17 SCOB [2023] HCD 20

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

Writ Petitions No. 6846 of 2016

Md. Jahirul Hoque
..... Petitioner
Vs.
Judge, Artha Rin Adalat, Chattogram and others
..... Respondents

Ms. Afroza Nazneen Akter, Advocate
....For the petitioner
Mr. Tushar Kanti Roy, DAG
.....For the respondent No.1
Mr. Khondaker Iqbal Ahmed, Advocate
.....For the respondent No.3.
Heard and Judgment on 09.06.2022.

Present:
Mr. Justice J. B. M. Hassan
And
Mr. Justice Razik Al Jalil
And
Mr. Justice Md. Zakir Hossain

Editors' Note:
The petitioner, a guarantor to the loan in question, filed this writ petition without surrendering before the court, when the learned Judge of the Artha Rin Adalat, in an execution case, awarded civil detention against him under section 34 (1) of the Artha Rin Adalat Ain, 2003. The petitioner claimed that the decree holder bank had not filed the application as per requirement of section 34 of the act and the adalat had issued the impugned order of detention without exhausting all process against the principal borrower for realizing decretal dues. On the other hand, the respondent no 3-decree holder bank claimed that being fugitive from justice the petitioner couldn't claim relief. Moreover, he has alternative remedy of appeal and so the writ is not maintainable. The High Court Division held that the writ petition is maintainable on the ground that a Judgement Debtor cannot be treated as a fugitive accused and the order of detention being an interlocutory order, appeal cannot be preferred against the same. On the claim of the petitioner the Court held that the execution case can proceed against all the judgment debtors simultaneously and privilege of a guarantor to become liable to repay after borrower's default remains valid only before instituting the suit. The Court has made the rule absolute on the ground that decree holder bank has not filed the application, with verification or affidavit, under section 34 of the Artha Rin Adalat Ain, 2003 in accordance with law.

Key Words:
Section 2, 4, 5, 6(1), 6(5), 34, 41 and 44 of the Artha Rin Adalat Ain, 2003; Section 35 of the Code of Criminal Procedure,1898; Liability of principal borrower and guarantor

<u>Difference between "the Accused" and "the Judgment Debtor:</u>
In this case, a fundamental difference exists between two classes of justice seekers i.e "the Accused" and "the Judgment Debtor". The term "Accused" has not been specifically defined in the Code of Criminal Procedure (Cr.PC). But the common

parlance of 'Accused' is, a person who is charged with the commission of 'Offence'. On the other hand, an 'Offence' is defined in the Code of Criminal Procedure as an act or omission made punishable by any law for the time being in force. On the other hand, under the Act, 2003 the term "Judgment Debtor" means a person against whom a decree has been passed ordering him to repay the decretal dues and it remains unsatisfied. In this particular case, the warrant of arrest was issued against a person who is, admittedly not an Accused person but a Judgment Debtor. The impugned order was passed against the Judgment Debtor (petitioner) awarding him civil detention under section 34 of the Act, 2003. (Para -21, 22)

<u>Sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Artha Rin Adalat Act, 2003:</u>
<u>By no means, we can treat a Judgment Debtor as an Accused person or criminal suspect:</u>
It is crystal clear that the legislature has incorporated this provision in the statute to compel a judgment debtor to repay decretal dues and so, the Adalat can pass any term of civil detention to a Judgment Debtor not more than 6(six) months. But certainly, the order of civil detention is not a sentence which is defined in the Black's Law Dictionary 8th Edition, page 1393 as "the judgment that a court formally pronounces after finding a criminal defendant guilty" Or "a punishment imposed on a criminal wrongdoer". From all the legal provisions of the Act, 2003 as referred to by the learned Deputy Attorney General (DAG) viz sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003 it appears that the Artha Rin Adalat adjudicated the artha rin suit as a civil dispute by a civil Court following the provisions of the Code of Civil Procedure. Although, in sections 6(1) and 26 of the Act, 2003 it has been provided that the Code (CPC) shall be applied subject to not being inconsistent with the provisions of the Act, 2003, but the provisions of the Act, 2003 are also similar and supplementary to the provisions of the Code (CPC). Further, after adjudication of the suit, the petitioner has been determined as a Judgment Debtor which is substantially different from the term of an Accused person in a criminal case. Therefore, by no means, we can treat a Judgment Debtor as an Accused person or criminal suspect. There must have distinction between the Accused in a criminal case and the Judgment Debtor in a civil suit. (Para 23, 24)

<u>Section 34(1) of the Artha Rin Adalat Act, 2003,</u>
We find that the Artha Rin Adalat as a civil Court itself can pass order of civil detention under section 34(1) of the Act, 2003 against the Judgment Debtor and to execute/effect the civil detention, the Adalat is issuing warrant of arrest in order to make him available for serving out the awarded civil detention. Section 35 only provides that in issuing warrant of arrest, the Adalat shall be deemed to be a Magistrate of a 1st class. But nowhere in the provision, the applicability of the Code of Criminal Procedure is provided. However, in the last part of section 35 although the Code of Criminal Procedure, 1898 is mentioned but it is related to prescribed Form of warrant of arrest and other matters for the time being until prescribed Form is prepared by the Artha Rin Adalat. It does not mean that the applicability of the Code of Criminal Procedure has been provided in issuing warrant of arrest. (Para-26)

