manupatra®

LEX/BDHC/0202/2003

Equivalent Citation: 2004(12)BLT(HCD)100, 56 DLR (2004) 573

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Writ Petition No. 838 of 2001

Decided On: 29.10.2003

Appellants: **Abdur Rashid Chowdhury**
Vs.
Respondent: **Additional District Judge and Ors.**

Hon'ble Judges:
Md. Abdur Rashid and S. Rahman Miah, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Rokanuddin Mahmud, Khan Saifur Rahman and Masood R. Sobhan, Advocates

For Respondents/Defendant: Rafique-ul Haque, Ahsanul Karim, Anik Hoque and Shah Monjurul Hoque, Advocates

JUDGMENT

Md. Abdur Rashid, J.

1. The above Rule Nisi was issued upon the respondents asking them to show cause as to why order dated 28-5-2000 passed by the respondent No. 1 the Bankruptcy Court in Bankruptcy Suit No. 27 of 2000 rejecting the plaint should not be declared to have been passed without lawful authority and of no legal effect and why respondent No. 1 should not be directed to issue summons/notice of said bankruptcy suit upon respondent No. 2, the Shinepukur Holding Limited and respondent No. 3, Mahmudur Rahman. On 25-4-2000, the petitioner as plaintiff presented a plaint before the Bankruptcy Court at Motijheel in Dhaka, briefly the Court, against respondent Nos. 2 and 3 for a decree, amongst others, for declaring said respondent Nos. 2 and 3 bankrupt for nonpayment of a matured debt of Taka 3,33,000,00. The plaint was registered as Bankruptcy Suit No. 27 of 2000 and the learned Judge of said Court was pleased to fix 7-5-2000 for hearing on maintainability, which was adjourned ultimately, to 28-5-2000.

2. On 28-5-2000, the plaintiff filed notice/summons for issue upon said defendant respondents. Learned Judge however rejected the prayer of the plaintiff for issue of summons upon the defendants and rejected the plaint under section 5(1) and section 110 of the Bankruptcy Act, 1997 (Act X of 1997), hereinafter referred to as the Act by impugned order.

3. On behalf of the petitioner it was submitted that in view of the scheme of the Act the Court had no jurisdiction either under section 5(1) and/or section 110 of the Act to reject a plaint and having so acted in rejecting the plaint it went beyond its jurisdiction.

4. Secondly, it was submitted that the Court was wrong to find that as the suit was not filed by any bank or financial institution and/or that the debt claimed against the defendants was not a 'matured debt' of any bank or financial institution, the plaintiff was not entitled to sue the defendants; and upon such erroneous assumptions, the

Court failed to exercise the jurisdiction vested in it by the Act in not issuing summons upon the defendants.

5. Opposing the application, an affidavit-in-opposition was filed on behalf of defendant No. 1 respondent No. 2. It was submitted that the writ petition as framed is not maintainable as the impugned order was appealable under section 96 of the Act.

6. Secondly, it was submitted that the remedy by way of a statutory appeal was efficacious enough to disentitle the petitioner to invoke the extraordinary jurisdiction of this Division under Article 102 of the Constitution.

7. Thirdly, it was submitted that even after the impugned order, the petitioner was entitled to bring a fresh suit or make an application for setting aside said order under rule 26(3) of the Bankruptcy Rules, 1997, in short, the Rules.

8. Fourthly, it was submitted that as the claim of the petitioner was based upon an agreement containing an arbitration clause and in view of such arbitration clause, the suit was barred under or by the Arbitration Act, 2001.

9. Lastly, it is submitted that the writ petition must be held to be bad for delay and laches as the impugned order was passed on 28-5-2000 and the writ petition was moved on 18-3-2001.

The Rule was however, mainly opposed on the ground that when a special law is made providing special remedy and special procedure to follow and giving a right to appeal, no application under Article 102 of the Constitution is maintainable before exhausting such appeal procedure.

