(4) of the Ain, 2003. ...(Para 17)

Section 33 of the Artha Rin Adalat Ain, 2003

On meaningful reading of sub-sections (5), (7), (7Ka) and (7Kha) of section 33 of the Ain, 2003, it transpires that where the possession of property requires to be obtained through intervention of the Court, the decree holder has to file an application in writing to the Executing Court to hand over possession of the said property to the decree holder or the auction purchaser as the case may be and before handing over possession of the property, the Executing Court shall be reassured that it is the property which was lawfully mortgaged by its original owner against the loan liabilities or which was attached under the original title and possession of the judgment-debtor for execution of the decree. The provisions of sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated by the Artha Rin Adalat Ain (Amendment) Act, 2010 (Act XVI of 2010) in order to protect the property of the actual owner. In this case, admittedly, the possession of the mortgage property remains with the judgment-debtor. If the execution case is disposed of upon issuance of certificate of title, the decree holder will not be able to obtain the possession without the intervention of the Court. Therefore, the contention of the petitioner is that upon issuance of certificate of title under section 33(7) of the Ain, 2003, the Executing Court has become *functus officio* is fallacious and not based on cogent reasons. ...(Para 18)

Doctrine of *stare decisis* must not be applied at the cost of justice:

The doctrine of *stare decisis* which is the binding force of precedent may be destroyed if a statute is enacted inconsistent with the decision or if it is reversed or overruled by a higher Court or it is based on the doctrine of *per incuriam*. The doctrine of *stare decisis* should not be regarded as a rigid and inevitable doctrine, which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The Court may, in an appropriate case, overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. Every case has to consider its own merit, peculiar facts and circumstances and therefore, in following the precedent, the Court must be very careful and cautious. ...(Para 24)

Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003:

The contention of the learned Advocate of the petitioner that upon issuance of the certificate under section 33(7) of the Ain, 2003, the Executing Court has nothing to do but to dispose of the execution case finally is not based on any rationality. For the sake of argument, if the Court becomes *functus officio*, how later on the Court will entertain another execution case or any other application for handing over possession if it remains with the judgment-debtor. The Court may correct its own mistakes by invoking, the umbrella provision, embodied under section 57 of the Ain, 2003 to do justice and to undo injustice despite the provisions of section 20 of the Ain, 2003. It has to remember that the provisions of section 20 of the Ain, 2003 is neither absolute nor sacrosanct nor untouchable. The parties to the suit cannot and should not suffer for the mistake committed by the Court itself. On perusal of the entire edifice of the Ain, 2003, it becomes visible to us that the Code of Civil Procedure, 1908 shall be applicable

subject to not being inconsistent with the provisions of the Ain, 2003. The Adalat may review its own order by invoking section 57 of the Ain, 2003 with extreme circumspection in an exceptional case. ...(Para 25)

Section 52 of the Artha Rin Adalat Ain, 2003:

It persistently comes to our notice that Bank officials are very much reluctant to provide the bank statement containing the outstanding dues of the borrower even after issuance of the direction of the Court. This sort of attitude is tantamount to contempt of Court. In this circumstance, if bank official does not comply with the order of the court, then the court may proceed against them under section 52 of the Ain, 2003 or in an appropriate case, it may refer to the High Court Division for taking punitive measure against the delinquent officials. It is expected that Bank and Financial Institutions should comply with the order of the Court with utmost expedition. ...(Para 27)

Section 5 (2) of the Artha Rin Adalat Ain, 2003:

Right of redemption exists unless the mortgaged property is sold on auction or the right is barred by limitation:

It also appears from the record that admittedly, the petitioner-Bank filed Artha Rin Suit for recovery of loan money but did not file any mortgage suit under section 5(2) of the Ain, 2003. If the Bank or financial institute wishes to foreclose down the right of redemption of the mortgagor, then it has to file mortgage suit and in that case the decree awarded by the Adalat shall be preliminary decree and in all other cases, the decree awarded by the Court in a suit filed for recovery of loan money shall be the final decree. A suit to obtain a decree that a mortgagor shall be absolutely debarred from his right to redeem the mortgaged property is called a suit for foreclosure. In this case, the decree holder did not institute any mortgage suit for foreclosure. Right of redemption exists unless the mortgage property is sold on auction in accordance with the Ain, 2003 or barred by the Limitation Act, 1908. ...(Para 28)

As soon as auction sale is held in pursuance of the decree passed in a suit for recovery of loan money, the decree shall be final and accordingly, the right of redemption of the mortgage property be extinguished. In the instant case, auction was not held in accordance with law and the mortgage property was not sold on auction, therefore, it cannot be said that the right of redemption of the judgment-debtor has been extinguished. ...(Para 29)

To sum up, our final conclusion is as under:

i. **Auction notice was not issued in accordance with the mandatory requirement of law and auction process was not conducted as per the provision of section 33(1) of the Ain, 2003 and therefore, issuance of certificate of ownership by the stroke of a pen by the Executing Court is patently illegal.**

ii. **In case of issuance of certificate under section 33(5) of the Ain, 2003, it is obligatory to exhaust the auction process under sub-sections (1) and (4) of section 33 of the Ain, 2003. If the certificate of title is issued upon without exhausting the procedure of section 33(4) of the Ain, 2003 that will make the said provision useless and nugatory. In such a case, the Bank or Financial Institutions by a show up auction process under section 33(1) of the Ain, 2003 will straight apply for a certificate of title with an ulterior**

motive depriving the judgment-debtor from obtaining the actual market price of the property. So we hold the view that before issuance of certificate of title to the mortgage property or other property of the judgment-debtor, the Executing Court shall follow the provisions of sections 33(1) and 33(4) of the Ain, 2003 and after that it will fix the actual market price of the mortgage property or other property and succinctly be stated in the certificate of title so that the outstanding dues if any may be adjusted later on. In such a case, the Executing Court shall determine the actual market price of the mortgage property on the basis of a report from the Sub-Registrar of the local jurisdiction. Apart from the same, in certificate issuing order, the Executing Court shall state as to whether the decretal amount has been adjusted wholly, if not, the amount of outstanding dues should state therein. It repeatedly comes to our notice that the Executing Court mechanically allows the prayer of issuance of certificate of title. Mechanical issue of certificate of title is deprecated by this Court.

iii. **The Court should not be tempted to follow the precedent of one case by matching color of another case. The Court should not be oblivious that a single significant or material fact may change the entire edifice of the case as no two cases are similar. Every case has to decide upon its own facts and peculiar circumstances, therefore, the Court has to incur infinite painstaking.**

iv. **The principle enunciated in the case reported in 15 BLT(HCD) (2007) 425 and 63 DLR (2011) 282 is based on sound reasonings and the same was strengthen and fortified by incorporating sub-sections 7Ka and 7Kha of section 33 by amended Act XVI of 2010.**

v. **Sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated in order to mending the lacuna of the provision of sub-sections 5, 7 and 9 of section 33 of the Ain, 2003. Moreover, in the case of Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others, supra, the case of 15 BLT (HCD) (2007) 425 was not considered.**

vi. **Section 33(9) of the Ain, 2003 provides that when the rights of possession and use of any property under sub-section (5) or the title of any property under sub-section (7) vests in favour of the decree holder, the suit for execution of the said decree shall, subject to the provisions of section 28, be finally disposed of. The word 'final' is not absolute. It has to be read with sections 28, 33(7Ka) and 33(7Kha) of the latest amended Ain, 2010. Therefore, we strongly hold the view that mere issuance of certificate under sections 33(5) and 33(7) of the Ain, 2003 is not enough to finally dispose of the execution case. If the possession of the mortgage property or other property attached by the Executing Court for realizing outstanding loan money remains with the decree holder, the Executing Court may dispose of the execution case in view of section 33(9) of the Ain, 2003. Resorting to literal meaning of section 33(9) of the Ain, 2003 will be a great concern and it may cause devastating consequence,**

therefore, harmonious construction of the aforesaid provisions is sine qua non to fulfill the purpose of the legislature.

