

13 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain

-Chief Justice.

Mr. Justice Hasan Foez Siddique

Ms. Justice Zinat Ara

Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.41 of 2008.

(From the judgment and order dated 04.03.1998 passed by the High Court Division in Writ Petition No.435 of 1994)

**Government of Bangladesh, represented by the :Appellant.
Secretary, Ministry of Works.**

-Versus-

Abdul Mannan being dead his heirs: :Respondents.

1. Begum Shamsun Nahar and others.

For the Appellant. : Mr. Mahbubey Alam, Attorney General (with Mr. Biswajit Debonath, Deputy Attorney General) instructed by Mr. Md. Ferozur Rahman, Advocate-on-Record.

For the Respondents. : Sheikh Fazle-Noor-Taposh, Advocate (with Mr. Mehedi Hassan, Advocate) instructed Mr. Moulavi Md. Wahidullah, Advocate-on-record.

Dates of Hearing. : 05.03.2019, 06.03.2019 and 02.04.2019

Date of Judgment : The 2nd April, 2019.

Abandoned property, suit for specific performance contract;

In the suit for specific performance of contract the declaration of the suit property is not an abandoned property, is beyond the scope of the suit and such declaration has no legal value at all. ... (Para 25)

In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree. ... (Para 26)

J U D G M E N T

SYED MAHMUD HOSSAIN, C. J:

1. This civil appeal by leave is directed against the judgment and order dated 04.03.1998 passed by the High Court Division in Writ Petition No.435 of 1994 making the Rule Nisi absolute and setting aside the judgment and order dated 18.01.1994 passed by the learned Chairman, First Court of Settlement, Dhaka in Case No.66 of 1991 rejecting the case upholding the inclusion of the case property in the list of abandoned buildings.

2. The writ-petitioner Mohammad Abdul Mannan (respondent No.1 herein) filed the above case before the First Court of Settlement for exclusion of the case property comprising 1 (one) bigha of land with a two storey building and other structures thereon, being holding No.130-A, Road No.3, Dhanmondi R/A, from the 'Ka' list of the abandoned buildings.

3. The writ-petitioner's case, in short, is that the property in question belonged to Mr. Fazal Dossani on the basis of the deed of lease dated 16.02.1957 executed by the Government and he was said to have made an oral gift dated 01.07.1962 in favour of his wife and said to have delivered possession thereof. The fact of oral gift was affirmed by an affidavit dated 13.10.1971. Mr. Fazle Dossani's wife Mrs. Gulbanu Dossani entered into an agreement with the writ petitioner and his brother to transfer the property in question and received an amount of Tk.15,000/- as earnest money and thereupon executed a deed of agreement on 24.02.1971. On 28.02.1972, Gulbanu received a further amount of Tk.1,00,000/-(one lac) from the writ petitioner and his brother towards the part payment of the consideration money which was fixed at Tk.2,00,000/-(two lac). But document having not been executed and registered the writ petitioner and his brother filed Title Suit No.15 of 1972 and obtained an *ex parte* decree and in execution thereof obtained the deed of sale through Court. It was further case of the writ petitioner that possession of the property was obtained by him and his brother on 08.10.1971 and that they let out the property to Lumba and another, both officials of the Indian High Commission. The property in question was listed as abandoned property but it was released and the writ petitioner became sole owner of the property pursuant to an amicable partition effected by a solenama dated 26.11.1980 between him and his co-sharers in Title Suit No.676 of 1979 of Court of Subordinate Judge, Khulna.

4. It may be recalled that respondent No.1 Abdul Mannan died during pendency of the appeal and his heirs were substituted in his place.

5. It is the contention of the writ petitioner that the property was unjustly and illegally listed as abandoned building.

6. The case before the Court of Settlement was contested at the hearing stage by the Government upon making oral submissions. The Court of Settlement by its judgment dated 18.01.1994 dismissed the case filed before it seeking delisting of the property from the list of the abandoned buildings.

