**Misc Case No. 35 of 2017**

Present : Md Hasan Zaman, Judge, Artha Rin Adalat No.1, Dhaka

| Order No- |
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| Dated- |

Today is fixed for pronouncement of order of the present Misc case. The petitioner and the Opposite party are present by filing hazira.

Now the record is taken up for necessary order.

ORDER

The applicants, namely **Md. Salam Madhbor** and 02 others impleading themselves as third parties, instituted the instant Misc Case on 24.09.2017 against Sonali Bank Limited and 4 others under Section 32 r/w section 33(7Kha) and 57 of the **Artha Rin Adalat Ain, 2003**. The applicants have prayed for release and exemption of the scheduled property from the Schedule of Execution Case No. 296 of 2017, arising out of Artha Rin Suit No. 750 of 2016.

**Third Party/Petitioner's case :**

The case of the third-party petitioners, in brief, is that Opposite Party No.1 instituted Artha Rin Suit No. 750 of 2016 against Opposite Party Nos.2–5 for realization of its outstanding loan dues, and the suit was decreed ex parte by judgment and decree dated 19.02.2017, the decree having been signed on 23.02.2017. Thereafter, Opposite Party No.1 instituted Artha Jari Case No.296 of 2017 for execution of the said decree.

The petitioners state that on 19.09.2017, one Sahidul Huq, introducing himself as a bailiff of the learned Court, visited the locality of the scheduled property and informed the occupants of the building about the decree passed in Artha Rin Suit No.750 of 2016. On the following day, i.e. 20.09.2017, Petitioner No.1 made inquiry before the Court through his learned Advocate and came to know about the said Artha Rin Suit and the execution proceeding. Thereafter, the petitioners engaged a lawyer, filed an information slip before the Court and perused the relevant records of the execution case.

According to the petitioners, the property described in the mortgage deed and the schedules of Artha Rin Suit No.750 of 2016 and Artha Jari Case No.296 of 2017 are vague, defective and incapable of proper identification. The petitioners assert that the scheduled land measuring 4.95 decimals, originally owned by Kopil Uddin Mia, was successively transferred by registered deeds to Montaj Mia, Md. Nur Uddin and thereafter to Md. Shahinur Alam, husband of Opposite Party No.2 and father of Opposite Party No.3. Md. Shahinur Alam subsequently mortgaged the property to Janata Bank Limited on 19.07.2001, but after repayment of the loan, the mortgage was duly redeemed by Redemption Deed No.4651 dated 09.07.2007 and the corresponding Power of Attorney was cancelled by Deed No.4652 dated 09.07.2007.

Thereafter, Md. Shahinur Alam transferred the entire 4.95 decimals of land to the petitioners by registered Sale Deeds Nos.1752 and 1753, both dated 15.07.2007, and delivered possession thereof on the same date. The petitioners subsequently mutated their names, opened separate jotes and have been paying government rent regularly.

The petitioners further contend that, despite having no subsisting right, title or interest in the said property, Opposite Party Nos.2–5 fraudulently included the petitioners' property in the mortgage created in favour of Opposite Party No.1. Thus, the mortgage, insofar as it relates to the petitioners' property, is illegal, void and not binding upon them. The petitioners assert that they are bona fide owners in possession and that the decree-holder cannot lawfully execute the decree against property belonging to third parties who were not parties to the loan transaction.

Accordingly, the petitioners pray that the scheduled property belonging to them be released from the execution proceeding and excluded from the schedule of Artha Jari Case No.296 of 2017; otherwise, they shall suffer irreparable loss and injury which cannot adequately be compensated in money.

**The case of the Opposite Party No.1, Sonali Bank Limited, in brief is that** the petitioner has filed the instant Miscellaneous Case on the basis of false, fabricated and baseless assertions, and the scheduled property is not legally releasable under the provisions of law as invoked by the petitioner. The actual facts, as stated by the Opposite Party No.1, are that a total land measuring 2.78 acres under Dag No.88 of C.S. Khatian No.36 originally belonged to Mesed Ali and others, whose names were duly recorded in the said C.S. Khatian. After the death of Mesed Ali, his son Momtaj Mia inherited the property and his name was subsequently recorded in R.S. Khatian No.140. Thereafter, Momtaj Mia transferred 6.6 Khata of land in favour of Udayan Samabai Samiti by a registered Kabala dated 19.02.1980. Subsequently, the Secretary of Udayan Samabai Samiti transferred the said 6.6 Khata of land in favour of Md. Shanur Alam by registered Kabala dated 03.04.1986. Thereafter, Md. Shanur Alam mutated his name in respect of the said land in Mutation Case No.11872/2005, whereupon a separate Jote No.496 was opened in his name, and he continued to possess the land and pay the rents regularly.