vii. As per the mandate of section 58 of the Ain, 2003, the Government may, by notification in the official gazette, make rules to give effect to the provisions of this Ain, 2003. Some provisions of the Ain, 2003, need more clarification and to give effect to the provisions therein for the smooth functioning of the Artha Rin Adalat. The Government may formulate comprehensive delegated legislations and the necessary forms like issuance of certificate of title, certificate of possession, enjoyment of usufructs and sale of the mortgage property etc. should be prescribed therein to do away with the confusions crept in the Ain, 2003.

viii. In view of section 5 of the Ain, 2003, it appears that two types of suits may be filed before the Artha Rin Adalat. One is mortgage suit for sale or foreclosure and the other is Artha Rin Suit for recovery of loan money. In the former suit, the Adalat shall pass preliminary decree and in the later suit, the Adalat shall pass final decree. A decree awarded by the Adalat in any suit instituted under the Ain, 2003 except mortgage suit under sub-section 3 of section 5 of the Ain, 2003, shall be deemed to be a preliminary decree of foreclosure in favour of the plaintiff financial institution; and as soon as the auction sale is held in continuation of the decree of the mortgage immovable property in favour of the plaintiff against the loan, the said preliminary decree shall be deemed to be the final decree, and the sale shall be final and the purchase shall be valid and thereafter, the judgment-debtor shall have no right to redeem the said mortgaged property.

ix. In this case, auction was not conducted in accordance with law. Moreover, no auction sale was held. Therefore, the right of redemption has not yet been extinguished by operation of the Ain, 2003 or the Limitation Act, 1908.

x. The petitioner Bank did not file any mortgage suit. Admittedly, it filed Artha Rin Suit for recovery of Tk. 5,20,370.62. Admittedly, the principal amount was Tk. 5,20,370.62 and execution case was filed for Tk. 6,51,888.82. The judgment-debtor on 03.12.2006 paid Tk. 2,00,000/-, on 12.12.2006 paid Tk. 95,000/-, on 13.12.2006 paid Tk. 4,00,000/-, on 17.09.2007 paid Tk. 21,000/- and on 08.10.2009 paid Tk. 2,00,000/- and as such the judgment-debtor deposited Tk. 9,16,000/-. The decree holder did not deny the same to the Executing Court. The decree holder-Bank could not submit any statement of accounts to show that those amounts were adjusted. Moreover, the judgment-debtor is ready to pay off the rest of the outstanding dues to protect his homestead. As the mortgage property has not been sold by auction, therefore, the right of redemption of the mortgage property has not yet been extinguished; the learned Judge of the Executing Court by applying his judicial conscience rightly passed the impugned order, which is laudable, hence, the same does not call for any interference.

xi. Title is legal ownership. Possession is physical control of the movable or immovable property. Possession is the prima facie evidence of ownership, called as nine out of ten points of law meaning that there is a presumption the possessor of a property or thing is owner of it and the other elements in order to have that property or thing must prove their title or better possessory right. Certificate of ownership or title equivalent to title deed. Title deed having no possession is only a paper transaction. Title deed is not acted upon unless possession is handed over to the title holder.

xii. It transpires from the record that the judgment-debtor-respondent No. 2 is engaged in furniture business in local district. In order to expand his business, he took loan of Tk. 3 lakhs later on extended upto 5 lakhs by mortgaging his last resort homestead measuring 0.1650 acres situated within the periphery of Kushtia District town on 10.03.2002. At the relevant time of issuance of certificate of ownership the value of the said property was more than one crore. The Executing Court assigning cogent and very convincing reasons allowed the application of the judgment-debtor. The main purpose of the Ain, 2003 is to realize the outstanding loan money of the Bank or any other Financial Institutions but not to snatch away the mortgage or any other property of the borrower.

...(Para 30)

JUDGMENT

Md. Zakir Hossain, J:

1. At the instance of the petitioner, the *Rule Nisi* was issued calling upon the respondents to show cause as to why the impugned order No. 30 dated 18.03.2013 passed by the respondent No. 1, the learned Joint District Judge, 1st Court and Artha Rin Adalat, Kushtia in Artha Rin Execution Case No. 06 of 2008 directing the petitioner Bank to submit the account of outstanding dues of the respondent No. 2 to the respondent No. 1 Court within 15(fifteen) days and also directing the respondent No. 2 to make the payment thereafter within 30(thirty) days from the date of submission of the said account as a pre-condition for the purpose of setting aside order Nos. 13 and 14 dated 08.07.2009 and 24.05.2010 respectively passed by the respondent No. 1 Court in the said Execution Case No. 6 of 2008 shall not be declared to have been issued 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. At the time of the issuance of the *Rule*, this Court was pleased to stay the operation of further proceedings of the Execution Case No. 6 of 2008, now pending before the respondent No. 1 for a period of 3(three) months, which was subsequently extended from time to time by this Court.

3. Facts leading to the issuance of the *Rule* may be stated, in brief, as follows:

The petitioner- City Bank Ltd. instituted Artha Rin Suit No. 2 of 2008 before the Court of Joint District Judge, 1st Court and Artha Rin Adalat, Kushtia, the respondent No. 1, shortly called the Adalat, against the respondent No. 2 for realization of outstanding dues to the tune of Tk. 5,20,370.62 and interest thereon. Having received the summons, the respondents entered appearance in the suit and contested the same denying the material averments set out in the plaint. After conclusion of the trial, the Adalat was pleased to pass a decree to the suit

by its judgment and decree dated 15.06.2008. Accordingly, the decree was drawn and signed on 22.06.2008. Thereafter, the decree holder-Bank put the decree into execution by filing Artha Rin Execution Case No. 06 of 2008 and a notice was floated for selling out the mortgage property on auction but no auction was held. Thereafter, on the prayer of the decree holder-Bank, the Executing Court issued a certificate of ownership or title in respect of mortgage property under section 33(7) of the Artha Rin Adalat Ain, 2003, hereinafter shortly referred to the Ain, 2003. Then the Executing Court sent the copy of the certificate of title for registration and accordingly, the same was registered. After that the Executing Court by its order No. 13, dated 08.07.2009 disposed of the execution case in view of section 33(9) of the Ain, 2003. On 18.03.2013, the judgment-debtor filed an application to get back the property by depositing the outstanding dues of the decretal amount and the application was resisted by the decree holder-Bank. Upon hearing, the Executing Court was pleased to allow the petition filed under section 57 of the Ain, 2003 with some conditions stipulated in the operative portion of the impugned order. Challenging the legality and propriety of the said order, the petitioner-decree holder-Bank moved this Court and obtained the *Rule* and stay therewith.

4. Mr. Ahsanul Karim along with Mr. Khairul Alam Choudhury, the learned Advocate appearing on behalf of the petitioner, submits that the impugned order No. 30 dated 18.03.2013 directing the petitioner-Bank to submit account of outstanding dues of the respondent No. 2, the judgment-debtor for the purpose of setting aside order Nos. 13 and 14 dated 08.07.2009 and 24.05.2010 respectively passed by the Executing Court is *ex facie* illegal in view of section 20 of the Ain, 2003. He also submits that after issuance of certificate under section 33(7) of the Ain, 2003, the execution case was duly disposed of and as such, the Executing Court became *functus officio;* hence, the impugned order is *ex facie* illegal and liable to be turned down, otherwise, it will entail serious loss to the petitioner-Bank. He further submits that in view of the provisions of section 20 of the Ain, 2003, the Executing Court had got no jurisdiction to entertain the application as made by the judgment-debtor, nevertheless, the Executing Court most illegally entertained the same and passed the impugned order and therefore, the same suffers from serious illegality. He next submits that the Executing Court has got no jurisdiction to review its earlier order, if the judgment-debtor is aggrieved by the interim order passed by the Executing Court, he may seek remedy under section 44 of the Ain, 2003.