10. In support of the submissions, following cases were cited: 42 DLR (AD) 86, Begum Lutfunnessa vs. Bangladesh 48 DLR (AD) 171, The Secretary, Internal Resource Division, Ministry of Finance and Planning vs. Nasrin Banu; 47 DLR (AD) 155, 2001 BLD (AD) 36, Bangladesh vs. Habib Jamil; 2001 BLD (AD) 63, 7 BLT (AD 31; 46 DLR (AD) 191, Zahurul Islam vs. National Bank Ltd; LEX/BDHC/0131/2002 2002 BLD 320, Bangladesh Jute Mills Corporation vs. Maico Jute and Bag Corporation; 53 DLR (AD) 112; Government of Bangladesh vs. Member, Administrative Tribunal; 8 MLR (AD) 148 and one unreported decision in the case of Hasina Textile and Printing Mills vs. Court of Additional District Judge and Bankruptcy Court.

11. Against the affidavit-in-opposition the petitioner filed an affidavit-in-reply denying the submissions made therein.

12. It was submitted on behalf of the petitioner that on the date of hearing of the Rule, the petitioner had no scope to present an appeal.

13. It was submitted that after rejection and/or dismissal of the plaint, there was no scope for the petitioner to take any steps under Rule 26(3) of the Rules.

14. It was submitted that impugned order passed rejecting the plaint under sections 5(1)and 110 of the Act is not made appealable, no appeal therefore could validly be presented before this Division under section 96 of the Act.

15. It was further submitted that it was not correct to say that the petitioner was guilty of negligence or laches in making the application or that the arbitration clause barred the suit or that the debt in question belonged to any company.

16. On his behalf, the decisions in the case of Nagina Silk Mill vs. Income Tax Officer and others 15 DLR (SC) 181 and Begum Lutfunnessa vs. Bangladesh, 1990 BLD (AD) 103 : 42 DLR (AD) 86 were cited.

17. The facts do not appear to be disputed. On 25-4-2000 the petitioner as plaintiff presented a plaint along with the copies of documents and 'Talabana' before the Court for service of notice.

18. In the plaint, it is averred that defendant No. 1 Shinepukur Holding Limited and No. 2 Mahmudur Rahman (respondent Nos. 2 and 3 herein) as property developers entered into an agreement dated 30-10-85 with the plaintiff and his brother, Abdul Hamid Chowdhury for purchase of more or less 1.5 acres of land comprising of Holding No. 43, New Eskaton Road, Dhaka at a consideration of Taka 11,00,00,000 (eleven crore) including liabilities of Taka 2,34,00,000 clearly promising to pay Taka 8,66,00,000 equally to the plaintiff and his brother within 15 days of the expiry of a period of eighteen months from the date of commencement of construction. The defendants got possession of the land with execution of the agreement, constructed multi-storied buildings and sold them away. After a considerable delay, defendants paid the plaintiff Taka 1,00,00,000 only out of his share of Taka 4,33,00,000. In spite of repeated demands, defendants did not pay the plaintiff any more money. So, the defendants owe to the plaintiff a matured debt of Taka 3,33,00,000.

19. The plaintiff served a legal notice for money without any result. Then, on 12-8-99 the plaintiff served a formal notice making a formal demand for repayment of the debt under section 9(1)(i) of the Act. The defendants though received the notice but failed to make any payment within 90 days and thereby committed an act of bankruptcy within the meaning of section 9(1) of the Act, which made the defendants liable to be declared bankrupt. Hence, the suit for declaring the defendants bankrupt.

20. Same date the plaint was received and registered as Bankruptcy Suit No. 27 of 2000 as is evidenced by order No. 1 dated 25-4-2000. At the same time, the Court fixed 7-5-2000 for hearing on maintainability of the suit, which was ultimately fixed on 28-5-2000.

On the date fixed the plaintiff made an application for an order for issue of the summons upon the defendants. But the Court rejected the application and also rejected the plaint by impugned order invoking provisions of sections 5(1) and 110 of the Act.

