IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Zubayer Rahman Chowdhury,
Chief Justice
Mr. Justice Md. Ashfaqul Islam.
Mr. Justice Md. Rezaul Haque.
Mr. Justice S.M. Emdadul Hoque.
Mrs. Justice Farah Mahbub.

CIVIL APPEAL NO.163 of 2007.

(From the judgment and order dated 04.01.2004 passed by the High Court Division in Writ Petition No.7271 of 2003).

Rupali Bank Limited, represented by its Managing Director, Rupali Bhaban, 34, Dilkusha Commercial Area, Dhaka. : .....Petitioner.

-Versus-

Joint District Judge and Artha Rin Adalat, 3rd Court, Dhaka and others. : .....Respondents.

For the Petitioner. : Mr. Md. Imam Hasan, Senior Advocate instructed by Mr. Md. Shafiqul Islam Chowdhury, Advocate-on-Record.

For Respondent No.3. : Mr. Md. Taufique Hossain, Advocate-on-Record.

For Respondent Nos.1-2. : Not represented.

Date of hearing and order : 21.04.2026.

J U D G M E N T

Farah Mahbub,J:

This Civil Appeal by leave is directed against the judgment and order dated 04.01.2004 passed by the High Court Division in Writ Petition No.7271 of 2003 summarily rejecting the writ petition.

Challenging the impugned Order No.67 dated 07.10.2003 passed by the Artha Rin Adalat No.3, Dhaka (in short, Adalat) in Money Suit No.540 of 1990 striking out the names of defendant nos. 7 and 10 from the plaint of the suit, the appellant herein as writ petitioner, filed Writ Petition No.7271 of 2003 before the High Court Division under Article 102 of the Constitution of the People's Republic of Bangladesh (in short, the Constitution) stating, *inter alia*, that the writ petitioner, i.e., Rupali Bank Ltd. is a state-owned commercial bank incorporated under the Companies Act, 1994 (in short, Act, 1994).

The writ petitioner as plaintiff instituted Money Suit No.10 of 1990, (subsequently renumbered as Money Suit No.540 of 1990 upon transfer) before the Adalat on 14.01.1989 for realization of Tk.17,36,68,171.34/- (Taka seventeen crore thirty six lakh sixty eight thousand one hundred seventy one and thirty four paisa) only from the defendant no.1, M/s. Ashraf Jute Mills Ltd., Kanchan, Rupnagar, Narayanganj and its directors, guarantors and other concerned persons.

During the course of trial, the plaintiff filed an application under Order XXXVIII Rule 5 and Order XXXIX Rules 1, 2 and 5 of the Code of Civil Procedure, 1908 (in short, Code, 1908) seeking attachment before judgment and temporary injunction restraining defendant no.9, Bangladesh Shilpa Rin Sangstha (in short, BSRS) from transferring the assets of the defendant no.1 to M/s. Uttara Jute Fibres and Industries Ltd. Although an *ad interim* order was initially granted on 26.06.1990, it was subsequently vacated vide order dated 16.07.1990. Challenging the said

order, the plaintiff preferred First Miscellaneous Appeal No.315 of 1990 before the High Court Division and obtained an interim order of stay in Civil Rule No.192 (FM) of 1990.

Meanwhile, Bangladesh Road Transport Corporation (BRTC) filed an application under Sections 162 and 163 of the Companies Act, 1913 on 24.03.1987 before the Company Bench, High Court Division praying for winding up of the defendant no.1 due to its failure to pay monthly rent of the premises of BRTC. In the said proceeding, BSRS and the plaintiff entered appearance on 08.03.1989 and 14.11.1989 respectively, claiming themselves as creditors of defendant no.1. Ultimately, by an *ex parte* order dated 09.08.1990, the Company Court ordered the winding up of the company and appointed an Official Liquidator thereof. However, during the pendency of the winding-up proceeding, BSRS, as one of the secured creditors of defendant no.1, exercised its power under Section 34 of the Bangladesh Shilpa Rin Sangstha Order, 1972 (in short, Order, 1972) and sold the mortgaged properties of defendant no.1 to Uttara Jute Fibres and Industries Ltd. by auction on 17.01.1990 and delivered possession thereof to the purchaser on 21.07.1990.

Challenging the impugned sale, BRTC filed Company Matter No.9 before the High Court Division whereby, the auction sale dated 17.01.1990 was set aside vide judgment and order dated 28.08.1991. However, on appeal, said decision was reversed and the auction sale was ultimately upheld by this Division vide judgment and order dated 19.11.1992.