5. He also contends that since the petitioner-Bank acquired title in the mortgage property in accordance with law, therefore, such right cannot be taken away without due process of law and handing over of possession of the mortgage property is not pre-condition for conferring title therein.

6. He further contends that the principles enunciated by the High Court Division in the cases of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others,*** reported in 15 BLT(HCD) (2007) 425 and ***Salma Begum v. Sonali Bank Limited and others,*** reported in 63 DLR (2011) 282 are in no way applicable to the facts and circumstances of the instant case at hand. In support of his argument, he relies on the cases of ***Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others,*** reported in 13 MLR (AD) (2008) 356; ***Bank Asia Limited v. Judge, Artha Rin Adalat, Chattogram and others,*** reported in 71 DLR (2019) 338 and ***Sheuly Khanam v. Artha Rin Adalat, 2nd Court, Dhaka and Others,*** reported in 17 BLC (2012) 579.

7. Finally, he submits that the Executing Court without conceiving the *ratio* enunciated by the Apex Court of the country most illegally and arbitrarily allowed the petition of the judgment-debtor, therefore, the same is liable to be turned down.

8. As against to this, Mr. Shasti Sarker, the learned Advocate appearing on behalf of the respondent No. 2, the judgment-debtor, submits that the learned Judge of the Executing Court after considering the facts and circumstances of the entire case and the *ratio* decided in the case of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others,*** *supra* and ***Salma Begum v. Sonali Bank Limited and others,*** supra, rightly and legally allowed the application of the judgment-debtor. He next submits that the mortgage property is the homestead of the judgment-debtor, if the judgment-debtor is dispossessed from the mortgage property, he will be thrown to the street and it will entail serious loss and injury to the judgment-debtor. He further submits that the judgment-debtor paid more than the decretal amount and as per the direction issued by the Executing Court, the judgment-debtor is ready to pay the entire outstanding dues with interest thereon, but unfortunately, the decree holder-Bank did not pay heed to this and also did not submit any statement of accounts as directed by the Executing Court. In fine, he contends that the facts and circumstances of the case of ***Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others****,* supra is in no way applicable to the present case as there are significant differences between the facts and circumstances of the aforesaid cases.

9. Now the moot issues are:

i. Was the certificate of title or ownership under section 33(7) of the Ain, 2003 legally issued in the Artha Rin Execution Case No. 06 of 2008?
ii. Was the Artha Rin Execution Case No. 06 of 2008 duly disposed of after issuance of certificate of title under section 33(7) of the Ain, 2003?
iii. Is the Executing Court legally empowered to review its own order in an appropriate case?
iv. Has the right to redemption of the mortgage property of the judgment-debtor been extinguished?
v. Is the impugned order legally sustainable in the eyes of law?

10. In order to find out the answers of the aforesaid issues, we have meticulously perused the entire materials on record along with annexures and the submissions advanced by the learned advocates of the parties and the legal positions intricately involved in this case with seriousness as it deserves.

11. It transpires from order sheet of the Artha Execution Case No. 06 of 2008 that notice was floated in the Daily Destiny and Daily Andoloner Bazar fixing 18.06.2009 for auction sale of the mortgage property, but none participated in the bid. Thereafter, the Executing Court fixed the date of 08.07.2009 for taking step by the decree holder-Bank. On 08.07.2009 the decree holder-Bank filed an application under section 33(7) of the Ain, 2003 for issuance of certificate of ownership. Upon hearing, the Adalat allowed the prayer of the decree holder by its order No. 13 dated 08.07.2009. The relevant portion of the order may be stated thus:

> *অদ্য ডিক্রিদার পক্ষের পদক্ষেপ গ্রহণের জন্য দিন ধার্য্য আছে। ডিক্রিদার অর্থঋণ আইন ২০০৩ এর ৩৩(৭) ধারা মোতাবেক বিবরণী সম্পত্তির মালিকানাস্বত্ব ডিক্রিদার ব্যাংকের উপর ন্যাস্ত করার প্রার্থনা করিয়াছেন। দায়িকপক্ষ (প্রকৃতপক্ষে ডিক্রিদারপক্ষ) কর্তৃক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার আওতায় আবেদন দাখিল বিষয়ে বিজ্ঞ কৌশুলীর বক্তব্য শুনলাম। দায়িক পক্ষ ডিক্রিকৃত টাকা পরিশোধ না করায় এবং অর্থঋণ আইন, ২০০৩ এর ৩৩(১), (২) ও (৩) ধারার বিধান মোতাবেক টাকা আদায়ের পদক্ষেপ গ্রহণ করার সত্ত্বেও ডিক্রিকৃত টাকা আদায় করা সম্ভব হয়নি। ডিক্রিদার ব্যাংক পক্ষ অর্থঋণ আইন, ২০০৩ এর ৩৩(৪) ও (৫)*

ধারার আওতায় কার্যক্রম গ্রহণের কোন পদক্ষেপ গ্রহণ না করে উক্ত বন্ধকি সম্পত্তি বাবদে মালিকানা চাওয়ার আগ্রহ প্রকাশ করে এ আবেদন দাখিল করিয়াছেন। সুতরাং ডিক্রিদার ব্যাংক এর প্রার্থনা মোতাবেক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার বিধান মোতাবেক দায়িক কর্তৃক ব্যাংক এর অনুকূলে বন্ধক দেওয়ার সম্পত্তির মালিকানা ডিক্রিদার ব্যাংক এর অনুকূলে ন্যাস্ত করণের ক্ষেত্রে কোন প্রতিবন্ধকতা নাই। এমতাবস্থায় ডিক্রিদার ব্যাংক কর্তৃক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার আওতায় দাখিলী আবেদন মঞ্জুর করা হলো। দায়িক পক্ষ কর্তৃক ব্যাংক এর অনুকূলে বন্ধকী তপশীল বর্ণিত সম্পত্তির মালিকানা ডিক্রিদার ব্যাংক এর অনুকূলে ন্যাস্ত হয়েছে মর্মে ঘোষণা করা হলো। তৎমর্মে ডিক্রিদার ব্যাংক এর অনুকূলে সনদপত্র ইস্যু করা হোক। প্রকাশ থাকে যে, উক্ত সনদপত্র তপশীল সম্পত্তির স্বত্বের দলিল হিসাবে বিবেচিত হবে। উক্তরূপ ইস্যুকৃত সনদপত্র রেজিষ্ট্রার জন্য সংশ্লিষ্ট সাব রেজিষ্ট্রারী অফিসে প্রেরণ করা হোক। তবে শর্ত থাকে যে, অর্থঋণ আদালত আইন, ২০০৩ এর ৩৩(৮) ধারার বিধান মোতাবেক কোন কর বা রেজিষ্ট্রী খরচ আদায় যোগ্য হবে না। এ মামলায় আর কিছুই করণীয় নাই। এ অবস্থায় অর্থঋণ আদালত আইন, ২০০৩ এর ৩৩(৯) ধারার বিধান মোতাবেক অত্র ডিক্রিজারী মোকদ্দমাটি চূড়ান্ত নিষ্পত্তি করা হলো।

(Underlined for emphasis)

12. Thereafter, by order No. 14, dated 24.05.2010, the ownership certificate was transmitted to the concerned sub-registry office for registration. It appears from the order No. 15 dated 23.06.2010 that the aforesaid certificate was duly registered. Thereafter, the decree holder-Bank did not file any execution case within the stipulated time for recovery of possession. Undisputedly, possession remains with the judgment-debtor. In view of the provision of section 28(3) of the Ain, 2003, the second execution case is to file within 1 year from the date of dismissal or settlement of the first or previous execution case, failing which the same shall be barred by limitation.

