

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 3960 of 2009.

In the matter of:

Secretary, Railway Division, Ministry of
Communication, Bangladesh
Secretariat, Dhaka.

.....Petitioner.

Versus.

Md. Shahidullah alias A.Z.M. Shahidullah
and others.

.....Opposite parties.

Mr. Md. Shaheed Alam, Advocate.

..... For the petitioner.

Mr. Golam Arshed with

Mr. Md. Abul Kalam Patwary, Advocate.

..... For the opposite party Nos.1 and 2.

Mr. S.R.M. Lutfur Rahman Akond, Advocate.

.....For the opposite party Nos.6-36.

Heard on: 17.7.14, 20.7.14, 21.7.14 and
24.7.2014.

Judgment on: 14.09.2014.

This Civil Revision is at the instance of the Secretary, Railway Division of the Government of Bangladesh being defendant No.2 of Title Suit No. 219 of 2005 instituted by the opposite party No.1 and 2 (plaintiffs) in respect of the legality of the acquisition the suit land including the graveyard located therein in LA Case No.27 of 1959-60 and release thereof.

The learned Assistant Judge, 4th Court Dhaka, as the trial court, by its judgment and decree, dated 30.03.2008, dismissed the suit. But the learned Additional District Judge, 6th Court, Dhaka, as the appellate court, by his judgment and decree dated 15.4.2009

passed in Title Appeal No. 154 of 2008 reversed the decision of the trial court and decreed the suit with a direction for local investigation of the suit land for ascertaining the quantum of land used as graveyard as part of the suit land.

Earlier a Rule was issued by this Court in this Civil Revision about sustainability of the judgment and decree passed by the appellate court.

Plaintiff's Case.

The two plaintiffs (opposite party Nos.1 and 2) filed the above noted suit claiming that the graveyard located in the suit land measuring 98 decimals of C.S. plot No.456 and 457 corresponding to 8 (eight) S.A. plots was illegally acquired by the Government and that it has been kept without using the same for the purpose for which it was acquired. Plaintiffs have prayed for declaration that the acquisition was illegal. They also prayed for a mandatory injunction for release of the suit land and, in case of failure to do so, to release the same by the court itself.

The plaintiffs claim that the suit land belonged to their grandfather being C.S. recorded tenant Syed Ali Munshi and several others. By amicable partition, Syed Ali Munshi got the entire suit land. After his death the land devolved upon his only son Noor Mohammad from whom the plaintiffs inherited it and have been in possession thereof. A family graveyard was established by the forefathers of the plaintiffs on the suit land. However local people were also allowed to use it as graveyard.

In L.A. Case No.27/59-60 the suit land was acquired for the purpose of cutting earth there from and for filling in the neighboring land for construction of the Kamalapur Railway Station. The predecessor of the plaintiffs never accepted the compensation and they as well as the plaintiffs continued to use the same as

family graveyard. Like their predecessors plaintiffs have been allowing the local people to use the same for burial purposes.

The Government took a decision on 22.08.1983 for release of the unused portions of land acquired in the said L.A. Case No.27/59-60. So plaintiffs were expecting that their land would be released. But it did not happen. So, on 17.11.2003 they submitted an application to the Government in the Land Ministry for release of the property, but to not effect. Hence the suit.

Case of defendant No.2.

Secretary, Railway Division of the Government of Bangladesh as defendant No.2, in his written statement contends that the suit is not maintainable, that it is barred by limitation and by the principles of estoppel, waiver and acquiescence and also suffers from the defect of parties.

The defendant admits that the suit land was acquired for cutting earth and for filling the land of a government project. After acquisition of the suit land and other lands, Gazette Notification was duly published in 1962. The affected persons were paid due compensation. Government is not responsible for the alleged non-receipts of such compensation by the predecessor of the plaintiffs.

Proceedings and decision of the courts below:

The trial court framed 3 issues namely, on (1) maintainability of the suit, (2) plaintiffs' right to get release of the suit land and (3) the relieves prayed for.

At the trial, the plaintiffs produced oral evidence through 5 witnesses including plaintiff No.1 as P.W.1. They produced only one document being a copy of the application dated 17.11.2003 (Exhibit-1) sent by the plaintiffs to the Land Ministry.

Defendant No.2 produced only oral evidence through a single witness (D.W.1).

After consideration of the evidence on record the trial court recorded findings that at present there is a graveyard on the suit land but the suit land was lawfully acquired and that after 50 years the plea of non receipt of compensation was not acceptable.

The trial court with reference to the case of Haji Abul Bashar vs. Bangladesh (50 DLR (AD) page-11) found that the acquired land could not be released. Accordingly the trial court dismissed the suit.