On the other hand, F.M.A. No.315 of 1990 was dismissed for default in view of Section 7 of the Artha Rin Adalat Ain, 1990 (in short, Ain, 1990). Upon receipt of the lower Court records on 07.08.2001 from the High Court Division, the Adalat resumed the proceedings. During the pendency of the trial, upon an application filed by the plaintiff, the Adalat, vide Order no.45 dated 29.11.2001, directed attachment of the properties belonging to defendant no.7.

Later, on 13.01.2003, the plaintiff filed an application under Order VI Rule 17 of the Code, 1908 seeking amendment of the plaint by impleading M/s. Uttara Jute Fibres and Industries Ltd., the purchaser of the assets of defendant no.1, as defendant no.10 and by enhancing the decretal claim to Tk 13,90,95,737.34/-(Taka thirteen crore ninety lakh ninety five thousand seven hundred thirty seven and thirty four paisa) only. Said application was allowed by the Adalat vide Order no.57 dated 13.01.2003.

However, after more than 13 (thirteen) years from the institution of the suit, defendant no.7 filed an application before the Adalat on 14.07.2003 praying for striking out his name as defendant from the suit. The plaintiff opposed the application, on the contention that defendant no.7, being a former director and an existing shareholder of defendant no.1, was equally liable, along with the other directors and shareholders, for repayment of the loan liability to the plaintiff in respect of the credit facilities availed under Cash Credit Account No. 70 from 1966 until the institution of the money suit. In support thereof, the plaintiff produced the

resolutions of a meeting held on 17.06.1988 chaired by the Deputy Secretary, Ministry of Jute, wherein defendant no.7 was expressly identified as an ex-director and shareholder of defendant no.1. Said resolutions further disclosed a decision to transfer the mill of the defendant no.1, along with its assets and liabilities, to one Girilal Mudi, the owner of defendant no.10.

On the same date, i.e. on 14.07.2003, the newly added defendant no.10 filed a separate application under Section 250 of the Companies Act, 1994 read with Order VII Rule 11 of the Code, 1908 seeking rejection of the plaint. The plaintiff filed a written objection asserting, *inter alia*, that defendant no.10 had acquired not merely the assets but also the liabilities of defendant no.1, as evidenced by the resolution held in the meeting dated 17.06.1988, and, therefore, the plaint was not liable to be rejected.

Upon hearing the parties, the Adalat, vide the impugned Order no.67 dated 07.10.2003, disposed of both the applications striking out the names of defendant nos.7 and 10 from the plaint of the suit with observation that neither defendant no.7 nor defendant no.10 has signed any charge documents or any mortgage deed either as principal debtor or as guarantor. It was further observed that, although, the defendant no.10 had purchased the assets of defendant no.1 from BSRS, it had not directly borrowed any loan from the plaintiff. Hence, the suit was not maintainable against them, although the plaint itself was not liable to be rejected in its entirety.

In this regard, the categorical assertion of the plaintiff is that, the defendant no.7 was a necessary and proper party whose properties had already been attached before judgment vide order dated 29.11.2001 and the defendant no.10, having acquired the auctioned property together with its assets and liabilities, was also a necessary party. It was further asserted that the Adalat acted without lawful authority in striking out their names during the pendency of the trial.

In view of the aforesaid grounds, the plaintiff as writ petitioner invoked the writ jurisdiction under Article 102 of the Constitution by filing Writ Petition No.7271 of 2003 before the High Court Division, which was summarily rejected vide judgment and order dated 04.01.2004.

Consequently aggrieved, the plaintiff-petitioner filed Civil Petition for Leave to Appeal No.609 of 2004 before this Division whereupon leave was granted vide order dated 30.04.2007.

Hence, the instant Civil Appeal.

Mr. Md. Imam Hasan, the learned Senior Advocate, appearing on behalf of the appellant submits that the High Court Division fell into error in affirming the impugned order of striking out the names of the defendant nos.7 and 10 from the plaint by treating them as standing on the same legal footing solely on the findings that neither they had personally executed any charge documents nor any mortgage deeds. In doing so, the Court overlooked the distinct legal basis upon which each defendant had been impleaded. In this regard, he goes to submit that, the defendant no.7 was impleaded as an ex-director and continuing shareholder of the

defendant no.1, while the defendant no.10 was impleaded as the purchaser of the auctioned property having acquired the assets and liabilities of the defendant no.1 during the pendency of the suit.