13. On 23.09.2012, the judgment-debtor filed an application under section 57 of the Ain, 2003 for setting aside order No. 13, dated 08.07.2009 and order No. 14, dated 24.05.2010. Thereafter, as many as 13 days were fixed for disposal of the application, but due to the adjournment petitions from both the sides, the Executing Court could not dispose of the application filed by the judgment-debtor. It appears from the record that the judgment-debtor paid Tk. 9,16,000/- to the decree holder by five installments and accordingly, submitted deposit slips. The contention of the judgment-debtor is that the decree holder-Bank did not adjust the deposited amount with the outstanding dues. After that, the Executing Court passed the following order:

"...জমাকৃত টাকা দায়িকের দেনার সাথে সমন্বয় হয় নাই। উহা সমন্বয়ের আদেশ হওয়া আবশ্যক। ডিক্রিদার পক্ষের বিজ্ঞ আইনজীবী নিবেদন করেন যে, উহা সমন্বয় করা আছে। দায়িক পক্ষ দাবীর সমর্থনে ৪(চার) খানা জমা রশিদ দাখিল করেছে। দায়িকের জমা টাকা প্রকৃতপক্ষে সমন্বয় করা আছে কিনা তা নির্ধারণ করা ন্যায় সঙ্গত। কাজেই ন্যায় বিচারের স্বার্থে দায়িকের নিকট প্রকৃতপক্ষে কত টাকা পাওনা আছে এবং দায়িক কত টাকা পরিশোধ করেছে তার একটা পূর্ণাঙ্গ হিসাব বিবরণী দাখিলের জন্য ডিক্রিদার পক্ষকে নির্দেশ দেওয়া গেল।"

(Underlined for emphasis)

14. Despite the solemn order of the Executing Court, Bank officials on different pleas took time but unfortunately, failed to submit any complete statement of accounts. Upon hearing, the application of the judgment-debtor dated 23.09.2012, the Executing Court allowed the prayer of the judgment-debtor by impugned order dated 18.03.2013. In this respect, the relevant portion of the impugned order passed by the Executing Court may be stated below for better appreciation and understanding:

"অত্র মামলায় স্বীকৃত মতে নালিশী জমি নিলাম বিক্রয় করা হয় নাই, ডিক্রিদারপক্ষ নালিশী জমির দখল প্রাপ্ত হয় নাই এবং দায়িক নালিশী তপশীল বর্ণিত জমির বাড়ীতে পরিবার পরিজন নিয়ে বসবাস করছে। ডিক্রিদারের মূল উদ্দেশ্য টাকা আদায় করা। দায়িক যেহেতেু ডিক্রিদারের পাওনা সমুদয় টাকা সুদ-আসল ও মামলার যাবতীয় খরচ সহ পরিশোধে রাজী আছেন, সেহেতু দায়িকের বসত বাড়ী বিক্রি করে ডিক্রিদারের টাকা আদায়ের কোন আবশ্যকতা নাই। ন্যায় বিচারে দায়িক পক্ষের বিগত ২৩/০১/২০১২ইং তারিখের অর্থঋণ আদালত আইন-২০০৩

এর ৫৭ ধারার বিধান মতে আনীত দরখাস্ত আপাততঃ আংশিক মঞ্জুর করা হল। আগামী ১৫(পনের) দিনের মধ্যে দায়িকের নিকট পাওনা সমুদয় টাকার হিসাব অত্র আদালতে দাখিলের জন্য এবং দায়িক টাকা প্রদান করলে তা গ্রহণের জন্য ডিক্রিদারপক্ষকে নির্দেশ দেয়া গেল। ডিক্রিদার কর্তৃক প্রদত্ত হিসাব প্রাপ্তির পর পরবর্তী ৩০(ত্রিশ) দিনের মধ্যে ডিক্রিদারের পাওনা সমুদয় টাকা পরিশোধের জন্য দায়িক পক্ষকে নির্দেশ দেয়া গেল। দায়িক সমুদয় টাকা জমা প্রদান করলে অত্র আদালতের ০৮/০৭/২০০৯ ইং তারিখের ১৩ নং আদেশ ও ২৪/০৫/২০১০ইং তারিখের ১৪ নং আদেশ রদ রহিতের আদেশ প্রদান করা হবে। দায়িক নির্ধারিত সময়ের মধ্যে সমুদয় টাকা পরিশোধে ব্যর্থ হলে অত্র আদেশ অকার্যকর বলে গণ্য হবে। উভয় পক্ষকে জ্ঞাত করানো হউক।"

(Underlined for emphasis)

15. Having received the order of the Executing Court, the decree holder-Bank did not submit the statement of accounts showing the outstanding dues of the judgment-debtor, rather the decree holder-Bank took several times for submitting statement of accounts but eventually, failed to do the same. After that the decree holder-Bank filed this writ petition.

16. Provisions of section 33 of the Ain, 2003 is so dry and complex. It basically describes the provision as to the procedure of auction sale of mortgage property or any other property of judgment-debtor, issuance of certificate in favour to the decree holder to sale mortgage property or to possess and enjoy the *usufructs* therein, and to hand over possession of the mortgage property to the decree holder or auction purchaser as the case may be. In order to conceive the complex provisions of law, one needs to go through the relevant provisions in conjunction with each other to make the same crystal clear. In this juncture, we should mention the entire provisions of law, which may read as follows:

৩৩। **নিলাম বিক্রয়** ।- (১) অর্থ ঋণ আদালত ডিক্রী বা আদেশ জারীর সময় কোন সম্পত্তি বিক্রয়ের ক্ষেত্রে বাদীর খরচে বিজ্ঞপ্তি প্রচারের তারিখ হইতে অন্যূন ১৫ (পনের) দিবসের সময় দিয়া সীলমোহরকৃত টেন্ডার আহ্বান করিবে, উক্ত বিজ্ঞপ্তি কমপক্ষে বহুল প্রচারিত একটি বাংলা জাতীয় দৈনিক পত্রিকায়, তদুপরি ন্যায় বিচারের স্বার্থে প্রয়োজন মনে করিলে স্থানীয় একটি পত্রিকায়, যদি থাকে, প্রকাশ করিবে; এবং আদালতের নোটিশ বোর্ডে লটকাইয়া ও স্থানীয়ভাবে ঢোল সহরত যোগেও উক্ত বিজ্ঞপ্তি প্রচার করিবে।

(২) প্রত্যেক দরদাতা, উদ্ধৃত দর অনূর্ধ্ব ১০,০০,০০০ (দশ লক্ষ) টাকা হইলে উহার ২০%, উদ্ধৃত দর ১০,০০,০০০ (দশ লক্ষ) টাকা অপেক্ষা অধিক এবং অনূর্ধ্ব ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকা হইলে উহার ১৫% এবং উদ্ধৃত দর ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকা অপেক্ষা অধিক হইলে উহার ১০% এর সমপরিমান টাকার, জামানতস্বরূপ, ব্যাংক ড্রাফট বা পে-অর্ডার আদালতের অনুকূলে দরপত্রের সহিত দাখিল করিবেন।

(২ক) দরপত্র সরাসরি নির্দিষ্ট দরপত্র বাক্সে কিংবা রেজিস্ট্রীকৃত ডাকযোগে নির্ধারিত সময়ের মধ্যে নির্ধারিত কর্তৃপক্ষের নিকট প্রেরণের মাধ্যমে দাখিল করিতে হইবে।

(২খ) অনূর্ধ্ব ১০,০০,০০০ (দশ লক্ষ) টাকার উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৩০ (ত্রিশ) দিবসের মধ্যে, ১০,০০,০০০ (দশ লক্ষ) টাকা অপেক্ষা অধিক এবং অনূর্ধ্ব ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকার উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৬০ (ষাট) দিবসের মধ্যে এবং ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকার অধিক উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৯০ (নব্বই) দিবসের মধ্যে, দরদাতা সমুদয় মূল্য পরিশোধ করিবেন এবং তাহা করিতে ব্যর্থ হইলে আদালত জামানতের টাকা বাজেয়াপ্ত করিবেঃ