It is further stated that on 05.12.2005, Md. Shanur Alam obtained a C.C. loan of Tk.5,00,000/- from the Opposite Party No.1 Bank in the name of his business concern, namely M/S Raju Hardware. As security for the said loan facility, he mortgaged the scheduled property in favour of the Opposite Party Bank and, accordingly, executed registered Deed of Mortgage No.5960 dated 08.12.2005 and registered Power of Attorney Deed No.5961 dated 08.12.2005 in favour of the Bank. Thus, the Bank acquired a valid and subsisting mortgage interest over the scheduled property prior to the alleged purchase made by the petitioner.

It is further the case of the Opposite Party No.1 that, as Md. Shanur Alam failed to repay the outstanding loan liability, the Bank instituted Artha Rin Suit No.750 of 2016 for realization of its dues, which was decreed in favour of the Bank on 23.02.2017. For execution of the said decree, the Opposite Party Bank thereafter instituted Artha Jari Case No.296 of 2017. In the said execution proceeding, the petitioner appeared claiming an independent interest in the scheduled property as a third party and subsequently filed the instant Miscellaneous Case seeking release of the scheduled property.

The Opposite Party No.1 further contends that the petitioner has claimed to have purchased 4.95 decimals of land from Md. Shanur Alam by registered Kabala Nos.4753 and 4752 dated 15.07.2007. However, the alleged purchase was made long after the scheduled property had already been mortgaged in favour of the Opposite Party Bank on 08.12.2005. Therefore, at the time of the alleged purchase, Md. Shanur Alam had no lawful authority to transfer the mortgaged property free from the Bank's existing mortgage interest. The petitioner, having purchased the property subsequent to the creation of the mortgage, is bound by the said mortgage and cannot acquire any title or interest therein so as to defeat the Bank's prior and lawful security interest.

It is the specific contention of the Opposite Party No.1 that the alleged transfer in favour of the petitioner was made in violation of Section 53D of the Transfer of Property Act, 1882, which prohibits transfer of mortgaged property in a manner inconsistent with the rights of the mortgagee. The petitioner, therefore, cannot claim any lawful right, title or interest in the scheduled property on the basis of the subsequent Kabala deeds. The subsequent mutation obtained by the petitioner, if any, also cannot create or confer any better title upon the petitioner than that of the transferor and is, therefore, of no legal consequence against the prior mortgage of the Bank.

Accordingly, the Opposite Party No.1 asserts that the petitioner's alleged purchase having been made subsequent to the creation of the mortgage and without obtaining the consent or permission of the mortgagee Bank, the petitioner has acquired no enforceable right to seek release of the scheduled property from the execution proceeding. The instant Miscellaneous Case is thus devoid of merit, misconceived and not maintainable in law, and the petitioner is not entitled to the relief sought. The Opposite Party No.1, therefore, prays for dismissal of the instant Miscellaneous Case with costs.

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**Issues :**

The following issues has been framed for proper adjudication of the present Misc case –

1) Whether the Miscellaneous Case is maintainable in its present form and manner ?
2) Whether the Miscellaneous Case is allowable ?
3) Whether the petitioner may get the relief as prayed for ?

**Discussion of Evidence**

The petitioner brought a witness namely **Sayed Golam Nabi** as **Pt.W.1** and during examination in Chief of Pt.W.1, the following documents have been proved and marked as Exhibit :

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| 1. Deed of Power of Attorney | Exhibit-1 |
| 2. Original Deed No.1088 and 433 | Exhibit-2 Series |
| 3. Deed of Mortgage deed No.2499 and IGPA No.2500 | Exhibit-3 Series |
| 4. Deed of Redemption No.4651 and POA No.4652 | Exhibit-4 Series |
| 5. Original Deed No.4752 and 4753 | Exhibit-5 Series |
| 6. Mutation Khatian, DCR and Rent receipts | Exhibit-6 Series |

On the Other hand , the Opposite Party Bank in support of its defence produced a witness namely **Nurul Huda,** a Senior Officer of OP Bank as **OP.W.1** and the following documents have been proved and marked as Exhibit :

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| 1. Letter of Authorization | Exhibit-Ka |
| 2. C.S Khatian No.36 | Exhibit-Kha |
| 3. S.A Khatian No.38 | Exhibit-Ga |
| 4. R.S Khatian No.144 | Exhibit-Gha |
| 5. Deed No.1088 | Exhibit-5 Uma |
| 6. Deed No.433 | Exhibit- Cha |