7. Against the judgment and order dated 18.01.1994 passed by the First Court of Settlement, the writ petitioner, Mohammad Abdul Mannan as the writ-petitioner filed a writ petition before the High Court Division and obtained Rule Nisi in Writ Petition No.435 of 1994.

8. The learned Assistant Attorney General opposed the Rule Nisi appearing on behalf of the writ-respondents but did not file any affidavit-in-opposition.

9. The learned Judges of the High Court Division upon hearing the Rule Nisi by the judgment and order dated 04.03.1998 made the Rule absolute.

10. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the writ-respondent as the leave-petitioner filed Civil Petition for Leave to Appeal No.1454 of 2006 before this Division and obtained leave on 15.01.2008 resulting in Civil Appeal No.41 of 2008.

11. Mr. Mahbubey Alam, learned Attorney General, appearing on behalf of the appellant, submits that the High Court Division in its writ jurisdiction resettled the questions of fact which were settled by the Court of Settlement on consideration of materials on record and as such, the impugned judgment should be set aside. He further submits that the decree in a suit for specific performance of contract does not decide the title and possession of the property in question and that there is no bar to inclusion of the property in the 'Ka' list of the abandoned property and as such, the impugned judgment should be set aside. He also submits that mere agreement to sell by itself would not be sufficient to establish transfer of title of the property in question and there is no satisfactory evidence regarding transfer of any legal right, title or interest in the property in question. He then submits that writ-petitioner failed to prove the oral gift said to have been made by Mr. Dossaini, the original owner to his wife Mrs. Gulbanu and the subsequent agreement to sell in favour of the writ-petitioner and his brother and as such, interference is called for by this Division.

12. Mr. Mehadi Hasan, learned Advocate, appearing on behalf of the writ-petitioner-respondents, on the other hand, submits that the case property is not an abandoned property since a certificate dated 15.11.1972 was issued by the then Sub-Divisional Officer (S.D.O.), Sadar (South), Dhaka (Annexure-I to the writ petition) specifically stating that the case property is not an abandoned property.

13. He further submits that the writ-petitioner and his brother have been in possession of the disputed property and that while they have been in possession of the case property, the same could not be treated as an abandoned property and as such, the impugned judgment and order dated 18.01.1994 passed by the Court of Settlement is highly illegal and without jurisdiction.

14. He then submits that the finding of the Court of Settlement that the note verbal dated 26.12.1979 issued by the Ministry of Foreign Affairs to the High Commission of India (Annexure-N to the writ petition) was managed by the writ-petitioner is based on no evidence and that the High Commission of India acted on the said note verbal and handed over possession of the property to the writ-petitioner in June,1980 and as such, no interference is called for.

15. He then submits that the Court of Settlement failed to exercise its jurisdiction by not sending the signature of Mr. A.F.M. Abdur Rashid contained in Annexure-U to the writ petition for comparison with his other admitted signatures by the handwriting expert and as such, the impugned judgment and order dated 18.01.1994 passed by the Court of Settlement is illegal and without jurisdiction. He also submits that the First Court of Settlement became the party to the case before it and assumed all the functions of the appellant-Government by *suo motu* calling Mr. A. F. M. Abdur Rashid to be examined and *suo muto* calling other records and thus lost its role as a Court constituted under law and as such, the High Court Division rightly interfered with the judgment and order arrived at by the Court of Settlement.

16. We have heard the submissions of the learned Attorney General for the appellants and the learned Advocate for respondent No.1, perused the impugned judgment and the materials on record.

17. Admittedly, the case property originally belonged to Mr. Fazal Dossani and the Government has not questioned the fact that Mrs. Gulbanu was not his wife. The Government has challenged the genuineness of the alleged deed of gift in favour of the Mrs. Gulbanu.