He further submits that, the High Court Division misdirected itself by failing to consider the resolutions of the meeting dated 17.06.1988 (Annexure-E1 to the writ petition) and other material documents wherefrom it is clearly reflected the proposed auction sale of the assets of defendant no.1 as well as the active participation of defendant Nos.7, 9 and 10 in the said transaction. He goes to contend that, the Adalat has miserably failed to appreciate that the credit facilities were availed of by the defendant no.1 through its Managing Director or other duly authorised officers acting pursuant to the resolutions of the Board of Directors. Therefore, the absence of individual signatures of any director on the loan or security documents did not, by itself, absolve defendant no.7 of his liability or justify his exclusion from the proceedings. The High Court Division also ignored the significant conduct of defendant no.7, who, after contesting the suit for over 13 (thirteen) years sought for striking his name only at an advanced stage of the trial with an apparent ulterior motive.

He goes to argue that, defendant no.10, having succeeded to the assets and liabilities of the defendant no.1, was a necessary and proper party to the suit. Hence, the Adalat, despite rejecting the application for rejection of plaint at the instance of defendant no. 10, erroneously struck out its name from the proceedings, a relief that was not even sought for,

thereby causing substantial prejudice to the plaintiff and thereby frustrating the effective adjudication of the dispute.

Accordingly, he submits that the impugned judgment and order passed by the High Court Division warrants interference of this Division for the cause of justice.

Mr. Md. Taufique Hossain, learned Advocate-on-Record, appearing on behalf of respondent no.3 submits that the Adalat has rightly struck out the name of defendant no.10 from the plaint of the suit, as it was neither the borrower nor the mortgagor or guarantor in respect of the loan liabilities of defendant no.1 to the plaintiff. In this connection he goes to submit that, when BSRS sold the mortgaged properties to the defendant no.10 in exercise of its statutory power of sale under Section 34 of the Order, 1972, said defendant acquired the properties free from any charge or encumbrance claimed by the plaintiff. Any claim of the plaintiff as the second chargee in respect of those properties was, therefore, confined to the sale proceeds realised by BSRS, subject to the satisfaction of first charge in favour of BSRS. Defendant no.10 merely acquired the properties through the statutory sale and did not thereby assume the outstanding loan liabilities of defendant no.1 company.

The learned counsel further submits that allowing the plaintiff to proceed against defendant no.10 or the properties purchased by it would, in effect, amount to questioning the validity of the statutory sale conducted by BSRS under Section 34(1) of the Order, 1972, which is barred by Section 34(5) thereof. He submits that even if the plaintiff

alleges that BSRS sold the mortgaged properties for less than their full market value, its remedy, if any, would lie in claiming damages against BSRS under Section 69(3) of the Transfer of Property Act, 1882, and not against defendant no.10. Accordingly, the title acquired by the defendant no.10 to the properties cannot be challenged merely on the ground that the sale was improper or irregular. As such, he submits that the defendant no.10 was unnecessarily impleaded in the suit and the trial court rightly struck out its name, a decision which the High Court Division correctly upheld by rejecting the writ petition filed by the plaintiff as writ petitioner.

The cardinal issue that calls for determination is whether, in the facts and circumstances of the case, the High Court Division was justified in upholding the decision of the Adalat as to striking out the names of defendant nos. 7 and 10 from the plaint merely on the ground that neither of them had personally executed the charge documents or the mortgage deed in the capacity of principal debtor or guarantor in respect of the defaulted loan in question.

At the outset, it is necessary to observe that the two defendants stood on entirely different factual and legal footings and, therefore, their respective positions could not have been adjudged by applying one and the same criterion. On appraisal of the records, it appears that, defendant no.7 was impleaded in the suit in his capacity as a former director and continuing shareholder of defendant no.1, whereas defendant no.10 was subsequently impleaded pursuant to the amendment of the plaint as the

purchaser of the assets of defendant no.1 in a statutory auction conducted by BSRS.

The Adalat, however, proceeded upon a common premise that, since neither of them had personally signed the charge documents or mortgage deed, neither of them could remain a party to the suit. In our view, such an approach has resulted in a failure to examine the distinct legal character of their respective involvement in the transaction and the real controversy requiring adjudication in the suit.