তবে শর্ত থাকে যে, সংশ্লিষ্ট ডিক্রীদার-আর্থিক প্রতিষ্ঠান লিখিত দরখাস্ত দাখিল করিয়া দায়িকের সুবিধার্থে সময়সীমা বর্ধিত করিবার জন্য অনুরোধ করিলে, আদালত এই উপ-ধারার অধীন নির্ধারিত সময়সীমার অনূর্ধ্ব ৬০ (ষাট) দিবস পর্যন্ত বর্ধিত করিতে পারিবে।

(২গ) ডিক্রীদারের পক্ষে যদি লিখিতভাবে আদালতকে এই মর্মে অবহিত করা হয় যে, উপ-ধারা (২) এর অধীন দাখিলকৃত দরপত্রে সম্পত্তির প্রস্তাবকৃত মূল্য অস্বাভাবিকভাবে অপর্যাপ্ত বা কম এবং আদালত যদি উহাতে একমত পোষন করে, তাহা হইলে আদালত, কারণ লিপিবদ্ধ করিয়া, উক্ত দর প্রস্তাব অগ্রাহ্য করিতে পারিবে।

(৩) উপ-ধারা (২খ) এর অধীনে জামানত বাজেয়াপ্ত হইলে উহার অর্থ ডিক্রীদারকে প্রদান করা হইবে, ডিক্রীকৃত দাবীর সহিত উক্ত অর্থ সমন্বয় করা হইবে, এবং অতঃপর আদালত, দ্বিতীয় সর্বোচ্চ দরদাতা কর্তৃক উদ্ধৃত দর এবং পূর্বে বাজেয়াপ্তকৃত জামানত একত্রে সর্বোচ্চ দরদাতা কর্তৃক উদ্ধৃত দর অপেক্ষা কম না

হইলে, উক্ত দ্বিতীয় সর্বোচ্চ দরদাতাকে সম্পত্তি নিলাম খরিদ করিতে আহ্বান করিবে; এবং দ্বিতীয় সর্বোচ্চ দরদাতা আহুত হইবার পর উপ-ধারা (২খ) এ নির্ধারিত সময়সীমার মধ্যে সম্পুর্ণ মূল্য পরিশোধ করিবেন এবং তাহা করিতে ব্যর্থ হইলে তাঁহার জামানত বাজেয়াপ্ত হইবে এবং জামানতের উক্ত অর্থ ডিক্রীদারকে ডিক্রীর দাবীর সহিত সমন্বয় করিবার জন্য প্রদান করা হইবে।

(৪) কোন সম্পত্তি উপ-ধারা (১), (২), (২ক), (২খ), (২গ) ও (৩) এর বিধান অনুসারে নীলামে বিক্রয় করা সম্ভব না হইলে, আদালত পুনরায় কমপক্ষে বহুল প্রচারিত ২(দুই)টি বাংলা জাতীয় দৈনিক পত্রিকায়, তদুপরি ন্যায় বিচারের স্বার্থে প্রয়োজন মনে করিলে স্থানীয় একটি পত্রিকায়, যদি থাকে, উপ-ধারা (১) এর অনুরূপ পদ্ধতিতে বিজ্ঞপ্তি প্রকাশ করাইয়া এবং আদালতের নোটিশ বোর্ডে নোটিশ টাংগাইয়া ও স্থানীয়ভাবে ঢোল সহরতযোগে সীলমোহরকৃত টেন্ডার আহ্বান করিবে; এবং বিক্রয় ও বাজেয়াপ্ত বিষয়ে উপ-ধারা (২), (২ক), (২খ), (২গ) ও (৩) এ উল্লিখিত বিধান অনুসরণ করিবে।

(৪ক) উপ-ধারা (১) ও (৪) এর অধীন পত্রিকার মাধ্যমে বিজ্ঞপ্তি জারী করিবার ক্ষেত্রে, বাদী লিখিতভাবে আদালতকে যে পত্রিকার নাম অবহিত করিবেন আদালত তদনুযায়ী উক্ত পত্রিকায় বিজ্ঞপ্তি প্রকাশ করাইবে।

(৫) কোন সম্পত্তি উপ-ধারা (১), (২), (২ক), (২খ), (২গ), (৩) ও (৪) এর বিধান অনুসারে বিক্রয় করা সম্ভব না হইলে, উক্ত সম্পত্তি, ডিক্রীকৃত দাবী পরিপূর্ণভাবে পরিশোধিত না হওয়া পর্যন্ত, দখল ও ভোগের অধিকারসহ ডিক্রীদারের অনুকূলে ন্যস্ত করা হইবে, এবং ডিক্রীদার উপ-ধারা (১), (২), (২ক), (২খ), (২গ), (৩) ও (৪) এর বিধান অনুসারে উক্ত সম্পত্তি বিক্রয় করিয়া অপরিশোধিত ডিক্রীর দাবী আদায় করিতে পারিবে, এবং আদালত ঐ মর্মে একটি সার্টিফিকেট ইস্যু করিবে।

(৬) ডিক্রীকৃত অংকের অতিরিক্ত অর্থ বিক্রয় বাবদ আদায় হইলে, উক্ত অতিরিক্ত অর্থ দায়িককে ফেরৎ প্রদান করিতে হইবে, এবং বিক্রীকৃত অর্থ ডিক্রীর দাবী অপেক্ষা কম হইলে অবশিষ্ট অর্থ বাবদ, ২৮ ধারার বিধান সাপেক্ষে, আরো জারীর মামলা গ্রহণযোগ্য হইবে।

(৬ক) উপ-ধারা (৫) ও (৬) এর বিধানে যাহা কিছুই থাকুক না কেন, যেক্ষেত্রে কোন সম্পত্তি, দখল ও ভোগের অধিকারসহ, ডিক্রিদারের অনুকূলে ন্যস্ত করা সত্বেও ডিক্রিদার উক্ত সম্পত্তি উপযুক্ত মূল্যে প্রকাশ্য নিলামে বিক্রয় করিতে অসমর্থ হন, সেক্ষেত্রে উক্ত সম্পত্তির নির্ধারিত মূল্য কিংবা যুক্তিসংগত আনুমানিক মূল্য বাদ দিয়া, ধারা ২৮ এর বিধান সাপেক্ষে, জারীর মামলা দায়ের করা যাইবে।

(৬খ) এই ধারায় ভিন্নতর যাহা কিছুই থাকুক না কেন, উপ-ধারা (৫) এর অধীন কোন সমপত্তি, দখল ও ভোগের অধিকারসহ, ডিক্রীদারের অনুকূলে ন্যস্ত হইবার ক্ষেত্রে, অনুরূপ ন্যস্ত হইবার ৬ (ছয়) বৎসরের মধ্যে উপ-ধারা (৭) এর অধীন ডিক্রীদারের পক্ষে আদালতের নিকট লিখিত আবেদন করিয়া উক্ত সম্পত্তির মালিকানা অর্জন করা যাইবে এবং তাহা না করা হইলে ৬ (ছয়) বৎসর উত্তীর্ণ হইবার সাথে সাথেই উক্ত সম্পত্তিতে ডিক্রীদারের মালিকানা স্বয়ংক্রিয়ভাবেই বর্তিত হইবে এবং সংশ্লিষ্ট আদালত হইতে তৎমর্মে ঘোষণা বা সনদ গ্রহণ করা যাইবে।

(৭) উপ-ধারা (৪) ও (৫) এর বিধান সত্ত্বেও, ডিক্রীদার, উল্লিখিত সম্পত্তি মালিকানাসত্ত্বে পাইতে আগ্রহী মর্মে আদালতের নিকট লিখিতভাবে আবেদন করিলে, আদালত, উপ-ধারা (১), (২), (২ক), (২খ), (২গ) ও (৩) এর বিধানাবলীর কোনরূপ হানি না ঘটাইয়া, উপ-ধারা (৪) ও (৫) এর কার্যক্রম অনুসরণ করা হইতে বিরত থাকিবে; এবং ডিক্রীদারের প্রার্থিতমতে উল্লেখিত সম্পত্তির স্বত্ব ডিক্রীদারের অনুকূলে ন্যস্ত হইয়াছে মর্মে ঘোষণা প্রদানপূর্বক তৎমর্মে একটি সনদপত্র জারী করিবে এবং জারীকৃত এইরূপ সনদপত্র সত্ত্বের দলিল হিসাবে গণ্য হইবে; এবং আদালত উহার একটি অনুলিপি সংশ্লিষ্ট স্থানীয় সাব- রেজিষ্ট্রারের অফিসে নিবন্ধনের জন্য প্রেরণ করিবে।