18. The High Court Division came to a finding that Mrs. Gulbanu entered into an agreement for sale of the suit property in favour of the writ-petitioner and his brother and that she also made over possession of the property in favour of the writ-petitioner. The High Court Division noted that Gulbanu took entire consideration money and also made over the income tax certificate and other

documents in favour of the writ-petitioner but she could not execute and register the deed of sale in favour of the writ-petitioner and as such, the writ-petitioner was constrained to file a suit for specific performance of contract and obtained a decree. The High Court Division then noted that the decree was duly executed and the deed of sale was registered through Court and as such, the question of presence of the real owner or her whereabouts or management of the property did not arise at all. The High Court Division held that the property was managed by the writ-petitioner before the President's Order came into force and as such the requirements of Article 2 are totally nil and as such the disputed property could not be treated as abandoned property.

19. The High Court Division found that the certificate issued by the Sub-Divisional Magistrate, the competent authority proved that the property is not an abandoned property. The High Court Division observed that the Government did not file any affidavit-in-opposition controverting the statements made in the writ petition and as such, it could safely be presumed that the appellants had accepted the statements made in the writ petition. The High Court Division noted that the appellants did not file any written statement in the Court of Settlement and found that once the appellants found that the property was not an abandoned property, the same could not be published in the 'Ka' list of the Abandoned Buildings by the Gazette Notification as abandoned building. The High Court Division also held that the writ petitioner had been in possession of the disputed property throughout and that while he had been in possession thereof, the property could not be treated as abandoned property. The High Court Division, therefore, held that the judgment and order of the Court of Settlement is highly illegal and had been passed without consideration of materials on record.

20. The Court of Settlement held that there was no evidence whatsoever oral or documentary to prove the oral gift by Mr. Dossani in favour of Mrs. Gulbanu on 01.07.1962. In order to prove the oral gift, the writ-petitioner filed an affidavit sworn by Mr. Dossani on 13.10.1971 (Annexure-D to the writ petition). Having gone through the affidavit, we find that this affidavit was sworn before a Magistrate at Karachi, Pakistan then an enemy country at war with Bangladesh. There is no explanation for the long gap of 9 years between the alleged oral gift and the affidavit. Although the affidavit mentioned possession of Mrs. Gulbanu in the property, there is no paper such as receipts showing payment of various taxes, ground rents, etc. by her to the tax receiving authorities during the said long period of 9 years.

21. What is remarkable to note here is that there is no paper showing mutation/substitution of Mrs. Gulbanu's name in place of Mr. Dossani with the DIT (Dhaka Improvement Trust) or Ministry of Works, or Income Tax Authority, etc. to prove Mrs. Gulbanu's exclusive possession of the case property. Therefore, the Court of Settlement did not give importance to the affidavit sworn in an enemy country and at the time of swearing the affidavit liberation war was going on in this country. What is important to note here is that the so-called affidavit was sworn in 8 months after the deed of agreement of sale of the writ-petitioner.

22. Admittedly, the deed of agreement dated 24.02.1971 is an unregistered agreement and there is no explanation why it was not registered. Even if the deed of agreement was registered, the oral gift not being proved Mrs. Gulbanu has no interest in the case property and subsequently the deed of agreement did not confer any enforceable right upon the writ-petitioner in the property.

23. The writ-petitioner instituted Title Suit No.15 of 1972 against Mrs. Gulbanu for a specific performance of contract as she failed to honour her commitment made in the agreement. The agreement dated 24.02.1971 (Annexure-B to the writ petition) showed the payment of Tk.15000/- as earnest money and the writ-petitioner claimed to have paid a further sum of Tk.100,000/-(one lakh) as part payment of the consideration to Mrs. Gulbanu on 28.02.1971 (Annexure-C to the writ petition).