So far as the defendant no.7 is concerned, the mere fact that he did not personally execute the loan or security documents cannot, by itself, furnish a lawful basis for striking out his name at the interlocutory stage of the proceedings. The materials on record, as noticed hereinbefore, disclose that the loan facilities were availed of by defendant no.1, a juristic entity, through its Managing Director and/or duly authorised officers pursuant to the decisions of its competent corporate organs. A company, being an artificial juridical person, necessarily acts through its directors and authorised officers. The absence of the personal signature of each individual director on every loan or security document is, therefore, not by itself determinative of the question whether such director has any liability arising out of the affairs of the company or whether his presence is necessary for the effective adjudication of the dispute. That question must depend upon the pleadings, the nature of the claim, the capacity in which the person has been impleaded and the evidence that may ultimately be adduced at trial.

In the present case, there is material on record indicating that defendant no.7 was an ex-director and shareholder of defendant no.1 and his involvement in the affairs and proposed transfer of the assets of the company and liabilities was reflected in the contemporaneous resolutions of the meeting dated 17.06.1988 (Annexure E1 to the writ petition). Said document, according to the appellant, was produced before the Adalat and was specifically relied upon to demonstrate his connection with the affairs of the company and the proposed transfer of the mill together with its assets and liabilities. Whether such material is sufficient to establish substantive liability against defendant no.7 is, however, a matter to be determined upon evidence and cannot properly be foreclosed by striking out his name at the threshold merely because he did not personally sign the charge documents.

It is well settled that the Court, while considering the question of the proper constitution of a suit, ought to distinguish between the ultimate question of liability and the preliminary question of whether the presence of a party is necessary or proper for the effective and complete adjudication of the controversy. A party may be necessary or proper not merely because a decree is ultimately enforceable against him, but also because his presence may be required to effectively determine the questions arising out of the transaction forming the subject matter of the suit. The power to strike out a party, therefore, ought to be exercised judicially and with circumspection, particularly where the pleadings

disclose a triable issue concerning participation of that party in the underlying transaction.

The settled principle of law is that the procedural provisions particularly, amendment concerning pleadings and parties are intended to advance the determination of the real controversy rather than to defeat it on technical considerations. Amendment of a plaint can be allowed in the discretionary power of the Court and such discretion is required to be exercised judicially and not in an arbitrary or perfunctionary manner amounting to an illegal exercise of jurisdiction: *Shafiqul Islam vs. Mustafizur Rahman,* reported in *2008 BLD (AD) 39.* The conclusion, therefore, must be that while the first part of Rule 17 dealing with amendments in general vests the Court with discretion, the latter part, dealing with such amendments as are necessary for the purpose of determining the real controversy between the parties, imposes an obligation on the Court, and not merely a discretion, to allow such amendments: *Bibhas Chandra Bose vs. Dolly Bose nee Dutta*, reported in *AIR 1989 Cal 190.*

We are, therefore, of the view that the alleged liability of the defendant no.7, if any, needs to be determined upon consideration of the pleadings, the contemporaneous resolution dated 17.06.1988, the corporate records and other evidence to be adduced by the respective parties. In addition, his prolonged participation in the litigation for more than thirteen years is also a relevant circumstance, though not by itself conclusive of liability. The belated attempt to secure his exclusion from

the array of defendants, particularly after an order of attachment before judgment had already been made in respect of his property, called for a more careful judicial examination rather than an abrupt striking out of his name. The Adalat ought not to determine disputed questions of fact and substantive liability in a manner that prematurely forecloses the opportunity of the plaintiff to establish its case at trial.

The position of defendant no.10, however, requires separate consideration. It is undisputed that defendant no.10 was not the original borrower from the appellant bank. It did not, according to the materials before us, obtain the loan facility in question in its own name, nor did it execute the original charge or mortgage documents as borrower or guarantor. Its impleadment arose from the subsequent acquisition of the assets of defendant no.1 through the statutory auction conducted by BSRS under Section 34 of the Order, 1972. The auction sale dated 17.01.1990 was initially challenged by BRTC, however, the decision dated 28.08.1991passed by the High Court Division setting aside the sale was set aside by this Division and the sale was ultimately upheld vide judgment and order dated 19.11.1992.

The legal consequence of such statutory sale cannot be determined merely by asking whether the defendant no.10 was the original borrower or guarantor. The Adalat must also examine the legal effect of the statutory sale, the nature and extent of the title acquired by the purchaser, the statutory protection attaching to such sale and, importantly, whether the purchaser expressly or impliedly assumed the liabilities of the

transferor. These questions cannot be answered solely by reference to the absence of the signature of the purchaser on the original loan documents.