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| 7. Mutation Khatian No.876, DCR and Rent receipts | Exhibit-Chha Series |
| 8. City Khatian No.2105 | Exhibit-Ja |
| 9. Loan Application dated 20.11.2005 | Exhibit-Jha |
| 10. Sanction Letter dated 05.12.2005 | Exhibit-Nio |
| 11. Deed of Mortgage and Deed of IGPOA | Exhibit-Ta Series |

## Discussions and Decisions

Upon careful consideration of the oral evidence adduced by both sides, the documents produced, the exhibits marked, and the entire materials on record, the principal question requiring determination in the instant Miscellaneous Case is whether the scheduled **4.95 decimals** of land claimed by the petitioners forms part of the mortgaged property involved in Execution Case No. 296 of 2017, arising out of Artha Rin Suit No. 750 of 2016 and whether the petitioner is entitled to have the said property released from the execution proceedings.

Upon careful perusal of the evidence on record, it appears that **Exhibit-1** is the Power of Attorney whereby Pt.W.1 was duly authorized to depose on behalf of the petitioners. In his deposition, **Pt.W.1** stated that the scheduled land originally belonged to Udayan Samabai Samiti and thereafter to Md. Shanur Alam. His testimony in this regard finds material corroboration from the documentary evidence adduced by the petitioners.

It appears from **Exhibit-2** that Udayan Samabai Samiti purchased land measuring **1052 Ajutangsho** appertaining to C.S. Khatian No.36, S.A. Khatian No.38, C.S. and S.A. Plot No.88 and subsequently R.S. Khatian No.93, R.S. Plot No.263, from Montaj Mia by registered **Kabala Deed No.1088** dated 19.02.1980. Thereafter, the said Samiti transferred **0495 Ajutangsho** of land from the same Khatian and Plot to **Md. Shanur Alam** by registered Kabala Deed No.433 dated 03.04.1986, which has been marked as **Exhibit-2/1**. Thus, the documentary evidence establishes the source of Shanur Alam's title to the land in question.

The evidence further discloses that Md. Shanur Alam subsequently created a mortgage over the said **0495 Ajutangsho** of land in favour of **Janata Bank Limited** as security for the loan facility obtained by him. The mortgage was created by registered Mortgage Deed No.2499/2001 dated 19.07.2001, marked as **Exhibit-3**, and on the same date he executed Power of Attorney Deed No.2500/2001, marked as **Exhibit-**

**3/1**, authorizing the Bank to sell the mortgaged property in the event of default in repayment of the loan.

However, it is the specific case of Pt.W.1 that Shanur Alam subsequently discharged and fully adjusted his loan liability with the Bank and, consequently, the mortgage was redeemed. In support of such assertion, **Deed of Redemption No.4651 dated 09.07.2007** and **Power of Attorney Cancellation Deed No.4652 dated 09.07.2007** have been produced and marked as **Exhibit-4 and Exhibit-4/1**, respectively. These documents demonstrate that, upon adjustment of the loan liability, the Bank released the mortgaged property and the authority previously conferred upon it by the Power of Attorney was also cancelled.

It is further evident from the record that, after redemption of the mortgage, Md. Shanur Alam transferred $\mathbf{82\frac{1}{2}}$ **Ajutangsho** of land in favour of **Sayeda Rabea Nabi (**Petitioner No.3) by registered Kabala Deed No.4752 dated **15.07.2007**, marked as **Exhibit-5**. On the same date, he also transferred $\mathbf{412\frac{1}{2}}$ **Ajutangsho** of land in favour of **Md. Salam Madhbar (Petitioner No.1) and Hazera Begum (Petitioner No.2**) by registered Kabala Deed No.4882 dated 15.07.2007, marked as **Exhibit-5/1**. The sequence of the documents thus shows that the aforesaid transfers were made by Shanur Alam subsequent to the redemption of the mortgage and cancellation of the Bank's Power of Attorney.

The subsequent revenue records also lend support to the petitioners' claim of acquisition and possession. From **Exhibit-6 series**, it appears that Sayeda Rabea Nabi mutated her name in respect of **0071.33 Ajutangsho** of land in Mutation Case **No.42/2014-2015**, while Md. Salam Madhbar and Hazera Begum caused their names to be mutated in respect of **0356.67 Ajutangsho** of land in Mutation Case **No.682/2014-2015**. The evidence further indicates that the lands covered by the respective mutation records correspond to the same **City Jarip Plot No.2566**.

