



## LAW ANALYSIS

## ARTHA RIN ADALAT AIN, 2003

## Ensuring speedy recovery of overdue loans

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THE objective of prompt recovery of loans due to banks and other financial institutions has prompted the Parliament to enact the Artha Rin Adalat Ain, 2003 (ARAA). In line with the general pattern of the provisions in the ARAA for ensuring expeditious recovery of overdue loans, Section 12 of the ARAA empowers financial institutions to sell any property which has been subjected to mortgage, lien, or pledge by the debtor as security for the loan provided that the financial institution has a legal right to sell the same, without filing any suit. Section 12(4) of the ARAA enacts that in conducting such a sale, the court would as far as practicable follow the procedure of an auction sale as provided in Sub-Sections (1), (2), and (3) of Section 33. Sub-Section (1), (2), and (3) of Section 33 provides in detail the procedure to be followed in case of selling a property through an auction in pursuance of a decree passed by the court under the ARAA.

In *Zinnatul Ara (Mrs.) and Others v Government of Bangladesh & Others*, [2010] 15 MLR (AD) 185, the petitioner's property was sold by an auction under Section 12 of the ARAA. She contended that as the auction purchaser did not deposit the rest of the bid money within the stipulated 10 days following the auction as required under Section 33(2) of the ARAA (as was required under the law existing then), the sale should not have been confirmed; rather the deposited security money should have been forfeited. The petitioner also deposited 7.5 million taka and applied for setting aside the auction sale upon payment of solatium to the auction purchaser.

However, the Appellate Division (AD) did not accept the petitioner's argument and rejected her petition for review of the leave to appeal petition. The AD held that as the auction sale took place under Section 12(1) of the ARAA prior to the filing of any suit, in view of the provision in Section 12(4) of the ARAA, the compliance with the requirements of Section 33 was not mandatory



in this case (para 6). It should be noted that the AD also considered that the High Court Division deferred the delivery of judgment for allowing the petitioner to settle the matter with the auction purchaser which yielded no result as the purchaser showed no interest in negotiations (para 7).

Arguably, the provision of Section 12(8) of the ARAA that notwithstanding whatever else that may be contained in any other law in force, a sale taking place under Section 12 of the Act would create a valid title in favour of the purchaser and the purchaser's interest cannot be contested in any manner, may have swayed the AD to reach the ultimate conclusion in this case. However, if compliance with the provisions of Sub-Sections (1) to (3) are taken to be mandatory, then arguably the auction purchase itself can be deemed to be illegal and therefore, Section 12(8) of the ARAA would appear to be inapplicable in this case.

After all, the non obstante clause in Section 12(8) of the ARAA apparently ousts the application of the provision of other laws and not the other provisions of the ARAA. Hence, it is difficult to see how Section 12(8) of the ARAA would override the application of

its Section 33. Or, even if the purchaser's title could not be contested, proviso to Section 12(8) laying down that if there is any illegality or procedural irregularity in the sale process, the mortgagor may claim compensation from the financial institution, could have been applied.

As already pointed out, Section 12(4) does not provide that in selling a property under Section 12, Sub-Sections (1)-(3) of Section 33 must be followed completely. Nonetheless, the wordings 'as far as possible' do not imply that the Parliament has envisaged compliance with Section 33 (1)-(3) as non-mandatory; rather it would be plausible to think that the Parliament has implied that in conducting a sale under Section 12, the procedure provided for in Section 33 would be followed unless following such procedure would be impossible or impracticable. Thus, in view of the words used in Section 12(4), the aforementioned finding of the AD should have been based on a clear demarcation line between which part/s of Sub-Section (1)-(3) of Section 33 need and which one need not be followed in conducting a sale under Section 12. The legal basis for such a demarcation line should have also been thoroughly explained. However, in the perfunctory way the

judgment laid down that compliance with Section 33 is not mandatory, raises more questions than it resolves.

In fact, if this finding of the AD's judgment is taken literally, it may be plausible to think that as in the case of a pre-trial sale of a property under Section 12 compliance with Section 33 is not mandatory, then one may argue that in selling a property under Section 12 of the ARAA, even the circulation of notice of an auction proceeding and giving all interested persons a chance to participate in the public bidding process for purchasing the property is not mandatory.

Thus, arguably, even a sale of a property through private negotiations between officials of the financial institution and willing purchasers would be legal, if we follow the AD's conclusion in this case. None with a reasonable mind would probably hold that this is a logical conclusion, but clearly if we follow the decision of the AD in this case, then this is what we may logically arrive at.