<u>Ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding not for a judgment debtor:</u>
We consider that the petitioner's civil liability was adjudicated by a civil Court under the Artha Rin Adalat Ain and the Code of Civil Procedure. Thereby he is determined as a Judgment Debtor and not an Accused or convict for criminal offence. According to

section 34 of the Act, 2003, the civil detention has been awarded only for the purpose of compelling the judgment debtor to repay the decretal dues. As such, he does not require to surrender inasmuch as referred ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding.
(Para-27)

We are led to hold that the petitioner, a Judgment Debtor can not be treated as a fugitive accused and so, he did not require to surrender to the concerned Court before challenging the impugned order awarding civil detention under section 34 of the Act, 2003. Therefore, the writ petition is quite maintainable. (Para-29)

Order under section 34 of the Act, 2003 is an interlocutory order in the execution proceeding and so, appeal cannot be preferred against such order in view of section 44(2) of the Act, 2003. (Para-30)

Execution case shall proceed simultaneously against all the judgment debtors:
A 3rd party guarantor involved with the loan shall also be impleaded in the suit as defendant alongwith the principal borrower and the mortgagor and that the decree, if any, shall be effective against all defendants jointly and severally and the execution case shall proceed simultaneously against all the judgment debtors. Therefore, section 34(1) applies to all the judgment debtors to compell them to repay the decretal dues. However, in disposing of the property of the judgment debtors, by the 1st proviso to section 6(5), the legislature put a condition to the effect that the property of the principal borrower shall attract first and thereafter, the property of 3rd party mortgagor and the 3rd party guarantor respectively. But in awarding civil detention under section 34(1) of the Act, 2003 to compel the judgment debtors to satisfy decree, there is no such provision and here the condition is, absence of property or failure to sell mortgaged property. In this case, according to the application filed by the Bank, there is no property belong to the judgment debtors, considering which the Adalat awarded civil detention against both the principal borrower and the guarantor as well.
(Para-32, 33)

Section 6(5) of the Artha Rin Adalat Act, 2003:
Guarantor's property shall be attracted after the property of principal borrower:
Privilege of a guarantor to become liable to repay after borrower's default, remains only before instituting the suit. In other words, on failure to repay by the principal borrower, the guarantor had to pay the liability on demand. But both being failed to repay, the matter has been brought before the Court seeking relief against both of them liable and under section 6(5) of the Act, the decree being passed, both of them are liable jointly and severally and execution case shall proceed simultaneously against both of them. However, due to 1st proviso to section 6(5) of the Act, only guarantor's property shall be attracted after the property of principal borrower. (Para-34)

Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI, Rule 15 of the Code of Civil Procedure and Section 34 (1) of the Artha Rin Adalat Act, 2003:
Filing the application under section 34 (1) of the Act, 2003 civil detention of judgment debtor is sought for by the decree holder applicant. As such, the Adalat has to dispose of it awarding civil detention or rejecting the prayer. Hence, the applicant needs to substantiate the facts in the application for determination by the Adalat. Thus, considering facts of the application, judicial determination has to make by the Adalat

awarding civil imprisonment or not. Therefore, the Bank requires to file the application in accordance with Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI Rule 15 of the Code of Civil Procedure. But from the application (Annexure-C and C1) filed by the decree holder Bank, we do not find this compliance. In the circumstances, we are of the view that without verification or affidavit, putting signature at the top of the application alone is not enough to consider an application under section 34(1) of the Act, 2003. (Para 38)

JUDGMENT

J.B.M. Hassan, J:

1. By filing an application under article 102 (2) of the Constitution, the petitioner obtained this Rule Nisi calling upon the respondents to show cause as to why the impugned order bearing No. 56 dated 04.11.2015 passed by the learned Judge (Joint District Judge), Artha Rin Adalat, Chattogram in Artha Rin Execution Case No. 23 of 2010 awarding civil detention to the petitioner under section 34(1) of the Artha Rin Adalat Ain, 2003 for a period of 04(four) months (as contained in Annexure-E) should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. **Petitioner's Case:**
Respondent No.3-Sonali Bank Limited instituted Artha Rin Suit No. 107 of 2004 before the Artha Rin Adalat, Chattogram against the petitioner and others for realization of loan amounting to Tk. 1,17,67,296.00 along with up to date interest till realization of decretal dues.

3. Eventually, the suit was decreed against the defendant petitioner on contest and ex-parte against other defendants by the judgment and decree dated 09.06.2009 (decree signed on 15.06.2009) for Tk. 1,17,67,296.00 with interest and cost.

4. Decretal dues having not been paid by the judgment debtors, the decree holder bank filed Artha Execution Case No. 23 of 2010 against the petitioner and others (judgment debtors). In the process of execution, the decree holder bank filed an application on 23.05.2010 under section 34 of the Artha Rin Adalat Ain, 2003 **(the Act, 2003)** stating that there being no property owned by the judgment debtors, they may be detained by civil imprisonment under section 34 of the Act, 2003 in order to compell them to repay the decretal dues. After hearing, the Adalat by the impugned order dated 04.11.2015 awarded civil imprisonment to the petitioner along with another judgment debtor, namely, Mahabubul Alam for a period of four months and accordingly, issued warrant of arrest. In this backdrop, challenging the said order of civil imprisonment, the petitioner filed this writ petition and obtained the present Rule Nisi.