The rent receipts produced in evidence and marked as **Exhibit-6 and Exhibit-6/3** further corroborate the petitioners' assertion regarding their possession over the scheduled property. The documentary evidence, therefore, when considered as a whole, establishes a consistent chain of title commencing from the transfer in favour of Udayan Samabai Samiti, followed by the transfer in favour of Md. Shanur Alam, the subsequent mortgage in favour of Janata Bank Limited, redemption of the mortgage, and thereafter the transfer of the respective portions of the property in favour of the petitioners. The subsequent mutation records and rent receipts further support the petitioners' claim of possession over the scheduled land. On an overall assessment of the oral and documentary evidence, it appears that after purchase of the schedule land the petitioner became in possession and for this it may be said the petitioner's claim of title and possession over the suit property has strong and lawful base.

On the other hand, in support of the case of the Opposite party bank, the **Op.W.1** deposed in like manner as stated in written objection. It is claimed by **Op.W.1** that the suit land measuring 2.78 acres was originally belonged to Mesed Ali and Others and their name have been duly published in C.S 36 Khatian and thereafter in S.A khatian 38. **[Exhibit-Kha]** and **Exhibit-Ga]** proves that facts to be true. It appears from that khatian that Mesed Ali owned one-third of 2.78 acres of land. It is further claimed by the Op.W.1 that after the death of Mesed Ali, his son Momtaj Mia inherited the property and his name was subsequently recorded in R.S. Khatian No.144 **[Exhibit Gha]** which demonstrate that land measuring 25 decimals of R.S plot no.263 was recorded in his name. It is admitted by both party that Momtaj Mia transferred 6.6 Khata of land in favour of Udayan Samabai Samiti by a registered Kabala dated 19.02.1980 **Exhibit-[Uma].** Subsequently, the Secretary of Udayan Samabai Samiti transferred .0495 Ajutangsho land of R.S plot no. 263 in favour of Md. Shanur Alam by registered **Kabala No.433 dated 03.04.1986**. Thereafter, Md. Shanur Alam mutated his name in respect of the said land in **Mutation Case No.11872/2005** and continued to possess the land and pay the rents regularly. His name was thereafter recorded in City Khatian No.2105, marked as **Exhibit-Ja**, wherein 0428 Ajutangsho of land under City Jarip Plot No.2566 was recorded in his name.

The crucial documentary evidence, however, is **Exhibits-Jha, Eo, Ta and Ta/1**. These documents establish that on 05.12.2005 Md. Shanur Alam obtained a C.C. loan of Tk.5,00,000/- from the Opposite Party No.1, Sonali Bank Limited, in the name of his business concern, **M/S Raju Hardware**. In consideration of and as security for the said loan facility, Shanur Alam created a mortgage over the scheduled property in favour of the Opposite Party Bank by registered **Mortgage Deed No.5960** dated **08.12.2005**, marked as **Exhibit-Ta**. On the same date, he also executed registered Power of Attorney Deed No.5961, marked as **Exhibit-Ta/1,** in favour of the Bank.

Thus, the evidence establishes that, as on 08.12.2005, the scheduled property was validly subjected to a mortgage in favour of the Opposite Party Bank. This mortgage was created by the very person from whom the petitioners subsequently claim to have derived their title. Significantly, the petitioners' alleged purchase took place on 15.07.2007, i.e. more than one and a half years after creation of the mortgage in favour of the Opposite Party Bank.

The petitioners rely upon registered Kabala Deed No.4752 dated 15.07.2007, marked as Exhibit-5, whereby 82 Ajutangsho of land was allegedly transferred in favour of petitioner No.3, Sayeda Rabea Nabi, and registered Kabala Deed No.4882 dated

15.07.2007, marked as Exhibit-5/1, whereby 412 Ajutangsho was allegedly transferred in favour of petitioner No.1, Md. Salam Madhbar, and petitioner No.2, Hazera Begum. Even assuming that the said deeds were duly executed and registered, the petitioners cannot thereby acquire a title superior to or free from the pre-existing mortgage in favour of the Opposite Party Bank.

The principle applicable to the present case is that a person cannot convey a better title than what he himself possesses, and a subsequent transferee of mortgaged property takes the property subject to the existing rights of the mortgagee. Registration of a subsequent deed does not, by itself, extinguish or override a prior registered mortgage. Therefore, the mere fact that the petitioners obtained registered Kabala deeds on 15.07.2007 cannot defeat the mortgage created in favour of the Opposite Party Bank on 08.12.2005.

In this connection, the subsequent mutation records relied upon by the petitioners do not improve their position. Exhibits-6 series may show that the names of the petitioners were subsequently mutated in the revenue records and that rent was paid in respect of the land. Such mutation entries may have evidentiary value regarding possession or recognition in the revenue administration, but mutation does not create or confer title. More importantly, a subsequent mutation cannot extinguish, vary or prejudice an existing mortgage interest created in favour of the Bank prior to the petitioners' purchase.