21. The decision of the Court appears to be mainly based on the findings,

(a) that the plaint was not filed by any bank or financial institution within the meaning of section 2(j) of Financial Institutions Act, 1993. And no natural individual person is entitled to present a plaint under section 10 of the Act;

(b) that the defendants had no matured debt to the plaintiff within the meaning of Rule 2(n) of the Rules as the claim of debt is not a bank-debt

(c) that the money claimed by the plaintiff could not be considered as a matured debt within the meaning of section 9(1)(i)of the Act and the allegations made in the plaint do not constitute an act of bankruptcy; and

(d) that the Bankruptcy Court has no jurisdiction to pass a decree for recovery of money.

22. As learned Additional District Judge raised various questions under the Act and

expressed his views, upon which he rejected the plaint of the suit, the Act demands close reading.

23. The Act was made in Bengali. Then, under section 118 of the Act, an authentic version was published in English. In the event of any conflict between the Act and the English text, the Act shall prevail. The law is, no doubt, new. It was mainly made to meet the challenges of bankruptcy under the free market economy. The terms and sections of the Act considered, and upon which views expressed by the Court in Bengali are quoted in Bengali to better understand the impugned order.

24. Let us first consider what the term "মেয়াদোত্তীর্ণ দেনা means for it would answer many questions raised by the Court. The Act has not defined "মেয়াদোত্তীর্ণ দেনা" but Rule 2(n) of the Rules has defined the term as hereunder,

> "২ (ঢ) "মেয়াদোত্তীর্ণ দেনা" অর্থ ব্যাংক বা অন্য কোন আর্থিক প্রতিষ্ঠানের ক্ষেত্রে, বাংলাদেশ ব্যাংক কর্তৃক সময় সময় সংজ্ঞায়িত মেয়াদোত্তীর্ণ ঋণ বা দেনা, এবং অন্যান্য ক্ষেত্রে, ঋণ বা দেনা প্রদান সম্পর্কিত লিখিত দলিলে ঋণ বা দেনা বা উহার কিস্তি পরিশোধের জন্য নির্ধারিত সময়সীমা উত্তীর্ণ হওয়া সত্ত্বেও অপরিশোধিত ঋণ বা দেনা" *(Underlined by us)*

25. Definition is simple, straight and unambiguous. In case of bank or any other financial institution the matured debt means matured loan or debt as defined time to time by the Bangladesh Bank. And in other cases, matured debt means unliquidated loan or debt after the expiry of the time for payment of the loan, debt or installment as fixed in a written deed advancing loan or debt.

26. Such definition covers both the words loan and debt and makes no difference between them. Nor it excluded any loan or debt given by an individual person from being matured debt. Only condition imposed is that such loan or debt must be based on a written document. If the conditions are fulfilled, an unliquidated loan or debt given by even an individual natural person will become matured loan or debt after the expiry of the time or period fixed in the written deed of giving such loan or debt.

27. Then section 2(38) of the act define an eligible debtor debtor i.e.

> eligible debtor i.e. "যথাযোগ্য দেনাদার" as এমন একজন দেনাদার যিনি একক ব্যক্তি নহেন and section 2(08) defines individual person i.e. "একক ব্যক্তি" as প্রাকৃতিক সত্তাবিশিষ্ট কোন ব্যক্তি এবং "একক দেনাদার" অর্থ এমন একজন দেনাদার যিনি একক ব্যক্তি। section 2(38) defines eligible creditor i.e. "যথাযোগ্য পাওনাদার" as এমন একজন পাওনাদার, যিনি একক বা যাহারা যৌথভাবে অন্ততঃ ৫,০০,০০০ টাকার মেয়াদোত্তীর্ণ দেনার দাবিতে দেনাদারের নিকট ৯(১) ধারার (ঝ) দফা অনুসারে আনুষ্ঠানিক দাবিনামা প্রেরণ করিয়াছেন।

28. An individual natural person could be an eligible creditor when he sent a formal demand for payment of a matured debt of at least Taka 5,00,000 under section 9(1) (i) of the Act and an eligible debtor could similarly, be an individual natural person.