24. The Court of Settlement called the record of Title Suit No.15 of 1972 and examined the record. The Court of Settlement noted that the suit was filed against Mrs. Gulbanu on 18.03.1972 although the writ-petitioner claimed to have paid Tk.100,000/- towards the consideration to Mrs. Gulbanu on 28.02.1972. The Court of Settlement further held that if the payment of Tk.100,000/- was

made on 28.02.1972 why no document was obtained from Mrs. Gulbanu as a proof of the payment. But before the High Court Division the writ petitioner produced a receipt (Annexure-C) showing payment of Tk.100,000/- to Mrs. Gulbanu on 28.02.1972. From the judgment of the Court of Settlement, it appears that the receipt (Annexure-C) showing payment of Tk.100000/- was not produced before it. Had Annexure-C been produced before the Court of Settlement, it would have been considered by it. Such apparent contradiction in payment of Tk.100,000/- also belies the claim of the writ-petitioner. The Court of Settlement also noted that Mrs. Gulbanu's address was given as Gulistan building which was not her residential quarter. The Court of Settlement also noticed that summons on Gulbanu in the suit record showed that it was served upon one Saifur Ahmed and there was nothing in the Peon's report clarifying as to who this Saifur Ahmed was and whether he was at all authorized to receive summons on Gulbanu's behalf. Therefore, the Court of Settlement came to the finding that the address of Gulbanu as shown in the plaint of Title Suit No.15 of 1972 was false and no summons of the suit was served upon her and that the affidavit dated 13.10.1971 sworn at Karachi, Pakistan, proved that Mrs. Gulbanu was not residing in this country in 1971 or 1972 at all. In view of the aforesaid finding of the Court of Settlement, we are of the opinion that *ex parte* decree was obtained by practicing fraud upon the Court and as such, the decree did not prove the writ-petitioner's claim over the property.

25. The *ex parte* decree passed in Title Suit No.15 of 1972 of the Third Court of the then Subordinate Judge has been annexed as Annexure-H to the writ petition. Having gone through the *ex parte* decree dated 09.08.1973, we find that not only the suit for specific performance of contract was decreed but also the disputed property was declared to be not an abandoned property. Such a declaration in a suit for specific performance of contract is beyond the scope of the suit and such declaration has no legal value at all.

26. For argument sake even if the decree was obtained legally the Government is not bound by the decree passed in a suit for specific performance of contract. In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree.

27. In this connection reliance may be placed on the case of *C Q M H Ayub Ali vs. Bangladesh and others (1995) reported in 47 DLR (AD)71*, where it has been held as under:

“A ‘decree’ by definition means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The decree in the suit for specific performance of contract will show that it has only decided the controversy between the vendor and the vendee and directed the vendor to execute the necessary document in favour of vendee. I have, therefore, no hesitation to hold that such a decree is not the one which is mentioned in Proviso (a) [to section 5 of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No.LIV of 1985)] and, as such, the existence of such a decree cannot be pleaded as a bar for inclusion of the building in the list.”

28. The principle expounded in the case referred to above applies to the facts and circumstances of the case in hand.

29. Record reveals that the Government filed Title Suit No.17 of 1976 in the Third Court of the then Subordinate Judge, Dhaka after over 2½ years of the *ex parte* decree dated 09.08.1973 passed in Title Suit No.15 of 1972 for declaration that the judgment and decree dated 09.08.1973 passed in Title Suit No.15 of 1972 was void, inoperative and not binding because the case property was an abandoned property. The plaintiff in the suit, that is, the Government did not file requisite deficit court-fee as directed by the Court (Annexure-L to the writ petition). By the order dated 14.01.1980 [Annexure-L(1) to the writ petition], the then learned Subordinate Judge, Third Court, Dhaka, rejected the plaint for not paying deficit court-fee.

30. We have already held that Government is not bound by the decree passed in a suit for specific performance of contract and as such, rejection of plaint in Title Suit No.17 of 1976 would not improve the case of the writ-petitioner. The Government can still claim that the disputed property is an abandoned property although a suit by the Government in that respect is barred.

31. The writ-petitioner relied on the certificate dated 15.11.1972 (Annexure-I to the writ petition) alleged to have been issued by Mr. M. A. Hye, Sub-Divisional Officer, SDO, (South), Dhaka, which is quoted below:

“This is to certify that the immoveable property as per scheduled below is not an abandoned property or has not been restored within one year of the issuance of this certificate.”