5. **Case of Respondent-Bank:**
The decree holder bank appearing in the Rule as respondent No.3 has filed an affidavit in opposition contending, *inter alia,* are that after conclusion of trial, the Adalat decreed the suit in favour of the plaintiff-respondent No. 3, bank on 15.06.2009. But due to non payment of decretal dues, the bank filled Execution Case No. 23 of 2010 against the judgment-debtors. In the execution case, the Bank filed an application under section 34 of the Act, 2003 for

awarding civil detention to the judgment-debtor-petitioner and considering all aspects of the case, the Adalat allowed the application by the order No. 56 dated 04.11.2015.

6. Admittedly, the petitioner was a guarantor to the loan and there is no mortgaged property in the plaint of the suit. As such, in accordance with section 6(5) of the Act, 2003, decree will be executed against the principal borrower as well as the guarantor, jointly and severally. The petitioner is trying to delay disposal of the execution case and the respondent No. 1 rightly and legally passed the impugned order dated 04.11.2015 for upholding the rule of law and justice. Further, pursuant to order of civil detention and issuance of warrant of arrest, the petitioner did not surrender before the concerned Court. Thus, he became fugitive from justice. Therefore, without surrendering before the Adalat as per warrant, the petitioner filed this writ petition and so, it is not maintainable.

7. Submissions of Petitioner:

In support of the Rule Nisi, Ms. Afroza Nazneen Akter, learned Advocate for the petitioner submits as follows:

(i) Application under section 34 of the Act, 2003 (Annexures-C and C1 to the writ petition) does not reflect any verification or affidavit to be affirmed by the decree holder bank as per requirement of section 34 of the Act, 2003. As such, there being no application in accordance with law, the impugned order can not sustain in the eye of law. In support of her submission, learned Advocate refers to the case of Golam Haider Kabir Vs Government of the People's Republic of Bangladesh and others reported in 15 BLC (HCD) 831 and the case of AKM Tofazzal Hossain and others Vs Rupali Bank Ltd and others reported in 64 DLR (HCD) 435.

(ii) The petitioner is a guarantor to the loan in question and that without exhausting all process against the principal borrower for realizing decretal dues, the Adalat issued the impugned civil detention against the petitioner which is not tenable in accordance with section 6(5) of the Act, 2003. To substantiate the submission, learned Advocate refers to the case of ABM Liton Vs Bangladesh and others reported in 66 DLR (HCD) 207.

8. **Contentions of Decreeholder-bank (Respondent No. 3):**

Firstly, At the very out set, Mr. Khondaker Iqbal Ahmed, learned Advocate appearing for the respondent No.3-bank raises the question of maintainability of the writ petition in that the warrant of arrest having been issued against the petitioner he ought to have surrendered to the concerned Court before seeking any relief from the Court of law. But having not been done so, he became fugitive from justice. As such, the petitioner is not entitled to get any relief under this writ petition and so the writ petition is not maintainable. In support of his submission, learned Advocate refers to the case of Anti-Corruption Commission Vs Dr. HBM Iqbal Alamgir and others reported in 15 BLC (AD) 44, the case of State Vs Dr. Fazlur Rahman reported in 20 BLC (AD) 243, the case of Anti Corruption Commission Vs ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225, the case of Bashir Ullah Master Vs. Bangladesh and others reported in 61 DLR (HCD) 760, the case of Nitai Kumar Mondol Vs. Judge, Artha Rin Adalat and another reported in 62 DLR (HCD) 446 and an unreported judgment and order dated 25.02.2013 passed in writ petition No. 6312 of 2012.

Secondly, the petitioner had alternative remedy by preferring appeal under section 41 of the Act, 2003 against the impugned order. But without availing the same, he filed this misconceived writ petition which is not maintainable. Learned Advocate refers to the case of Bangladesh Agricultural Development Corporation (BADC) Vs Artha Rin Adalat and others reported in 59 DLR (AD) 6.

Thirdly, the authorized representative of the decree holder bank put the signature at the top of the application and so it can be treated as an application filed by the decree holder bank within the meaning of section 34 of the Act, 2003.

Fourthly, section 6(5) of the Act, 2003 attracts in respect of disposal of the property of the judgment debtors. Here, there being no property belong to the judgment debtors, the Adalat rightly awarded civil imprisonment against all the judgment debtors including the petitioner and the principal borrower as well.

9. **Submissions of the respondent No. 1:**

Mr. Tushar Knati Roy, the learned Deputy Attorney General (DAG) appearing for the respondent No.1 has drawn our attention to the relevant provisions under the Act, 2003, in particular, sections 2(Kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003. Referring to those provisions, finally, he submits that the Artha Rin Adalat, in fact, is a civil Court functioning in accordance with the provisions of the Code of Civil Procedure (the Code). Therefore, the Adalat following the Code and the Act, 2003 passed the order of civil imprisonment in order to compell the judgment debtor to repay the decretal dues.

