

3 SCOB [2015] HCD 47**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 8967 of 2014

Abdul Jalil Biswas
..... Petitioner

-Versus-

Bangladesh, represented by the Secretary,
Ministry of Housing and Public Works
Government of the People's Republic of
Bangladesh, Bangladesh Secretariat,
Ramna, Dhaka and others.
..... RespondentsMr. M.I. Farooqui, Senior Advocate with
Mr. M. Sadequr Rahman, Advocate with
Ms. Najneen Nahar, Advocate
.... For the petitioner.
Mr. Md. Shahidul Islam, DAG with
Mr. Sukumar Biswas, AAG
..... For the RespondentsDate of Hearing : 21.04.2015 &
22.04.2015

Date of Judgment : 23.04.2015

Present:**Mr. Justice Zubayer Rahman Chowdhury**
And
Mr. Justice Mahmudul Hoque**Abandoned Buildings (Supplementary Provision) Ordinance, 1985****In our view, the petitioner had rightly approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, as his case was found to be barred by limitation and since he had no other equally efficacious remedy to enforce his rights, the petitioner was entitled to invoke the writ jurisdiction.(Para 23)****Judgment****Zubayer Rahman Chowdhury, J:**

1. By the instant Rule, the petitioner seeks to challenge the enlistment of the property, being House No. B/10, Block E, Zakir Hossain Road, Mohammadpur, Dhaka in the 'Kha' list of Abandoned Buildings published in the Bangladesh Gazette Extra Ordinary dated 23.09.1986 (at page no. 9764 (19) at serial no. 4) as well as the judgment dated 13.02.2014 passed by the 1st Court of Settlement, Dhaka in Case No. 25 of 2005 dismissing the same.

2. The Rule is being opposed by respondent no. 1 (Government of Bangladesh) by filing an affidavit-in-opposition.

3. Relevant facts necessary for disposal of the Rule are that the property in question, measuring more or less 144 square yards and located at Plot No. B/10, Block E, Zakir Hossain Road, Mohammadpur, Dhaka with a house built thereon (hereinafter referred to as

the property) was allotted to one Abdul Wahab Tarafder on 23.12.1959 for a period of 99 years on certain terms and conditions. Upon execution of the said Lease Deed, being Lease No. 606 dated 21.01.1960 the vacant possession of the property was handed over to Abdul Wahab Tarafder, who subsequently sold the same to the petitioner by registered Sale Deed No. 5222 dated 11.06.1964 and the possession of the said property was also handed over to the petitioner.

4. Upon purchasing the said property, the petitioner obtained approval of a plan for constructing a two storied building thereon from the then DIT (presently RAJUK) on 06.12.1968, which was subsequently revised on 07.02.1980 and instead, an approval was obtained for constructing a four storied building on the said property. At the relevant time, as the petitioner was serving as an Officer of the then State Bank of Pakistan (now Bangladesh Bank), he obtained a loan from the Bank by mortgaging the said property with the Bank.

5. While being the absolute owner and possessor, the petitioner mutated his name in respect of the said property and also obtained gas, electricity and WASA connection therein. At the time of RS and Dhaka City Survey, the petitioner's name was duly recorded in the RS and Dhaka City Khatians.

6. The petitioner retired from service on 31.10.1992 as Deputy General Manager of Bangladesh Bank. Whilst he was in peaceful possession, occupation and enjoyment of the said property, it was listed in the Kha list of Abandoned Buildings, which was published in the Official Gazette on 23.09.1986. However, no notice was issued upon the petitioner prior to such enlistment. Subsequently on 14.08.1988, the petitioner came to know for the first time from one of his friend, a Senior Advocate of this Court, that the property in question has already been enlisted by the Government in the 'Kha' list of Abandoned Buildings.

7. Upon receiving the information, the petitioner filed an application on 25.08.1988 under section 7 of the Abandoned Buildings (Supplementary Provision) Ordinance, 1985 before the Court of Settlement, Dhaka for exclusion of the said property from the Kha list of Abandoned Buildings along with a prayer for condonation of delay, which was numbered as Case No. 25 of 2005. Upon hearing the parties, the First Court of Settlement, Dhaka by judgment dated 13.02.2014, dismissed the petitioner's case on the ground of limitation. Being aggrieved thereby, the petitioner moved this Court and obtained the instant Rule along with an order of stay.