(৭ক) উপ-ধারা (৫) বা (৭) এর অধীন সম্পত্তির দখল আদালতযোগে প্রাপ্ত হওয়া আবশ্যক হইলে, ডিক্রীদারের লিখিত আবেদনের ভিত্তিতে আদালত ডিক্রীদারকে উক্ত সম্পত্তির দখল অর্পণ করিতে পারিবে।

(৭খ) উপ-ধারা (৭ক) এর অধীন ডিক্রীদারকে সম্পত্তির দখল অর্পণ করিবার পূর্বে আদালতকে পুনঃ নিশ্চিত হইতে হইবে যে, উক্ত সম্পত্তিই আইনানুগভাবে উহার প্রকৃত মালিক কর্তৃক ডিক্রীর সংশ্লিষ্ট ঋণের বিপরীতে বন্ধক প্রদান করা হইয়াছিল অথবা ডিক্রী কার্যকর করিবার লক্ষ্যে দায়িকের প্রকৃত স্বত্ব দখলীয় সম্পত্তি হিসাবে উক্ত সম্পত্তিই ক্রোক করা হইয়াছিল।

(৮) বর্তমানে প্রচলিত অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, উপ-ধারা (৭) এর অধীনে জারীকৃত সনদপত্র বাবদ কোন কর বা রেজিষ্ট্রেশন ফি আদায়যোগ্য হইবে না।

(৯) উপ-ধারা (৫) এর অধীনে সম্পত্তির দখল ও ভোগের অধিকার অথবা উপ-ধারা (৭) এর অধীনে সম্পত্তির স্বত্ত্ব ডিক্রীদারের অনুকূলে ন্যস্ত হইলে, ধারা ২৮ এর বিধান সাপেক্ষে, উক্ত ডিক্রী জারী মামলার চূড়ান্ত নিষ্পত্তি হইবে।

(Underlined for emphasis)

17. It transpires from the order sheets that the Executing Court did not comply with the provisions of section 33(1) of the Ain, 2003. It is a mandatory requirement to publish an auction notice in a widely circulated daily newspaper. The daily Destiny has not got no existence at present and undisputedly, at the relevant time it was not a widely circulated daily newspaper. As the auction notice was not published in a widely circulated daily newspaper, therefore, prospective bidders could not participate in the bid. Moreover, the decree holder-Bank did not take any step under section 33(4) of the Ain, 2003 to sell out the mortgage property on auction and thereby, negated the provision of section 33(4) of the Ain, 2003.

18. On meaningful reading of sub-sections (5), (7), (7Ka) and (7Kha) of section 33 of the Ain, 2003, it transpires that where the possession of property requires to be obtained through intervention of the Court, the decree holder has to file an application in writing to the Executing Court to hand over possession of the said property to the decree holder or the auction purchaser as the case may be and before handing over possession of the property, the Executing Court shall be reassured that it is the property which was lawfully mortgaged by its original owner against the loan liabilities or which was attached under the original title and possession of the judgment-debtor for execution of the decree. The provisions of sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated by the Artha Rin Adalat Ain (Amendment) Act, 2010 (Act XVI of 2010) in order to protect the property of the actual owner. In this case, admittedly, the possession of the mortgage property remains with the judgment-debtor. If the execution case is disposed of upon issuance of certificate of title, the decree holder will not be able to obtain the possession without the intervention of the Court. Therefore, the contention of the petitioner is that upon issuance of certificate of title under section 33(7) of the Ain, 2003, the Executing Court has become *functus officio* is fallacious and not based on cogent reasons. We may take a look at the other part of the coin, if possession remains with the decree holder, then upon issuance of certificate under sections 33(5) or 33 (7) the Executing Court may dispose of the Artha Rin Execution Case by invoking section 33(9) of the Ain, 2003 subject to the provision of section 28 of the Ain, 2003.

19. In the case of 13 MLR (AD) (2008) 356, the Executing Court attempted to sell the mortgage property in auction as per the provision of the Ain, 2003, but it could not be sold in auction for the reason that the prices offered by the bidders were too low. Thereafter, the decree holder-Bank filed an application under section 33(5) of the Ain, 2003 praying for issuing certificate in respect of mortgage property in favour of it and by the order dated 30.08.2006 the said prayer of the decree holder-Bank was allowed. After issuance of the certificate under section 33(5) of the Ain, 2003 in favour of the decree holder-Bank, the petitioner filed an application under sections 33(5), 44 and 57 of the Ain, 2003 praying for staying the auction sale of the mortgage property by the decree holder-Bank. The said application was registered as Miscellaneous Case No. 22 of 2007. By the impugned order No. 23, dated 19.08.2007 the learned Judge of the Artha Rin Adalat rejected the said application holding that since the mortgage property was auction-sold by the bank and since the execution case was disposed of finally, the court became functus officio and as such there was no scope to allow the application under sections 49(2), 44 and 57 of the Ain, 2003. Challenging the said order the judgment-debtor moved this Court and eventually failed and

thereafter, he went to the Appellate Division. Upon hearing, the Appellate Division summarily dismissed the CPLA No. 1542 of 2007. The aforesaid judgment was passed on 27.03.2008 before incorporating sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 by Act XVI of 2010. The facts and circumstances of the aforesaid case are significantly distinguishable from those of the instant case at hand.

20. The facts and circumstances of the case of ***Feroza Begum v. Artha Rin Adalat No. 4, Dhaka,*** reported in 36 BLD (AD) 31 are also distinguishable from the instant case at hand. In the aforesaid case, it was observed:

> *From the facts narrated above, it appears that the petitioner had a number of opportunities to pay off the decretal amount. She was a party in the execution case and had the opportunity to clear the bank's dues earlier. We find from the impugned judgment that the High Court Division verbally directed the petitioner to pay off at least some amount to show willingness of the petitioner to clear up the outstanding dues, which she failed. The clear finding of the High Court Division was that the writ petition in its present form is not maintainable. Nevertheless, an opportunity was given to the petitioner to clear the bank's dues, which she failed to do.*

21. In the case of ***Sheuly Khanam v. Artha Rin Adalat, 2nd Court, Dhaka,*** supra, this division did not consider the latest amendment of the Artha Rin Adalat Ain, 2003 so far it relates to sections 33(7ka) and 33(7Kha). Apart from the same, the very facts and circumstances of the case are quite distinguishable with those of the instant case.

22. In the case of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others***, *supra*, the Author Judge was his Lordship Mr. Justice A.B.M. Khairul Haque (as his lordship was then). In the said case, it was held:

> *It appears that the decree-holder appellant filed an application praying for an Order to put the decree-holder into possession of the concerned property as it was allegedly obstructed by the judgment-debtor but the learned Judge, Artho Rin Court, dismissed the petition on the ground that on the issuance of the certificate of title in favour of the decree-holder, the execution case had already been disposed of and the Court has got nothing further to do in this respect. With respect, we are unable to agree with the said views of the learned Judge, Artho Rin Court. Sub-Section 7 envisages vesting of ownership of the property of the judgment-debtor upon the decree-holder. The said vesting of ownership includes delivery of possession of the property. Without the delivery of possession, the execution case cannot be disposed of.*

23. In the case of ***Salma Begum v. Sonali Bank Limited and others,*** supra, it was held-

It is our view that the execution case does not come to an end with the issuance of a certificate under section 33(5) of the Artha Rin Adalat Ain, 2003. Rather, it remains alive till the possession of the property alleged to have been sold in auction, was handed over to the auction purchaser. This finding gets support from a decision reported in 15 BLT at page 425 wherein has been held that sub-section 7 of Artha Rin Adalat envisages vesting of ownership of the property of the judgment debtor upon the decree-holder. The said vesting of ownership includes delivery of possession of the property. Without the delivery of possession, the execution case cannot be disposed of.