29. Section 2(18) defines an act of bankruptcy i.e. "দেউলিয়া কর্ম" as ধারা ৯ এ উল্লিখিত কোন দেউলিয়া কর্ম। section 9 enumerates the acts of the debtor as an act of bankruptcy. Of them, clause (i) of section 9(1) describes the following as an act of bankruptcy,

(ঝ) যদি অন্যূন ৫,০০,০০০ (পাঁচ লক্ষ) টাকা বৈধ এবং মেয়াদ উত্তীর্ণ দেনার বিপরীতে এক বা একাধিক পাওনাদার উক্ত পাওনা পরিশোধ করিতে বা উহার বাবদ পাওনাদারের সন্তোষ অনুযায়ী প্রয়োজনীয় জামানত প্রদান করিতে অনুরোধ জানাইয়া এই আইনের অধীন একটি আনুষ্ঠানিক দাবিনামা (formal demand) প্রেরণ করিয়া থাকেন এবং উক্ত দাবিনামা জারির পরবর্তী ৯০ (নব্বই) দিনের মধ্যে দেনাদার দাবি পূরণ না করেন।

30. When a creditor or creditors having a valid and matured debt against a debtor of not less than Taka 5,00,000 has served on such debtor a formal demand in prescribed manner asking the debtor to pay the debt or give sufficient security to his satisfaction and such debtor fails to comply with the demand within ninety days of service of the demand it will constitute an act of bankruptcy.

31. Then, section 10 reads,

১০। ঘোষণাদেশ প্রদানের ক্ষমতা।

দেনাদার কোন দেউলিয়া কর্ম করিলে, এক বা একাধিক যথাযোগ্য (eligible) পাওনাদার বা উক্ত দেনাদার, এই আইনের বিধানাবলি সাপেক্ষে, আর্জি পেশ করিতে পারিবেন, এবং আদালত উক্ত আর্জির পরিপ্রেক্ষিতে উক্ত দেনাদারকে দেউলিয়া ঘোষণা করিয়া একটি আদেশ প্রদান করিতে পারিবে; এই আইনে এইরূপ আদেশ দেউলিয়া ঘোষণাদেশ বলিয়া অভিহিত।

32. Section 10 therefore, clearly empowers one or more creditors or a debtor to present a plaint when a debtor commits an act of bankruptcy for an order of adjudication declaring such debtor as bankrupt.

33. After making an order of adjudication declaring a debtor bankrupt, the Court shall proceed to collect the estate of such debtor and distribute it amongst the creditors in accordance with elaborate procedure as prescribed by the Act.

34. In the plaint of the suit at hand, it is clearly averred that the plaintiff has got a matured debt against the defendants of Taka 3,33,00,000 He sent a formal demand for payment of the debt in the prescribed manner. The defendants having not complied with the demand within the period of ninety days committed an act of bankruptcy. Upon such claim, the plaintiff presented the plaint before the Court.

35. It is now well settled that in the matter of rejection of a plaint, the Court will always have to confine its consideration on the averments of the plaint only without any reference to any extraneous materials.

36. The question whether or not the plaintiff had any valid and matured debt against the defendants within the meaning of section 9(1) of the Act could only be decided at the trial of the suit.

37. But the Court fell in serious error in holding that no individual natural person as creditor is entitled to present a plaint, that no debt of such individual natural person even matured could be a matured debt and that the Court has no jurisdiction to recover money from a bankrupt under the Act.

38. Section 21 of the Act read with Rule 8 of the Rules provide for admission of the plaint. After presentation and admission of the plaint, section 22 of the Act read with Rule 13 of the Rules provide for elaborate procedure to be followed by the Courts, amongst others, for issue of summon/notice upon the defendants.