32. We have already noticed that Mrs. Gulbanu was not in this country in 1971-1972 as the said fact has been proved by the affidavit dated 13.10.1971 sworn at Karachi. As a result, the case property automatically became abandoned property as soon as P.O.16 of 1972 dated 28.02.1972 came into being. As regards the certificate dated 15.11.1972 (Annexure-I) issued by the S.D.O, the Court of Settlement came to the finding that it could not understand how the then S.D.O. could issue certificate or what he intended to mean by the statement to the effect “or has not been restored within one year of the issuance of this certificate.” The Ministry’s letter dated 06.07.1979 (Annexure-M-4 to the writ petition) was signed by A.F.M. Abdur Rashid, Senior Scale Section Officer of the Ministry. Mr. Rashid deposed before the Court of Settlement and has denied his alleged signature on the letter dated 06.07.1979. He also stated that the letter issued from the Ministry did not bear the personal seal of the Officer issuing such letters. The Court of Settlement noted that the Ministry’s file revealed that such rubber stamp seal did not appear in any other letters issued from the Ministry. The Court of Settlement also noted that there were other letters in the Ministry’s file issued by Mr. Rashid and those letters bore his signatures in Bengali but in this particular letter the signature is in English, the letter being the only exception in the entire case file to bear an English signature in the midst of Bengali signatures of other Officers as well. Therefore, the Certificate and the letter are documents fabricated by the writ-petitioner for creating evidence in his favour.

33. By the note verbal dated 26.12.1979 (Annexure-N to the writ petition), the Ministry of Foreign Affairs, Bangladesh, informed the Indian High Commission that the case property in the High Commission’s possession “as an abandoned property” has been released in favour of Mr. Abdul Mannan and Abdul Hannan. Having examined the letter dated 26.12.1979, we find that it did not bear the required embossed seal with initial of the issuing officer and as such, its credibility is not above doubt.

34. We are of the view that as soon as P.O.16 of 1972 came into being the case property was listed as abandoned and this fact has also been proved by the annexures to the writ petition.

35. The Court of Settlement noted that the Government file showed that after the case property became abandoned, the Indian High Commission occupied it as tenant of the Ministry of Works. We are of the view that the note verbal has been created by the writ-petitioner to suit his purpose.

36. It is contended on behalf of the writ petitioner-respondent that the signatures of Mr. A.F.M. Abdur Rashid as contained in Annexure-M-4 to the writ petition and other signatures should have been compared by a handwriting expert before the Court of Settlement could have drawn adverse inference about Annexure-M-4.

37. Having considered the Annexures of the writ petition and the attending facts and circumstances of the case, we are inclined to hold that it was not necessary to obtain the opinion of the handwriting expert before coming to a conclusion as regards Annexure-M-4. Moreover, the signature of A.F.M. Abdur Rashid appearing in Annexure-M-4 is in English although his other signatures in the official files are in Bengali.

38. Therefore, the question of obtaining the opinion of the handwriting expert does not arise. It is also contended on behalf of the writ-petitioner-respondent that the Court of Settlement assumed the function of the Government-appellants by *suo motu* calling Mr. A.F.M. Abdur Rashid as a witness. This contention is devoid of any substance as all Courts including the Court of Settlement have inherent jurisdiction to call any person as court witness. And as such, no exception could be drawn for calling Mr. A.F.M. Abdur Rashid as a witness by the Court of Settlement.

39. The findings arrived at and the decision made by the Court of Settlement have been based on proper appreciation of materials on record.

40. But the findings and decision made by the High Court Division having not been based on proper appreciation of materials on record call for interference.

41. In the light of the findings made before, we find substance in this civil appeal. Accordingly, this appeal is allowed without any order as to costs and the impugned judgment delivered by the High Court Division is set aside and the judgment and order passed by the Court of Settlement is restored.