10. **Petitioner's reply:**

Question of maintainability of the writ petition being raised, learned Advocate replies that the cited cases on this issue as referred to by the respondent No.3 (bank), in particular, the cases of the Appellate Division, are all related to the accused persons under the criminal proceedings, where the apex Court required surrender of those accused persons in the criminal proceeding. But here the petitioner has been awarded civil detention in a civil dispute under the civil Court. He is not an accused and that the Adalat issued the warrant to make him available as judgment debtor in order to compell him to repay the decretal dues. Therefore, the cited cases of the Appellate Division are not applicable in this particular case. Against cited decisions of the High Court Division, learned Advocate submits that there are two reported cases where the High Court Division laid down ratio that the judgment debtors need not surrender before the Court concerned in filing writ petition challenging order of civil detention. In this regard, she has drawn our attention to the case of Ziaur Rahman (Md) Vs Artha Rin Adalalt and others reported in 64 DLR (HCD) 189 and the case of Mirza Ahsan Habib Vs the Judge Artha Rin Adalat and another reported in 65 DLR (HCD) 579. Further, the petitioner had alternative remedy of preferring appeal against the impugned order and so, the writ petition is not maintainable.

11. **Court's deliberations:**

We have gone through the writ petition, supplementary affidavit thereto, affidavit in opposition filed by the respondent No. 3 **(the Bank)** and other materials on record as well as the cited cases as referred to by both the parties.

12. Maintainability of the writ petition having been questioned in this Rule, let us first decide the said issue, which is, precisely, whether the petitioner can maintain this writ petition challenging the order of civil detention under section 34 of the Act, 2003 without surrendering before the concerned Court pursuant to warrant of arrest following the order of civil detention awarded in an execution proceeding arose out of a money decree of the Artha Rin Adalat.

13. In this regard, first of all we have gone through the cited cases as referred to by the learned Advocate for the respondent Bank. In the case reported in 62 DLR (HCD) 446, the High Court Division observed as follows:

> "9. On close appraisal of the materials on record it further transpires to us that after awarding sentence dated 09.08.2006, the judgment debtor petitioner did not appear in the Court below. He remained fugitive since 09.08.2006 and being fugitive he obtained the present Rule. It is well settled that a fugitive has no right to seek any kind of redress as against his grievance of awarding sentence. In this regard, reliance is being placed in the cases of Mansur Ali Vs State 55 DLR (AD) 131, Khalilur Rahman Vs State 33 DLR 12 and Abdul Baset Chowdhury Vs State 13 BLC 713.
> 10. In view of the discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that since 09.08.2006, the petitioner being fugitive from justice is not entitled to get any relief from the High Court Division in this writ petition. Consequently, the Rule is liable to be discharged as not being maintainable."

14. Both the cited judgments reported in 61 DLR (HCD) 760 and 62 DLR (HCD) 446 have been passed by the same Bench of the High Court Division relying upon the cases of Mansur Ali Vs State reported in 55 DLR (AD) 131, the case of Khalilur Rahman Vs State reported in 33 DLR 12 and the case of Abdul Baset Chowdhury Vs State reported in 13 BLC 713. The unreported cited judgment passed in writ petition No. 6312 of 2012, was passed by another Division Bench relying upon the case of Anti Corruption Commission Vs ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225. In these three judgments, the High Court Division held that without surrendering before the concerned Court, the writ petition challenging order of civil detention under section 34 of the Act, 2003 and warrant of arrest thereto, is not maintainable. To come to the decision in those cited cases, the High Court Division relied upon two cases of the High Court Division and two cases of the Appellate Division, in particular, the case of Mansur Ali Vs State reported in 55 DLR (AD) 131 and the case of Anti-Corruption Commission Vs. ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225. Besides, the learned Advocate for the Bank has also referred to the case of Anti-Corruption Commission Vs. Dr. HBM Iqbal Alamgir and others reported in 15 BLC (AD) 44, the case of State Vs. Dr. Fazlur Rahman reported in 20 BLC (AD) 243 wherein the apex Court held that a fugitive from justice has no right to seek legal redress before any Court of law.

15. Now let us examine the aforementioned cases as referred to by the learned Advocate for the Bank. Both the cited cases of the High Court Division (i.e 33 DLR (HCD) 12 and 13 BLC (HCD)713), are related to the accused person in the criminal proceeding. In the case reported in 55 DLR (AD) 131. The apex Court held as under:

> "2. The convicts' appeal having been dismissed they preferred aforementioned Criminal Revision before the High Court Division and obtained the Rule. The High Court Division at the time of issuance of Rule enlarged the convicts, who were sentenced to imprisonment, on bail for 6 months but the convicts later on did not take any step for extension of the period of bail.
> 3. In the background thereof the High Court Division upon the view that convicts being fugitive from justice they are not entitled to get relief from the High Court Division in any manner and consequent thereupon discharged the Rule without entering into the merit of the Rule. The High Court Division by the same order directed the convicts to surrender before the trial Court to serve out the unserved portion of the imprisonment.
> 4. Mr. Md. Nawab Ali, learned Advocate on Record for the petitioners, submits that the learned Judge of the High Court Division instead of

discharging the rule on technical ground ought to have disposed of the Rule on merit since the legality of the judgment of the Court of Additional Sessions Judge affirming the judgment and order of conviction of the petitioners were challenged.