39. Section 28(1) of the Act empowers the Court to dismiss the plaint presented by a

creditor, if the Court is not satisfied with the proof of

(i) such creditor's right to present the plaint;

(ii) service on the debtor of a notice of the order fixing a date of hearing the plaint in accordance with section 22(2); and

(iii) the alleged act of bankruptcy.

40. Rule 11 of the Rules however, provides for rejection of the plaint on the following grounds,

বিধি ১১। আর্জি প্রত্যাখানঃ

(১) নিম্নলিখিত কারণে কোন আর্জি প্রত্যাখ্যান করা যাইবে, যথাঃ

(ক) আর্জিতে মামলার কারণ উল্লেখ না থাকা;

(খ) আর্জি ও বিবৃতি হইতে যদি প্রতীয়মান হয় যে, কোন আইনে মামলাটি নিষিদ্ধ;

(গ) মামলা দাখিলের ব্যাপারে আইন এবং বিধিমালার কোন শর্ত পূরণ করা না হইলে।

(২) কোন আর্জি প্রত্যাখ্যান করা হইলে, বিচারক উহার কারণ উল্লেখপূর্বক একটি আদেশ লিপিবদ্ধ করিয়া রাখিবেন।

(৩) এই বিধির অধীন কোন আর্জি প্রত্যাখ্যান হইলেও, বাদী একই কারণে মামলা করার জন্য নতুন আর্জি দাখিল করার অধিকার হইতে বঞ্চিত হইবেন না।

41. In the case before us, the Court did neither resort to section 28 of the Act in dismissing the plaint nor to Rule 11 of the Rules in rejecting the plaint. It invoked sections 5(1) and 110 of the Act in rejecting the plaint on the aforesaid erroneous assumptions. We find, deliberately.

42. Section 5 of the Act reads,

৫। দেউলিয়া বিষয়ক সকল প্রশ্নে সিদ্ধান্ত গ্রহণে আদালতের ক্ষমতা।--

(১) এই আইনের বিধানাবলি সাপেক্ষে, দেউলিয়া বিষয়ক কোন কার্যধারায় উত্থাপিত যে কোন প্রশ্ন, স্বত্ব বা অগ্রাধিকার সংক্রান্তই হউক অথবা আইনগত বা ঘটনাগত বা অন্য যে কোন ধরনের হউক না কেন, যা আদালতের গোচরীভূত হয় বা যাহা উক্ত মামলার পূর্ণাঙ্গ ন্যায় বিচার বা সংশ্লিষ্ট সম্পত্তির পূর্ণাঙ্গ বণ্টনের উদ্দেশ্যে নিষ্পত্তি করা সমীচীন ও প্রয়োজনীয় বলিয়া আদালত মনে করে সেইরূপ সকল প্রশ্নে সিদ্ধান্ত গ্রহণের পূর্ণ ক্ষমতা আদালতের থাকিবে।

43. And section 110 of the Act investing the Court with inherent powers provides,

১১০। আদালতের আন্তর্নিহিত ক্ষমতা ঃ

দেনাদার, কোন পাওনাদার বা রিসিভারের আবেদনক্রমে, আদালত উহার বিবেচনামতে যথাযথ এমন যে কোন আদেশ দিতে পারিবে, যাহা ন্যায় বিচারের স্বার্থে বা আদালতের কার্যক্রমের অপব্যবহার রোধকল্পে প্রয়োজনীয় বলিয়া মনে করেন।

তবে শর্ত থাকে যে, এ ধারায় প্রদত্ত ক্ষমতা এমন কোন ক্ষেত্রে প্রয়োগ করা যাইবে না, যে ক্ষেত্রে এই আইনের অধীনে অন্য কোন প্রতিকারের ব্যবস্থা আছে।

44. A reading of section 5(1) of the Act, makes it clear that the Court shall have full power to decide all questions, whether of title, priority, or of any nature whatsoever which may arise in the bankruptcy proceeding or which the Court may deem fit, expedient or necessary to decide for doing complete justice or making a complete

distribution of the property. The power given under the section is to be exercised in aid of the bankruptcy proceeding not otherwise. There is no provision in the whole of section 5 empowering the Court to reject a plaint.