24. The doctrine of *stare decisis* which is the binding force of precedent may be destroyed if a statute is enacted inconsistent with the decision or if it is reversed or overruled by a higher Court or it is based on the doctrine of *per incuriam*. The doctrine of *stare decisis* should not be regarded as a rigid and inevitable doctrine, which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The Court may, in an appropriate case, overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. Every case has to consider its own merit, peculiar facts and circumstances and therefore, in following the precedent, the Court must be very careful and cautious. In this respect, we are tempted to discuss the observations of Lord Denning in the matter of applying judicial precedent which have become *locus classicus*:

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*
>
> ...
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

25. The contention of the learned Advocate of the petitioner that upon issuance of the certificate under section 33(7) of the Ain, 2003, the Executing Court has nothing to do but to dispose of the execution case finally is not based on any rationality. For the sake of argument, if the Court becomes *functus officio*, how later on the Court will entertain another execution case or any other application for handing over possession if it remains with the judgment-debtor. The Court may correct its own mistakes by invoking, the umbrella provision, embodied under section 57 of the Ain, 2003 to do justice and to undo injustice despite the provisions of section 20 of the Ain, 2003. It has to remember that the provisions of section 20 of the Ain, 2003 is neither absolute nor sacrosanct nor untouchable. The parties to the suit cannot and should not suffer for the mistake committed by the Court itself. On perusal of the entire edifice of the Ain, 2003, it becomes visible to us that the Code of Civil Procedure, 1908 shall be applicable subject to not being inconsistent with the provisions of the Ain, 2003. The Adalat may review its own order by invoking section 57 of the Ain, 2003 with extreme circumspection in an exceptional case.

26. In the case at hand, it is our considered view that the execution case has not legally been disposed of, as possession of the mortgage property had not been made over to the decree holder, therefore, the Court has not become *functus officio* in entertaining the application filed by the judgment-debtor. Admittedly, the petitioner-judgment debtor at first took loan of Tk. 3 lakhs and subsequently, it was extended upto 5 lakhs. Decree was passed to the tune of Tk. 5,20,370.62. The execution case was filed for recovery of Tk. 6,51,888.82 (decretal amount of Tk. 5,20,370.62 + interest Tk. 55,506.20 + costs of case including bill of Newspapers Tk. 76,012). The judgment-debtor in different installments paid Tk. 9,16,000/-. The payment of the judgment-debtor has not been denied by the decree holder. But the decree holder did not produce any statement of accounts to show as to whether the said amount was adjusted with the outstanding dues of the petitioner despite the order of the Executing Court. To protect his homestead, the judgment-debtor was ready to pay off the outstanding dues, but

unfortunately, the Bank officials having obtained the direction of the Court did not submit the statement of accounts showing outstanding dues.

27. It persistently comes to our notice that Bank officials are very much reluctant to provide the bank statement containing the outstanding dues of the borrower even after issuance of the direction of the Court. This sort of attitude is tantamount to contempt of Court. In this circumstance, if bank official does not comply with the order of the court, then the court may proceed against them under section 52 of the Ain, 2003 or in an appropriate case, it may refer to the High Court Division for taking punitive measure against the delinquent officials. It is expected that Bank and Financial Institutions should comply with the order of the Court with utmost expedition.

28. It also appears from the record that admittedly, the petitioner-Bank filed Artha Rin Suit for recovery of loan money but did not file any mortgage suit under section 5(2) of the Ain, 2003. If the Bank or financial institute wishes to foreclose down the right of redemption of the mortgagor, then it has to file mortgage suit and in that case the decree awarded by the Adalat shall be preliminary decree and in all other cases, the decree awarded by the Court in a suit filed for recovery of loan money shall be the final decree. A suit to obtain a decree that a mortgagor shall be absolutely debarred from his right to redeem the mortgaged property is called a suit for foreclosure. In this case, the decree holder did not institute any mortgage suit for foreclosure. Right of redemption exists unless the mortgage property is sold on auction in accordance with the Ain, 2003 or barred by the Limitation Act, 1908.

29. As soon as auction sale is held in pursuance of the decree passed in a suit for recovery of loan money, the decree shall be final and accordingly, the right of redemption of the mortgage property be extinguished. In the instant case, auction was not held in accordance with law and the mortgage property was not sold on auction, therefore, it cannot be said that the right of redemption of the judgment-debtor has been extinguished. In this respect, the provisions of sections 5(1), 5(2), 5(3) and 5(4) of the Ain, 2003 are placed hereunder for understanding the consequence of Mortgage Suit and Suit for recovery of loan money under the Ain, 2003.

> ৫। **আদালতের একক এখ্‌তিয়ার** ।- (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।
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> (২) এই আইনের অধীন আর্থিক প্রতিষ্ঠান, স্থাবর সম্পত্তি জামানত স্বরূপ বন্ধক গ্রহণপূর্বক প্রদত্ত ঋণের বিপরীতে উক্ত বন্ধকী স্থাবর সম্পত্তির বিক্রয় (Sale) বা নিষ্ক্রিয় সমাপ্তির (Foreclosure) উদ্দেশ্যে The Transfer of Property Act, 1882 (Act No. IV of 1882) এর section 67 এর অধীন এবং The Code of Civil Procedure, 1908 (Act No. V of 1908) এর Order XXXIV এর বিধান অনুযায়ী কোন বন্ধকী মামলা (Mortgage suit) দায়ের করিতে চাহিলে, উক্ত মামলাও এই আইনের অধীন প্রতিষ্ঠিত অর্থ ঋণ আদালতেই দায়ের করিতে হইবে; এবং এইরূপ ক্ষেত্রে The Code of Civil Procedure, 1908 এর বিধানসমূহ এই আইনের বিধানসমূহের সহিত, যতদূর সম্ভব, সমন্বয়ের মাধ্যমে প্রযোজ্য হইবে।
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> (৩) উপ-ধারা (২) এর অধীন আর্থিক প্রতিষ্ঠানকর্তৃক দায়েরকৃত মামলা নিষ্ক্রিয় সমাপ্তির (Foreclosure) উদ্দেশ্যে একটি বন্ধকী মামলা (Mortgage suit) হইলে, কেবলমাত্র সেই ক্ষেত্রে আদালত কর্তৃক প্রদত্ত ডিক্রী প্রাথমিক ডিক্রী (Preliminary decree) হইবে এবং অন্যান্য সকল ক্ষেত্রে ঋণ আদায়ার্থ দায়েরকৃত মামলায় আদালত কর্তৃক প্রদত্ত ডিক্রী চূড়ান্ত ডিক্রী (Final decree) হইবে।
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> (৪) The Transfer of Property Act, 1882 অথবা বর্তমানে প্রচলিত অন্য কোন আইনে বিপরীত যাহা কিছুই থাকুক না কেন, উপ-ধারা (৩) এর অধীন বন্ধকী মামলা ব্যতিরেকে, এই আইনের অধীন দায়েকৃত কোন মামলায়, আদালত কর্তৃক প্রদত্ত ডিক্রী বাদী আর্থিক প্রতিষ্ঠানের পক্ষে নিষ্ক্রিয় সমাপ্তির (Foreclosure) প্রাথমিক ডিক্রী হিসাবে গণ্য হইবে; এবং ঋণের বিপরীতে বাদীর অনুকূলে বন্ধকী স্থাবর সম্পত্তি ডিক্রীর ধারাবাহিকতায়