5. The submission of the learned Advocate on Record of the petitioner merits no consideration since the law is settled now that a fugitive has no right to seek any kind of redress as against his grievance, if any, against the judgment and order of a Court convicting him to imprisonment."

(Underlines supplied)

16. In the case reported in 62 DLR (AD) 225 the Appellate Division held as under:

"8. Mr. Rafique-ul-Huq, on the other hand, contends that since the Government has recommended for withdrawal of the case from the prosecution against the writ petitioner, no fruitful purpose will be served if the order of the High Court Division is interfered with.

9. In the writ petition the petitioner stated that he is "presently being in abroad is not in a position to swear the Affidavit of the instant writ petition. The petitioner through a Power of Attorney dated 11.09.2008 authorized his son namely Samir Chowdhury to file this Writ Petition before this Hon'ble Court and for taking all necessary step in connection herewith". The petitioner is a fugitive from justice when he moved the petition and obtained the Rule Nisi. This Court repeatedly argued that a fugitive from justice is not entitled to obtain a judicial order defying the process of the Court. When a person wants to seek remedy from Court of law, he is required to submit to the due process of the Court and unless he surrenders to the jurisdiction of the Court, the Court will not pass any order in his aid. In view of the above, the learned Judges of the High Court Division illegally entertained the writ petition and stayed further proceedings of the case. The order of stay passed by the learned chamber Judge will continue till the disposal of the rule. The writ petitioner is directed to surrender before the Special Judge, Court No. 9, Dhaka within 6 (six) weeks from date failing which, the learned Special Judge shall take proper steps for the apprehension of the writ petitioner."

17. We have also gone through the decisions of the Appellate Division (cited on behalf of the Bank) wherein our apex Court defined the fugitive and legal right of a fugitive as to whether a fugitive can seek legal remedy from the Court of law without surrendering under the required process. All the cases of the apex Court are related to criminal proceeding, in particular, in the case reported in 20 BLC (AD) 243 his Lordship, Mr. Justice Imman Ali defined the word fugitive in the following manner:

"It is by now a well-established principle of law that an accused person who avoids the process of any court is a fugitive from justice and cannot seek justice without surrendering before a court of law"

(Underlined)

18. On a plain reading of the above, it is clear that the principle of law was applied in respect of an accused person and at the very next paragraph, his Lordship held as under.

"In this regard we may refer to the decision in Anti-Corruption Commission Vs Mahmud Hossain, 61 DLR (AD) 17, where Mohammad Fazlul Karim, J (as his lordship then was) observed as follows:

> "Cardinal principle of the criminal jurisprudence is that the person concerned should submit to the process of justice before he can claim the right of audience provided in law as well as the judicial convention, which is very much effective in the Court of law. Enunciating the age old maxim that a man who seeks justice from the Court of law must come before the Court to agitate his grievance and must surrender first to the process of justice, otherwise he remains to be fugitive from justice and could not seek aid or assistant of the process of justice in order to claim right of audience against the process of the court issued against him"
> "In the instant case, the petitioner having not surrendered to the process of the Court could not file any application or put his grievance before a Court of law far less before the Appellate Division of the Supreme Court of Bangladesh. In the absence of any surrender before the process of law, the Court of law is incompetent to issue any order or stay any process at its behest and if done so that would be illegal and without jurisdiction."

19. To make the above ratio more clear, we have also gone through the details judgment of the above cited case reported in 61 DLR (AD) 17 wherein regarding the term fugitive, the apex Court observed as follows:

> 23. The word "fugitive" is not defined any-where in our law. The expression "fugitive offender" is however defined in section 2(1)(d) in the Extradition Act, 1974 and means the person who, being accused or convicted of an extradition offence is, or is suspected to be, in any part of Bangladesh. The expression "fugitive from justice" is defined in Black's Law Dictionary, 7th Edition, page 680 as "A criminal suspect who flees, evades or escapes arrest, prosecution, or imprisonment, especially by fleeing the jurisdiction or by hiding".
>
> (Underlines supplied)

20. On perusal of the aforesaid decisions as referred to by the learned Advocate for the respondent Bank, it is clear that those are all related to Accused persons in criminal proceedings, in other words "criminal suspect". Relying upon these decisions, the Division Bench of the High Court Division in the cited cases of respondent-Bank decided that without surrender, the judgment debtor can not maintain writ petition against an order of civil detention passed under section 34 of the Act, 2003.

21. It is no more a res-integra, rather well settled in our jurisprudence that an accused in a criminal proceeding, without surrendering before the concerned Court, can not seek any sort of legal remedy and we are not differing with this established ratio decidendi of our jurisprudence. But, in this case, a fundamental difference exists between two classes of justice seekers i.e "the Accused" and "the Judgment Debtor". The term "Accused" has not been specifically defined in the Code of Criminal Procedure (Cr.PC). But the common parlance of 'Accused' is, a person who is charged with the commission of 'Offence'. On the other hand, an 'Offence' is defined in the Code of Criminal Procedure as an act or omission made punishable by any law for the time being in force. On the other hand, under the Act, 2003 the term "Judgment Debtor" means a person against whom a decree has been passed ordering him to repay the decretal dues and it remains unsatisfied.