The rent receipts produced by the petitioners also cannot confer any title upon them beyond what they acquired under the respective Kabala deeds. Payment of rent is not determinative of the priority of competing proprietary or mortgage interests. Thus, Exhibits-6 and 6/3, even if accepted as evidence of possession, cannot establish that the petitioners acquired the property free from the mortgage created in favour of the Opposite Party Bank.

The petitioners have relied upon the redemption deed, Exhibit-4, and cancellation of Power of Attorney, Exhibit-4/1, to contend that the property had already been released from mortgage before their purchase. However, those documents relate to the earlier mortgage in favour of Janata Bank Limited. They do not show, nor do they purport to show, that the subsequent mortgage created in favour of Sonali Bank Limited on 08.12.2005 had been discharged or released. Rather, the evidence of Op.W.1 together with Exhibits-Ta and Ta/1 establishes that the mortgage in favour of the Opposite Party Bank remained subsisting when the petitioners allegedly purchased the property on 15.07.2007.

Therefore, the redemption of the earlier mortgage in favour of Janata Bank Limited cannot be construed as redemption or cancellation of the distinct and subsequent mortgage in favour of the Opposite Party Bank. The two transactions are separate and independent security transactions. The petitioners' reliance upon Exhibits-4 and 4/1, therefore, does not advance their case against the Opposite Party Bank.

It is also material that the mortgage in favour of the Opposite Party Bank was created on 08.12.2005, whereas the alleged transfers in favour of the petitioners were made on 15.07.2007. Thus, the Bank's mortgage is chronologically and legally prior to the petitioners' alleged acquisition. The petitioners have not produced any document showing that the Bank had consented to the subsequent transfer, released the mortgage, waived its security interest, or otherwise permitted Shanur Alam to transfer the property free from the Bank's encumbrance. In the absence of any such evidence, the subsequent transferees cannot claim a better or superior interest than that possessed by their vendor.

The contention that the petitioners were bona fide purchasers also does not find sufficient support from the evidence. The existence of a registered mortgage deed and a registered Power of Attorney in favour of the Bank constitutes documentary evidence of the Bank's prior interest in the property. The petitioners' subsequent registered deeds could not lawfully operate to extinguish such pre-existing interest. Consequently, the subsequent transfers cannot be treated as creating an interest in the petitioners which is free from the Bank's mortgage.

The provision of section 53D of the Transfer of Property Act, 1882 is also relevant in considering the legal effect of a subsequent transfer of mortgaged property. The statutory prohibition against transfer of mortgaged property in derogation of the rights of the mortgagee makes it clear that a subsequent transfer cannot be permitted to defeat or prejudice the pre-existing mortgage interest. Accordingly, the Kabala deeds dated 15.07.2007, even if valid between the transferor and transferees to the extent permissible in law, cannot operate to defeat the Bank's prior security.

Upon a cumulative assessment of the entire evidence, therefore, I find that the petitioners have succeeded in showing a chain of transfer from Udayan Samabai Samiti to Md. Shanur Alam and thereafter to the petitioners. However, establishment of a chain of transfer alone is not sufficient for obtaining release of the property from execution. The petitioners are required to establish an interest which is legally capable of defeating the Bank's pre-existing mortgage. They have failed to do so.

The evidence rather establishes that Md. Shanur Alam had already mortgaged the scheduled property in favour of the Opposite Party Bank on 08.12.2005, whereas the petitioners allegedly acquired their respective portions only on 15.07.2007. Consequently, the petitioners' interest, if any, is subordinate to and subject to the prior mortgage in favour of the Opposite Party Bank. The subsequent mutation and payment of rent do not alter that legal position.

It is therefore found that the petitioners have failed to establish any lawful and enforceable right, title or interest in the scheduled property free from the mortgage of the Opposite Party Bank. They have consequently failed to establish any legal ground for releasing the scheduled property from the execution proceeding. The Miscellaneous Case is thus devoid of merit and the petitioners are not entitled to the relief sought.

Accordingly, the issues have been disposed of in disfavour of the petitioners.

**Hence**

**It is Ordered**

That the instant Miscellaneous Case is found to be devoid of merit and is accordingly **disallowed on contest**. The petitioners are not entitled to get the scheduled property released from the execution proceeding.

Thus the present Misc case is disposed of.

**Typed and Corrected by Me**

| Md. Hasan Zaman<br>Judge<br>Artha Rin Adalat No.1,<br>Dhaka | Md. Hasan Zaman<br>Judge<br>Artha Rin Adalat No.1,<br>Dhaka |
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