8. Mr. M.I. Farooqui, the learned Senior Advocate appears with Mr. M. Sadequr Rahman and Ms. Najneen Nahar, the learned Advocates in support of the Rule, while the same is being opposed by Mr. Md. Shahidul Islam, the learned Deputy Attorney General appearing with Mr. Sukumar Biswas, the learned Assistant Attorney General and Ms. Mahfuza Begum, the learned Assistant Attorney General.

9. At the very outset, Mr. Farooqui refers to Annexure H, being the impugned judgment dated 13.02.2014 and submits that the Court of Settlement, Dhaka had dismissed the petitioner's case solely on the ground of limitation, although it found that all the documents relating to the property were in the possession of the petitioner, which had also been marked as Exhibits.

10. Mr. Farooqui submits that no notice was served upon the petitioner, although issuance of notice is mandatory prior to enlistment of a property as an abandoned building. However,

according to Mr. Farooqui, this mandatory provision of law has not been complied with, causing serious prejudice to the petitioner. Mr. Farooqui further submits that there was no basis whatsoever on the part of the Government for including the petitioner's property in the Kha list.

11. Referring to Annexure B, Mr. Farooqui submits that the Deed of Sale, which was executed on 11.07.1964, was marked as Exhibit No. 2 before the 1st Court of Settlement, Dhaka without any objection. Referring to Annexure C, Mr. Farooqui submits that it is evident therefrom that the petitioner had mortgaged the property with the Bank for the purpose of obtaining a loan. Referring to the schedule of property described in the loan documents, Mr. Farooqui submits that it is the very same property which has been sought to be enlisted by the Government as an abandoned building.

12. Mr. Farooqui submits that the petitioner deposed as PW 1 before the Court of Settlement, Dhaka and duly proved all the relevant documents in respect of the said house, which were marked as Exhibits 2-12 without any objection from the Government. However, the Court of Settlement, Dhaka dismissed the case mainly on the ground of limitation. Mr. Farooqui submits that although the Constitution has guaranteed the right to property, however, such right was being attempted to be curtailed without following the due process of law. In support of his contention, Mr. Farooqui has referred to the decisions reported in 45 DLR 1993 576, 49 DLR 1997 108 and 51 DLR (AD) (1999) 24.

13. On the other hand, Mr. Md. Shahidul Islam, the learned Deputy Attorney General (briefly, the DAG) appearing in opposition to the Rule submits that the property was correctly enlisted in the 'Kha' list. He further submits that the Court of Settlement, Dhaka had rightly dismissed the suit on the ground of limitation since the petitioner failed to avail the remedy, if any, within the statutory period. The learned DAG submits forcefully that the original lessee Abdul Wahab Tarafdar had left the house uncared for during the war of liberation in 1971 and therefore, it was rightly enlisted as an abandoned building, as his whereabouts could not be traced.

14. The learned DAG submits that the present Deed of Sale, executed between Abdul Wahab Tarafdar and the petitioner on 11.06.1964, was invalid in the eye of law, being violative of clause 3 of the original Deed of Allotment, whereby the original allottee was precluded from selling or transferring the property unless a period of 10 years had been completed. Therefore, according to the learned DAG, the purported transfer from the original allottee in favour of the petitioner was illegal and consequently, it did not vest any ownership upon him and therefore, the enlistment of the said property by the Government in the 'Kha' list was rightly done. The learned DAG further contended that the petitioner did not file any utility Bills in respect of the said house to prove his occupation and possession therein between March 1971 and February 1972.

15. Lastly, the learned DAG submits that P.O. 16 of 1972 and Ordinance LIV of 1985, being special laws, the Court of Settlement, Dhaka had rightly held the suit to be barred by limitation. In support of his contention, the learned DAG had referred to the decisions reported in 48 DLR (AD) 10, 49 DLR AD 161, 57 DLR AD 167, 59 DLR AD 165, 61 DLR AD 15, 63 DLR (AD) 1, 1 BCL HD (2013) 8 and 3 BLC AD 42.

16. Refuting the contention advanced by the learned DAG that the property in question could not be transferred by the original allottee before the expiry of 10 years from the date of

allotment, the learned Advocate for the petitioner submits that there was a provision in the said Deed whereby the original allottee had the option to pay the full price of the property at any time during the subsistence of the lease and thereafter transfer the same. According to Mr. Farooqui, as the original allottee had paid the full price of the property in the meantime, the said transfer was valid in the eye of law.