22. In this particular case, the warrant of arrest was issued against a person who is, admittedly not an Accused person but a Judgment Debtor. The impugned order was passed

against the Judgment Debtor (petitioner) awarding him civil detention under section 34 of the Act, 2003. Now, let us read the section 34(1) of the Act, 2003 which runs as follows:

> "৩৪। (১) উপ-ধারা (১২) এর বিধান সাপেক্ষে, অর্থ ঋণ আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপ্রেক্ষিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬ (ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে পারিবে।"

23. From the above provision, it is crystal clear that the legislature has incorporated this provision in the statute to compel a judgment debtor to repay decretal dues and so, the Adalat can pass any term of civil detention to a Judgment Debtor not more than 6(six) months. But certainly, the order of civil detention is not a sentence which is defined in the Black's Law Dictionary 8th Edition, page 1393 as "the judgment that a court formally pronounces after finding a criminal defendant guilty" Or " a punishment imposed on a criminal wrongdoer".

24. From all the legal provisions of the Act, 2003 as referred to by the learned Deputy Attorney General (DAG) viz sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003 it appears that the Artha Rin Adalat adjudicated the artha rin suit as a civil dispute by a civil Court following the provisions of the Code of Civil Procedure. Although, in sections 6(1) and 26 of the Act, 2003 it has been provided that the Code (CPC) shall be applied subject to not being inconsistent with the provisions of the Act, 2003, but the provisions of the Act, 2003 are also similar and supplementary to the provisions of the Code (CPC). Further, after adjudication of the suit, the petitioner has been determined as a Judgment Debtor which is substantially different from the term of an Accused person in a criminal case. Therefore, by no means, we can treat a Judgment Debtor as an Accused person or criminal suspect. There must have distinction between the Accused in a criminal case and the Judgment Debtor in a civil suit.

25. Argument raised by the learned Advocate for the respondent bank that according to section 35 of the Act, 2003, the Code of Criminal Procedure is applicable in the execution process for civil detention and issuance of warrant of arrest. As such, due to issuance of warrant of arrest, the petitioner has to be treated as an accused under the Code of Criminal Procedure and thereby he became a fugitive in the eye of law. To appreciate his submission, we have gone through the provision of section 35 of the Act, 2003 which runs as follows:

> "৩৫। এই আইনের অধীনে জারীর কার্যক্রম পরিচালনাকালে আদালত গ্রেফতারী পরোয়ানা জারী ও দেওয়ানী কারাগারে আটকের উদ্দেশ্যে প্রথম শ্রেণীর ম্যাজিস্ট্রেট মর্মে গণ্য হইবে এবং এই আইনের অধীনে উপযুক্ত ফরমসমূহ তৈরী না হওয়া পর্যন্ত, উক্ত আদালত উক্ত বিষয়ে The Code of Criminal Procedure, 1898 এবং প্রাসংগিক ফরমসমূহ, প্রয়োজনীয় সংশোধন সাপেক্ষে (Mutatis Mutandis), ব্যবহার করবে।"

26. On a plain reading of the aforesaid provision as well as section 34(1) of the Act, 2003, we find that the Artha Rin Adalat as a civil Court itself can pass order of civil detention under section 34(1) of the Act, 2003 against the Judgment Debtor and to execute/effect the civil detention, the Adalat is issuing warrant of arrest in order to make him available for serving out the awarded civil detention. Section 35 only provides that in issuing warrant of arrest, the Adalat shall be deemed to be a Magistrate of a 1st class. But nowhere in the provision,the applicability of the Code of Criminal Procedure is provided. However, in the last part of section 35 although the Code of Criminal Procedure, 1898 is mentioned but it is related to prescribed Form of warrant of arrest and other matters for the time being until prescribed Form is prepared by the Artha Rin Adalat. It does not mean that the applicability of the Code of Criminal Procedure has been provided in issuing warrant of arrest. Therefore, we are unable to accept the submission of Mr. Khandaker, learned Advocate for the Bank.

27. Regard being had to the above, we consider that the petitioner's civil liability was adjudicated by a civil Court under the Artha Rin Adalat Ain and the Code of Civil Procedure. Thereby he is determined as a Judgment Debtor and not an Accused or convict for criminal offence. According to section 34 of the Act, 2003, the civil detention has been awarded only for the purpose of compelling the judgment debtor to repay the decretal dues. As such, he does not require to surrender inasmuch as referred ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding. This view of ours finds support in the case of Ziaur Rahman (Md) Vs Artha Rin Adalat and others reported in 64 DLR (HCD) 189 wherein another Division Bench of the High Court Division held as under:

> "12. But we are unable to accept this contention of the learned Advocate in the present case. In this case the petitioner is not an accused of any criminal case. The civil imprisonment which can be imposed on him under section 34(1) of the Artha Rin Adalat Ain, 2003 is only for the purpose of making him compelled to pay the decreetal amount and not for punishing him for committing any criminal offence.
>
> Section 34(1) of the Artha Rin Adalat Ain, 2003 has stated thus:
>
> উপধারা (১২) এর বিধান সাপেক্ষে, অর্থঋন আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপ্রেক্ষিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬ (ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে পারিবে।
>
> This very section 34(1) itself clearly tells that the civil imprisonment which is imposed on the judgment-debtors under this section is not any punishment for committing any offence, rather it is only for the purpose of making them compelled to pay the decreetal money.
>
> 13. In this case, as we have already mentioned above, no such civil imprisonment was at all imposed on this petitioner by any order of the Adalat concerned. However, even if any such civil imprisonment under section 34(1) of the Artha Rin Adalat Ain, 2003 was imposed on this petitioner then also his right to challenge that order before this Court could not be denied on the plea that he did not surrender before the Court which passed that order. There must be a distinction between the accused of a criminal case and the judgment-debtor of any civil proceeding. <u>In our opinion the right of a judgment-debtor to challenge the legality of the order of this civil imprisonment passed under section 34(1) of the Artha Rin Adalat Ain, 2003 cannot be denied on the ground that he did not surrender before the Adalat which passed that order</u>."
>
> (Underlines supplied)

28. In the case of Mirza Ahsan Habib Vs The Judge, Artha Rin Adalat and another reported in 65 DLR (HCD) 579 their Lordships of a Division Bench held as under:

> "9. Moreover the term 'fugitive' disqualifying a person to get any relief from the Court is applicable for criminal proceedings. But the Artha Rin Suit is a clear and simple suit of civil nature and in execution of the decree passed therein the present execution case is also a proceeding of civil nature. <u>Therefore, a judgment-debtor against whom an warrant of arrest is pending in a case of civil nature, cannot be termed as a fugitive and the door of justice is not closed for him.</u> The submission of the learned Advocate for the respondent on this point bears no substance and we find substance in the Rule."
>
> (Underlines supplied)

29. In view of above discussions and the referred ratio, we are led to hold that the petitioner, a Judgment Debtor can not be treated as a fugitive accused and so, he did not require to surrender to the concerned Court before challenging the impugned order awarding civil detention under section 34 of the Act, 2003. Therefore, the writ petition is quite maintainable.

30. The learned Advocate for the respondent Bank next submits that the petitioner had alternative remedy of appeal against the impugned order and so writ petition is not maintainable. In this regard we are of the view that the impugned order under section 34 of the Act, 2003 is an interlocutory order in the execution proceeding and so, appeal can not be preferred against such order in view of section 44(2) of the Act, 2003. The cited case reported in 59 DLR (AD) 6 is relating to judgment and decree of the artha rin suit and hence, it is not applicable in this case.

31. Now on merit of the Rule Nisi, learned Advocate for the petitioner submits that the petitioner is a guarantor and so, in accordance with section 6(5) of the Act, 2003 the civil imprisonment can not be awarded against him without exhausting all process against the principal borrower. To appreciate her submission, we have gone through the section 6(5) of the Act, 2003 which runs as follows:

> "৫। আর্থিক প্রতিষ্ঠান মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে মামলা দায়ের করার সময়, তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) বা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) ঋণের সহিত সংশ্লিষ্ট থাকিলে, উহাদিগকে বিবাদী পক্ষ করিবে; এবং আদালত কর্তৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথক ভাবে (Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরুদ্ধে একই সাথে পরিচালিত হইবে:
> তবে শর্ত থাকে যে, ডিক্রী জারীর মাধ্যমে দাবী আদায় হওয়ার ক্ষেত্রে আদালত প্রথমে মূল ঋণগ্রহীতা-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) এর সম্পত্তি যতদুর সম্ভব আকৃষ্ট করিবে:
> আরো শর্ত থাকে যে, বাদীর অনুকূলে প্রদত্ত ডিক্রীর দাবী তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) অথবা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) পরিশোধ করিয়া থাকিলে উক্ত ডিক্রী যথাক্রমে তাহাদের অনুকূলে স্থানান্তরিত হইবে এবং তাহারা মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে উহা প্রয়োগ বা জারী করিতে পারিবেন।"
>
> (Underlined)

32. On a plain reading of the aforesaid provision, it is clear that a 3rd party guarantor involved with the loan shall also be impleaded in the suit as defendant alongwith the principal borrower and the mortgagor and that the decree, if any, shall be effective against all defendants jointly and severally and the execution case shall proceed simultaneously against all the judgment debtors. Therefore, section 34(1) applies to all the judgment debtors to compell them to repay the decretal dues.

33. However, in disposing of the property of the judgment debtors, by the 1st proviso to section 6(5), the legislature put a condition to the effect that the property of the principal borrower shall attract first and thereafter, the property of 3rd party mortgagor and the 3rd party guarantor respectively. But in awarding civil detention under section 34(1) of the Act, 2003 to compel the judgment debtors to satisfy decree, there is no such provision and here the condition is, absence of property or failure to sell mortgaged property. In this case, according to the application filed by the Bank, there is no property belong to the judgment debtors, considering which the Adalat awarded civil detention against both the principal borrower and the guarantor as well.