Indeed, there could not have been any scope for arriving at this type of far-fetched conclusion, if the AD simply limited its decision to a more textual and restrictive application of Section 12. In this case, the AD noted that the auction purchaser could not deposit the entire bid money within the statutory period fixed under Section 33, because the proceeding was postponed by an order of the court (para 6).

Thus, the AD could have held that as the breach (i.e. failure to deposit the entire bid money) occurred by orders of the court, there was no failure on the part of the auction purchaser to deposit the entire bid money within the meaning of the Section. When such an avenue existed for the AD to avail, it is submitted that the wisdom of taking a much more expansive interpretation of the provision and holding that only a part of the law enacted by the Parliament is mandatory is open to questions.

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## FOR YOUR INFORMATION

## Before purchasing your dream flat

RAISUL ISLAM SOURAV

PURCHASING a flat becomes a lifetime dream for many people because of high scarcity of land. Among them some are purchasing their residence by expensing their whole savings. On the contrary, who have land, they handover that to the developer to construct building.

However, before entering any contract with the contractor, the landlord should be informed about the profile of the builder to whom he is decided to transfer his property. In accordance with the Real Estate Development and Management Act 2010, every building construction company must be registered. In addition, no developer entity can advertise or make a contract to sell their flats before getting approval from the concerned city development authority i.e. RAJUK.

The owner and the developer should execute a contract regarding the construction of the building. In that contract the portion of the property, any transaction between the parties, settlement procedure between the parties, share and distribution of the flats, period of work and other relevant matters should be determined. Moreover, the landlord will have to execute a power of attorney in favour of the developer to sell his part of the property.

## Be aware before purchasing a flat

Before purchasing a flat, the purchaser should scrutiny all the necessary documents including title deed, proper approval from concerned authorities, detail design of the building and compliance with the national building code and building construction rule, ingredients of the construction etc. The developer will deliver a list of fittings and fixtures to be used in the proposed flat. Every land developer is bound to provide all these documents to the prospective customer. The structure of the house must be designed properly by an architect and the construction must be done under the direct supervision of skilled structure and civil engineers. Additionally, the soil upon which the construction will take place must also be tested by the experts.

Furthermore, the procurer should be more cautious about any claim over the property, legal complexity, encumbrances etc. The buyer should investigate the safety, security, facilities and other technical matters of the building as well as the utility services like lift,



garage, gas, water, electricity, telephone line, fire extinguisher, drainage system etc.

Both the contracting parties should determine detail terms-conditions and rights-responsibilities of them in the contract deed. The sale deed must mandatorily be registered and the contract for sale deed (Bainanama) must also be registered. However, there is a cardinal principle of land transfer that no person can hand over a better title than he himself has. Therefore, the seller has no power to sell if his title is not absolute. Hence, an intending buyer should always be aware of it. If he buys the flat from the authorised person of the owner then the power-of-attorney document must be verified in order to check his extent of authority to sell that property.

## Rights of the purchaser

The developer will have to deliver the chosen flat within the agreed time. Even, he cannot change the design without prior permission of the authority and the buyer is not obliged to pay more money beyond the agreement. Nevertheless, if both the parties want to vary the condition(s) of the contract, they can do so amicably and mutually. However, the developer is bound to maintain the building up to 1 year. Further, he will repair the flat till two years for any construction default.

After the payment, the developer is bound to deliver the possession of the furnished and agreed size of flat to the purchaser as well as register a deed in this regard. If the measurement varied from the contract then the value will be adjusted within three months by the concerned parties. The buyer should always transact the money through banking channel. If the purchaser fails to pay the money or any installment then the builder can eject him by serving a 60 days preceding notice. In that case, the seller will have to return the received money through cheque within three months. However, the defaulter has a scope to pay the default installment by paying 10% extra interest to the seller. Nonetheless, the buyer cannot take this chance for more than three times.

Similarly, if the developer fails to deliver the possession within the specified time then he will have to return all the received money with necessary compensation. However, if the damaged amount is not settled in the contract then the amount will be 15% of the paid amount. Again, if the buyer wants to cancel the contract then the seller will get 10% of the paid amount as compensation.