45. Similarly, section 110 of the Act empowers the Court to exercise inherent jurisdiction. Unlike any other law, the Act does not empower the Court to invoke the inherent power suo moto. The Court can exercise its inherent power only when an application is made by a debtor or creditor or receiver under the section. Even after the application made, the inherent power cannot be exercised when a specific remedy is provided by the Act. There being specific provisions under section 28 of the Act for dismissal of a plaint or under Rule 11 of the Rules for rejection of a plaint, the Court cannot invoke its inherent power either to dismiss or reject a plaint.

46. It is true section 96 of the Act has created a right of an appeal. But such appeal under section 96(5) of the Act will lie only against the following orders or decisions,

(a) decision on title;

(b) decision on act of bankruptcy;

(c) decision on the priority in making payment out of the Estate;

(d) order dismissing a plaint pursuant to section 28;

(e) order awarding compensation pursuant to section 29;

(f) order of adjudication pursuant to section 30;

(g) a decree including a preliminary decree, decision or order which disposes of a suit or other proceeding, transferred under section 53, if such decree, decision or order would have been appealable had it been made by the transferee Court;

(h) order regarding any fundamental entry in the schedule pursuant to section 38;

(i) order annulling adjudication pursuant to section 40;

(j) order declaring the condition on which the debtor's property shall revert to him on annulment of adjudication pursuant to section 42;

(k) a reorganisation order or any order approving a plan of reorganization pursuant to section 46;

(l) order on application for discharge pursuant to section 47;

(m) order disallowing or reducing claim of any creditors pursuant to section 57 and

(n) order nullifying a previous transfer of property pursuant to sections 52 to 63.

47. Right to appeal is therefore, not unfettered and available only in case of any of the decisions or orders as enumerated above. Not otherwise. An order made under section 5(1) and/or 110 of the Act is not made appealable.

48. Besides, when a Tribunal is established by a statute for a particular purpose and empowered to exercise its jurisdiction in accordance with the procedure prescribed,

such tribunal cannot override or circumvent such procedure and pass any order it likes. If it does so, it acts beyond its jurisdiction. When the Tribunal goes wrong in law it goes outside its jurisdiction conferred on it. The Tribunal has jurisdiction to decide "rightly" but not the jurisdiction to decide "wrong". When a Tribunal commits an error of law in deciding an issue raised by it, it acts beyond its jurisdiction and such decision of the Tribunal can be quashed under writ jurisdiction.

49. It was the duty of the Court to decide the question of maintainability of the suit as was raised by itself by reading of the plaint and plaint only, and however, in accordance with the Act When presentation of the plaint by the plaintiff is not barred by the Act and rejection of the plaint being not in accordance with the Act, it was a proper case for interference by this Division in exercise of its constitutional jurisdiction. Cf. Utility Services Corporation of Pakistan Ltd. vs. Punjab Labour Appellate Tribunal, PLD 1987 SC 447.

50. The decisions cited at the Bar are of no assistance in the facts and circumstances of the case at hand.

51. In the circumstances, the impugned order rejecting the plaint cannot be sustained in law.

52. In the result, the Rule is made absolute without, however, any order as to cost. Impugned order dated 25-4-2000 passed by the Bankruptcy Court at Dhaka in Bankruptcy Suit No. 27 of 2000 is hereby declared to have been made and/or passed without any lawful authority and of no legal effect and accordingly, is quashed. Order of stay granted at the time of issue of the Rule is hereby recalled and vacated. Respondent No. 1, the Bankruptcy Court, is hereby directed to proceed with the suit by issue of the summons/notice however, in accordance with law, expeditiously.

Communicate at once.

© Manupatra Information Solutions Pvt. Ltd.