34. Therefore, let us see the status of a guarantor in the loan of the Bank or any financial institution. Admittedly, the petitioner is a guarantor being an executant in the Guarantee Form, a Contract. According to section 126 of the Contract Act, 1872, liability of a guarantor under a Contract is, to perform the promise, or discharge the liability, of a third person in case of his default. Here the petitioner executed Guarantee Form and thereby promised to discharge the liability of principal borrower in case of his default. Indisputably, the principal borrower defaulted in repaying the liability and on his default, the guarantor-petitioner also did not perform his obligation making repayment as per contract providing guarantee to the liability. In the circumstances, the Bank had to institute the suit wherein both the principal borrower and the guarantor were impleaded as defendents. Eventually, the suit was decreed and thereby both the principal borrower and the guarantor became judgment debtors making liable to repay the liability jointly and severally and the decree is executable simultaneously in accordance with section 6(5) of the Act, 2003. Therefore, privilege of a guarantor to become liable to repay after borrower's default, remains only before instituting the suit. In other words, on failure to repay by the principal borrower, the guarantor had to pay the liability on demand. But both being failed to repay, the matter has been brought before the Court seeking relief against both of them liable and under section 6(5) of the Act, the decree being passed, both of them are liable jointly and severally and execution case shall proceed simultaneously against both of them. However, due to 1st proviso to section 6(5) of the Act, only guarantor's property shall be attracted after the property of principal borrower.

35. Be that as it may, we have gone through the application filed by the decree holder bank (Annexures-C and C1 to the writ petition). The application seeking civil detention under section 34 of the Act, 2003 requires the decree holder to file the application by himself. In this particular case, showing the signature of Bank's representative placed at the top of the application, the learned Advocate for the respondent Bank submits that the decree holder Bank filed the application through its proper representative and it met the requirement of section 34 of the Act, 2003.

36. Now question arises whether this Annexure-C and CI can be treated as application in order to meet the requirement of section 34(1) of the Ain, 2003. Civil Rules and Orders (CRO) provides as to how the application shall be filed before the Court. In this regard, Rule 19, chapter I, Volume-I of the C.R.O runs as under:

> "19. All petitions requiring judicial investigation or determination unless filed with an affidavit in support thereof should be verified in the manner prescribed by Or. 6, r. 15"

37. The said provisions clearly require to file an application for judicial determination either by verification in accordance with Order VI Rule 15 of the Code of Civil Procedure or by swearing affidavit by the applicant.

38. Filing the application under section 34 (1) of the Act, 2003 civil detention of judgment debtor is sought for by the decree holder applicant. As such, the Adalat has to dispose of it awarding civil detention or rejecting the prayer. Hence, the applicant needs to substantiate the facts in the application for determination by the Adalat. Thus, considering facts of the application, judicial determination has to make by the Adalat awarding civil imprisonment or not. Therefore, the Bank requires to file the application in accordance with

Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI Rule 15 of the Code of Civil Procedure. But from the application (Annexure-C and C1) filed by the decree holder Bank, we do not find this compliance. In the circumstances, we are of the view that without verification or affidavit, putting signature at the top of the application alone is not enough to consider an application under section 34(1) of the Act, 2003. High Court Division in the case of AKM Tofazzal Hossain and others Vs Rupali Bank Ltd. and others reported in 64 DLR (HCD) 435 and the case of Md. Ohiduzzaman Mia alias Mukul Mia Vs Government of the People's Republic of Bangladesh and others reported in 2 ALR (HCD) 117, also decided the issue earlier holding that the application for civil detention under section 34 of the Act, 2003 has to be filed by the decree holder either by swearing affidavit or making verification in accordance with Order VI Rule 15 of the Code of Civil Procedure.

39. In particular, in the case reported in 2 ALR (HCD) 117 a Division Bench of the High Court Division (one of us was a party) held as under:

> "10. On an application under section 34(1) of the Ain, 2003 the Adalat may pass an order for civil detention and as such, it has to be filed substantiating facts in support of the claim for issuing warrant of arrest to detain the judgment debtor (petitioner) by awarding civil detention. Therefore, the application requires judicial determination and as per Rule 19, chapter-I, Volume-I of the C.R.O, the said application should be filed with an affidavit or in the alternative it should be verified by the authorized person of the applicant (decree holder bank) in the manner as prescribed by Order VI Rule 15 of the Code of Civil Procedure. In view of legal requirement, we hold that Annexure-D to the writ petition, is not a proper application in the eye of law and as such, the impugned order issuing warrant of arrest has been passed without any lawful application on behalf of the decree holder."

40. Considering the above ratio and in view of observations made above, we are led to hold that the present application praying for civil detention of the judgment debtor has not been filed in accordance with section 34(i) of the Act, 2003 and so the impugned order issued on the basis of this application, can not sustain in the eye of law.

41. **Decision of the Court:**

In view of above discussions. The Rule Nisi finds merit.

42. **In the result, the Rule Nisi is made absolute.** The order No. 56 dated 04.11.2015 passed by the learned Judge (Joint District Judge), Artha Rin Adalat, Chattogram in Artha Rin Execution Case No. 23 of 2010 awarding civil detention to the petitioner for a period of 04 (four) months (Annexure-E) is hereby declared to have been passed without lawful authority and of no legal effect.

43. However, the decree holder Bank is at liberty to file a fresh application under section 34 of the Act, 2003 before the Adalat following the observations made above and the Adalat shall consider the same in accordance with law.

44. Communicate a copy of this judgment and order to the respondents at once.