নিলাম বিক্রয় হওয়া মাত্রই উক্ত প্রাথমিক ডিক্রী চূড়ান্ত ডিক্রী হিসাবে গণ্য হইবে, এবং বিক্রয় চূড়ান্ত ও ক্রয় বৈধ গণ্য হইবে এবং অতঃপর উক্ত সম্পত্তি পুনরুদ্ধার করিবার কোনরূপ অধিকার (Right to redeem) বিবাদী-দায়িকের থাকিবে না।

(Underlined for emphasis)

30. To sum up, our final conclusion is as under:

i. Auction notice was not issued in accordance with the mandatory requirement of law and auction process was not conducted as per the provision of section 33(1) of the Ain, 2003 and therefore, issuance of certificate of ownership by the stroke of a pen by the Executing Court is patently illegal.

ii. In case of issuance of certificate under section 33(5) of the Ain, 2003, it is obligatory to exhaust the auction process under sub-sections (1) and (4) of section 33 of the Ain, 2003. If the certificate of title is issued upon without exhausting the procedure of section 33(4) of the Ain, 2003 that will make the said provision useless and nugatory. In such a case, the Bank or Financial Institutions by a show up auction process under section 33(1) of the Ain, 2003 will straight apply for a certificate of title with an ulterior motive depriving the judgment-debtor from obtaining the actual market price of the property. So we hold the view that before issuance of certificate of title to the mortgage property or other property of the judgment-debtor, the Executing Court shall follow the provisions of sections 33(1) and 33(4) of the Ain, 2003 and after that it will fix the actual market price of the mortgage property or other property and succinctly be stated in the certificate of title so that the outstanding dues if any may be adjusted later on. In such a case, the Executing Court shall determine the actual market price of the mortgage property on the basis of a report from the Sub-Registrar of the local jurisdiction. Apart from the same, in certificate issuing order, the Executing Court shall state as to whether the decretal amount has been adjusted wholly, if not, the amount of outstanding dues should state therein. It repeatedly comes to our notice that the Executing Court mechanically allows the prayer of issuance of certificate of title. Mechanical issue of certificate of title is deprecated by this Court.

iii. The Court should not be tempted to follow the precedent of one case by matching color of another case. The Court should not be oblivious that a single significant or material fact may change the entire edifice of the case as no two cases are similar. Every case has to decide upon its own facts and peculiar circumstances, therefore, the Court has to incur infinite painstaking.

iv. The principle enunciated in the case reported in 15 BLT(HCD) (2007) 425 and 63 DLR (2011) 282 is based on sound reasonings and the same was strengthen and fortified by incorporating sub-sections 7Ka and 7Kha of section 33 by amended Act XVI of 2010.

v. Sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated in order to mending the lacuna of the provision of sub-sections 5, 7 and 9 of section 33 of the Ain, 2003. Moreover, in the case of **Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others**, supra, the case of 15 BLT (HCD) (2007) 425 was not considered.

vi. Section 33(9) of the Ain, 2003 provides that when the rights of possession and use of any property under sub-section (5) or the title of any property under sub-section (7) vests in favour of the decree holder, the suit for execution of the said decree shall, subject to the provisions of section 28, be finally disposed of. The word 'final' is not absolute. It has to be read with sections 28, 33(7Ka) and 33(7Kha) of the latest amended Ain, 2010. Therefore, we strongly hold the view that mere issuance of certificate under sections 33(5) and 33(7) of the Ain, 2003 is not enough to finally dispose of the execution case. If the possession of the mortgage property or other property attached by the Executing Court for realizing outstanding loan money remains with the decree holder, the Executing Court may dispose of the execution case in view of section 33(9) of the Ain, 2003. Resorting to literal meaning of section 33(9) of the Ain, 2003 will be a great concern and it may cause devastating consequence, therefore, harmonious construction of the aforesaid provisions is sine qua non to fulfill the purpose of the legislature.

vii. As per the mandate of section 58 of the Ain, 2003, the Government may, by notification in the official gazette, make rules to give effect to the provisions of this Ain, 2003. Some provisions of the Ain, 2003, need more clarification and to give effect to the provisions therein for the smooth functioning of the Artha Rin Adalat. The Government may formulate comprehensive delegated legislations and the necessary forms like issuance of certificate of title, certificate of possession, enjoyment of usufructs and sale of the mortgage property etc. should be prescribed therein to do away with the confusions crept in the Ain, 2003.

viii. In view of section 5 of the Ain, 2003, it appears that two types of suits may be filed before the Artha Rin Adalat. One is mortgage suit for sale or foreclosure and the other is Artha Rin Suit for recovery of loan money. In the former suit, the Adalat shall pass preliminary decree and in the later suit, the Adalat shall pass final decree. A decree awarded by the Adalat in any suit instituted under the Ain, 2003 except mortgage suit under sub-section 3 of section 5 of the Ain, 2003, shall be deemed to be a preliminary decree of foreclosure in favour of the plaintiff financial institution; and as soon as the auction sale is held in continuation of the decree of the mortgage immovable property in favour of the plaintiff against the loan, the said preliminary decree shall be deemed to be the final decree, and the sale shall be final and the purchase shall be valid and thereafter, the judgment-debtor shall have no right to redeem the said mortgaged property.

ix. In this case, auction was not conducted in accordance with law. Moreover, no auction sale was held. Therefore, the right of redemption has not yet been extinguished by operation of the Ain, 2003 or the Limitation Act, 1908.

x. The petitioner Bank did not file any mortgage suit. Admittedly, it filed Artha Rin Suit for recovery of Tk. 5,20,370.62. Admittedly, the principal amount was Tk. 5,20,370.62 and execution case was filed for Tk. 6,51,888.82. The judgment-debtor on 03.12.2006 paid Tk. 2,00,000/-, on 12.12.2006 paid Tk.

95,000/-, on 13.12.2006 paid Tk. 4,00,000/-, on 17.09.2007 paid Tk. 21,000/- and on 08.10.2009 paid Tk. 2,00,000/- and as such the judgment-debtor deposited Tk. 9,16,000/-. The decree holder did not deny the same to the Executing Court. The decree holder-Bank could not submit any statement of accounts to show that those amounts were adjusted. Moreover, the judgment-debtor is ready to pay off the rest of the outstanding dues to protect his homestead. As the mortgage property has not been sold by auction, therefore, the right of redemption of the mortgage property has not yet been extinguished; the learned Judge of the Executing Court by applying his judicial conscience rightly passed the impugned order, which is laudable, hence, the same does not call for any interference.

xi. Title is legal ownership. Possession is physical control of the movable or immovable property. Possession is the prima facie evidence of ownership, called as nine out of ten points of law meaning that there is a presumption the possessor of a property or thing is owner of it and the other elements in order to have that property or thing must prove their title or better possessory right. Certificate of ownership or title equivalent to title deed. Title deed having no possession is only a paper transaction. Title deed is not acted upon unless possession is handed over to the title holder.

xii. It transpires from the record that the judgment-debtor-respondent No. 2 is engaged in furniture business in local district. In order to expand his business, he took loan of Tk. 3 lakhs later on extended upto 5 lakhs by mortgaging his last resort homestead measuring 0.1650 acres situated within the periphery of Kushtia District town on 10.03.2002. At the relevant time of issuance of certificate of ownership the value of the said property was more than one crore. The Executing Court assigning cogent and very convincing reasons allowed the application of the judgment-debtor. The main purpose of the Ain, 2003 is to realize the outstanding loan money of the Bank or any other Financial Institutions but not to snatch away the mortgage or any other property of the borrower.

31. Having regard to the facts and circumstances of the entire case and intricate questions of law involved in this case, we are of the view that the *Rule* is devoid of any substance as all the moot issues stand decided against the petitioner-Bank. Consequently, the *Rule* shall fall through.

32. As a result, the *Rule* is discharged, however, without passing any order as to costs. The earlier order of stay granted by this Court thus stands vacated and recalled.

33. Let a copy of the judgment be sent down to the Court below at once.