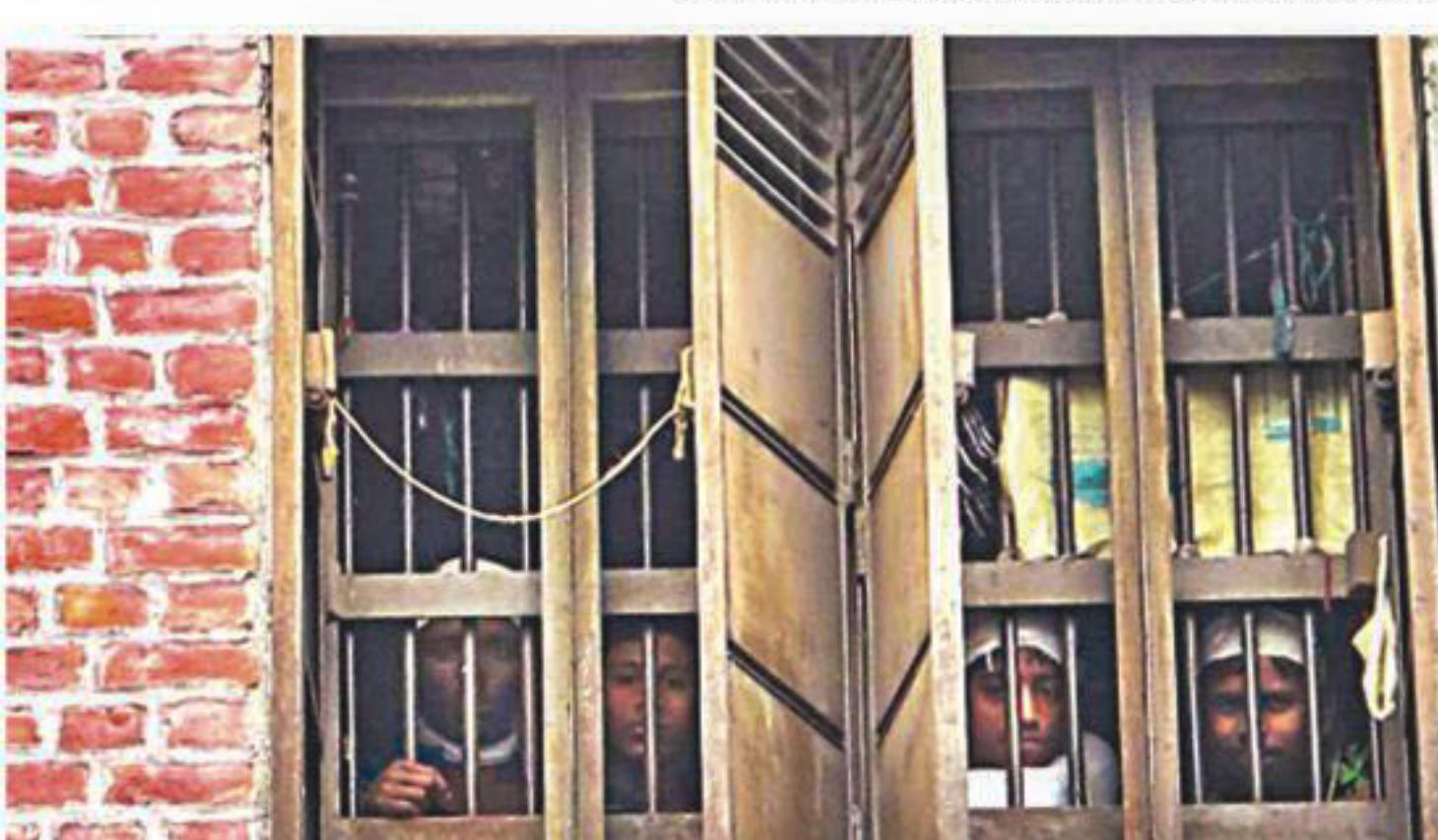
## Relief against grievance

If any discrepancy has been taken place between the seller and the buyer regarding the violation of the terms and conditions of the contract i.e. cancellation of allotment of flat without reasonable notice, construction beyond approved design, using of inferior standard materials to construct, creating encumbrances upon the property etc. then the parties will have to try to settle the matter amicably. Alternatively, the affected party can complain to the registering authority about such discrepancy.

However, if the parties are failed to resolve the matter by mutual understanding then it will be determined by arbitration tribunal constituted under the Arbitration Act 2001. It is better to insert the detail provisions of arbitration into the main sale contract, otherwise it may create complexity and the parties may not be able to constitute an arbitration tribunal. In that case, after the expiry of 30 days, the purchaser can file suit to claim damages or to enforce or cancel the contract before the competent court.

In addition, the buyer also can bring criminal action under the mentioned Act to the court of first class magistrate to punish the violator. However, the court will follow summary trial procedure to conclude this type of dispute. Nonetheless, the culprit can be jailed for highest three years or slapped with Tk 20 lakh in contravening any of the provision of this law.

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SOURCE: WINROCK INTERNATIONAL

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