17. We have perused the instant application together with the documents annexured thereto. We have also considered the submissions advanced by the learned Advocates of the contending sides.

18. In the instant case, Abdul Wahab Tarafder, who was an employee of the then State Bank of Pakistan, was allotted the house in question in 1960. Subsequently, while being in possession and occupation of the house, he transferred the same by executing a Deed of Sale dated 11.06.1964 in favour of Abdul Jalil Biswas, the present petitioner, who has been in occupation and possession of the property since then.

19. Ordinance LIV of 1985, namely The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 empowers the Government to enlist any property as an Abandoned Building which has been abandoned by its owner or occupier. However, in doing so, the Government is required to observe certain procedures including issuance of notice upon the owner or occupier prior to enlistment of the property as an “Abandoned Building”. In the instant case, the property was enlisted in the Kha list, thereby implying that it was not vacant, but was occupied by some persons, who may or may not be the real owner. Nevertheless, a notice under section 5(1) (b) of the Ordinance of 1985 was required to be issued in the prescribed Form upon the owner/occupant before the property could be enlisted in the Kha list of Abandoned Buildings.

20. It is to be noted that although the Government appeared before the Court of Settlement, Dhaka and contested the case, not a single scrap of paper or document was filed to show that notice had been served upon the petitioner. It is also to be noted that the issues raised by the learned DAG appearing on behalf of the Government was neither raised nor agitated before the Court of Settlement, Dhaka.

21. In this context, we may profitably refer to the case of *Zobon Nahar and other v. Bangladesh*, reported in 49 DLR (1997) 108, where the facts of the case and the issues involved therein were very similar to the matter on hand. In that case, the Court held:

“More so, where a statute requires a notice to be given before taking any action, service of notice to the concerned party, in that case becomes mandatory and failure to comply with this requirement renders such action ultra vires. We have already seen that both Articles 7 of the President’s Order 16 and section 5 (1) (b) of the Ordinance 54 of 1985 require notice to be issued upon the person whose property is declared an abandoned property or enlisted in the ‘Kha’ list, but no such notice had been issued and served upon the petitioner in violation of the aforesaid provisions of law even though the petitioners have always been in possession of the case property.”

22. The learned DAG submits that the petitioner had approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, having failed to achieve any positive result in the said Court, he has now invoked the writ jurisdiction. According to the learned DAG, the petitioner cannot do so as he has

already exhausted his available remedy before the Court of Settlement, which had found the suit to be barred by limitation.

23. In our view, the petitioner had rightly approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, as his case was found to be barred by limitation and since he had no other equally efficacious remedy to enforce his rights, the petitioner was entitled to invoke the writ jurisdiction. We are fortified in our view by the decision referred to earlier, reported in 49 DLR (1997) 108, where it was also held:

“The right to enforce a fundamental right is another fundamental right which gives the petitioner right to move this court even though his application was rejected by Settlement Court on the ground of limitation.”

(per K.M. Hassan, J, as he then was)

24. In the case of *Government of Bangladesh v. ATM Mannan and others*, reported in 1 BCL AD (2003) 8, referred to by the learned DAG, the Apex Court, while dealing with the issues of notice in respect of a property included the “Kha’ list of Abandoned Buildings, held that since it was an official Act, the service of notice shall be presumed “to have been regularly performed”, under section 114 (e) of the Evidence Act. While expressing our respectful agreement with the decision of the Apex Court, it is to be noted that in the aforesaid case, notice was admittedly served upon the occupant of the house. However, in the present case, there is no document to show that there was any service of notice upon the petitioner.

25. Be that as it may, having regard to the facts and circumstances of the case and having considered the submission advanced by the learned Advocate of both the sides and last but not least, in due deference to the decision referred to above, with which we express our utmost and respectful agreement, we are inclined to hold that the instant Rule merits positive consideration.

26. Accordingly, the Rule is made absolute.

27. The judgment dated 13.02.2014 passed by the 1st Court of Settlement, Dhaka in Case No. 25 of 2005 dismissing the same is set aside.

28. The respondent nos. 1, 2 and 3 are hereby directed to take positive steps to exclude the property namely, House No. B/10, Block- E, Zakir Hossain Road, Mohammadpur, Dhaka from the ‘Kha’ list of Abandoned Buildings, within a period of 60 (sixty) days from the date of receipt of the certified copy of the judgment passed today.

29. There will be no order as to cost.

30. The office is directed to communicate the order and send down the lower Court’s record at once.