The further contention raised by the respondents is that, by virtue of the sale under Section 34 of the Order, 1972, defendant no.10 acquired the property free from any liability and the remedy of the plaintiff appellant, if any, lay only against BSRS in determining the substantive rights of the parties. In this regard, the contention that the validity of the statutory sale cannot be reopened in view of Section 34(5) of the said Order is a matter requiring due consideration. However, these considerations do not necessarily lead to the conclusion that the name of the defendant no.10 could be struck out from the suit without first determining the precise nature of the claim made against it in the amended plaint and the legal effect of the documents relied upon by the appellant.

The record discloses that the plaintiff appellant by an application under Order VI Rule 17 of the Code, 1908, sought to implead defendant no.10 after the statutory sale and to amend the plaint. The application for amendment was allowed vide Order No.57 dated 13.01.2003 by the trial court. Defendant no.10 thereafter sought rejection of the plaint under Section 250 of the Act, 1994 read with Order VII Rule 11 of the Code, 1908. The Adalat did not reject the plaint under Order VII Rule 11; nevertheless, while disposing of the application, it proceeded to strike out the name of defendant no.10 from the plaint. This distinction is legally significant. The jurisdiction to reject a plaint under Order VII Rule 11 is

circumscribed by the statutory conditions contained therein, whereas the question whether a party should be retained in the suit involves a separate consideration of the pleadings, the cause of action asserted against that party and the necessity or propriety of its presence for complete adjudication.

The fact that an amendment has been allowed does not, of course, establish the substantive truth of the amended averments; nevertheless, once the amendment is allowed, the amended pleadings constitute the foundation upon which the rights and liabilities of the parties are to be adjudicated.

In the present case, the Adalat, instead of examining the amended pleadings and determining whether the plaintiff appellant had disclosed a triable cause of action against defendant no.10, appears to have proceeded directly to the conclusion that, since defendant no.10 was neither the borrower nor the original mortgagor or guarantor, its presence in the suit was unnecessary. Such reasoning, in our view, is too broad. A subsequent purchaser of the assets of a borrowing company may not, merely by reason of such purchase, become personally liable for the pre-existing contractual debt. At the same time, whether the purchaser has assumed any liability, whether the transaction involved an acquisition of assets together with liabilities, and what legal consequences flow from the particular statutory sale are questions which depend upon the terms of the transaction and the applicable statutory framework.

In the instant case, the statutory sale under Section 34 of the Order, 1972 has already been upheld by this Division. Consequently, no collateral proceeding can be permitted to unsettle that concluded sale indirectly. But that principle does not, in our view, justify the summary exclusion of defendant no.10 where the amended pleadings raise questions as to the legal consequences of the transfer and the alleged assumption of liabilities. The rights of defendant no.10 can adequately be protected by requiring the plaintiff appellant to establish its claim in accordance with law.

We are, however, equally clear that our interference should not be understood as holding, at this stage, that defendant no.7 is personally liable for the entire loan liability of defendant no.1 or that defendant no.10, by reason of the auction purchase alone, has assumed the debt of defendant no.1 company. Those are matters for adjudication upon the pleadings and evidence.

For the reasons stated above, we are of the considered view that the Adalat committed an error of law in striking out the names of defendant nos.7 and 10 from the plaint on the sole and common ground that neither had personally executed the charge documents or mortgage deed. The High Court Division, in summarily rejecting the writ petition and affirming the said order, failed to exercise its jurisdiction in accordance with law and thereby occasioned a failure of justice.

Accordingly, the impugned judgment and order dated 04.01.2004 passed by the High Court Division in Writ Petition No.7271 of 2003 and

affirming the said order, failed to exercise its jurisdiction in accordance with law and thereby occasioned a failure of justice.

Accordingly, the impugned judgment and order dated 04.01.2004 passed by the High Court Division in Writ Petition No.72071 of 2003 and the impugned Order no.67 dated 07.10.2003 passed by the Artha Rin Adalat No.3, Dhaka, so far as they relate to striking out the names of defendant nos.7 and 10 from the suit, are both set aside.

The names of defendant nos.7 and 10 shall stand restored in the array of defendants.

The Artha Rin Adalat shall proceed with the suit in accordance with law and shall determine, upon consideration of the pleadings and evidence of the parties, the respective liability, if any, of defendant nos.7 and 10.

Nothing contained in this judgment shall be construed as an expression of opinion by this Division on the ultimate merits of the claim against either of the defendants.

The appeal is, accordingly, allowed, without any order as to costs.

C. J.

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21.04.2026.
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