In the Appeal, the learned Additional District Judge reversed the decision of the trial court and decreed the suit on the reasoning that since there is a graveyard on part of the suit land, it can not be used for any other purposes, because that would violate the religious sentiment and human rights. So the graveyard portion of the suit land should be ascertained by local investigation. Accordingly the appellate court allowed the appeal and decreed the suit on setting aside the Judgment of the trial court and directed local investigation.

Addition of parties in Revision:

Opposite party Nos.6 to 35 were not parties in the original suit or in the appeal. But in this Revision they applied for being added as parties and prayed for a permission to contest the Rule on the ground that they have taken lease of part of the suit land from the government. Their application was allowed by this court by order dated 22.5.2013.

Deliberation in the revision :

At the hearing of this Revision, Mr.Md. Shaheed Alam, the learned Advocate for the petitioner being the Secretary, Railway Division (defendant No.2), submits that admittedly the suit land was

lawfully acquired by the Government in L.A. Case No.27/59-60 and therefore the suit land has vested in the Government and there is no legal scope to return the suit land or part thereof to the plaintiffs.

Mr. Alam, the learned Advocate in support of his submission informally produced a photo copy of the Gazette notification of 30th July, 1968 showing acquisition of the suit land and other lands.

Mr. Alam, the learned Advocate next submits that, at the time of acquisition, there was no graveyard and that the plaintiffs or their predecessors never raised any question about the legality of the acquisition of the suit land on the ground of existence of any graveyard and therefore the suit for declaration instituted in 2005, i.e. after 37 years of the Gazette notification of 1968 is barred by limitation.

Mr. Alam, the learned Advocate, lastly submits that the trial court, on consideration of these legal and factual aspects, lawfully dismissed the suit, but the appellate court failed to consider the above aspects and committed an error of law occasioning failure of Justice.

Mr. S.R.M. Lutfar Rahman Akhond, the learned Advocate for the added opposite parties, draws my attention to a number of documents filed in this Revision and submits that the plaintiffs have not filed any document with regard to the existence of a graveyard before or after such acquisition.

Mr. Rahman, the learned Advocate next submits that the added opposite parties have taken lease of various portions of the suit land and and that even the plaintiffs have taken lease of some other land as affected persons.

In reply Mr. Golam Arshed with Mr. Abul Kallam Patwary, the learned Advocates for the opposite party-plaintiffs, submit that it is

in evidence that there is a graveyard on the suit land for more than 100 years and therefore the acquisition of the suit land was illegal as per proviso to section 3 of the Emergency Requisition of Property Act, 1948 (**shortly the Act, 1948**).

Mr. Patwary, the learned Advocate next submits that the cause of action for instituting the suit arose in 2003, when the plaintiffs submitted their application to the Government for release of the suit land, but there was no response from the defendants and then they filed the suit in 2005, and therefore it is within limitation.

In support of his submission Mr. Patwary, the learned Advocate for the plaintiff-opposite party Nos. 1 and 2, refers to the case of Adul Hafez vs. Lal Meah and others (1988 BLD. Page-497).

Mr. Patwary, the learned Advocate next submits that the appellate court lawfully passed the impugned judgment reversing the decision of the trial court and therefore no interference is necessary in this Revision.

Findings and decision in the Revision:

Admittedly the suit land has been acquired by the Government in L.A. Case No.27 of 59-60. This is further evident from the photo copy of the Gazette Notification dated 30.7.1968 informally produced by the petitioner in this Court.

The legality of the acquisition of the suit land has been challenged by the plaintiffs on the ground of its nature as a graveyard.

Section 3 of the Act, 1948 empowers the Deputy Commissioner to requisition and also to permanently acquire a private property for public purpose and the second proviso 2nd

contains bar relating to a graveyard. The section is quoted below (underlines Added):

“3. Requisitioning of Property-When any property is required for a public purpose or in public interest, the [Deputy Commissioner] may requisition it by an order in writing.

Provided the projects covering more than one district or the projects of which the requiring body is [the Dacca Improvement Trust, the Chittagong Development Authority or the Khulna Development Authority], the proposal shall require the approval of the Government before proceedings under the Act, are started:

Provided further that no property used by the public for the purpose of religious worship [graveyard and cremation ground] shall be requisitioned:

[Provided further that when a property is required permanently for a public purpose or in public interest, the Deputy Commissioner may also requisition it with a view to its permanent acquisition for such public purpose or in such public interest”.]

It is evident that the second proviso to section 3 prohibits requisition and hence permanent acquisition of a graveyard used by the public i.e. a public graveyard could not be acquired under the Act, 1948.

It is noted that the expression “used by the public” occurring before “religious worship graveyard” clearly indicate that a family grave yard was not exempted from acquisition under section-3.

The plaintiffs, in their plaint (para-1 and2), claim that the suit land was a private property of their predecessor, and a family graveyard was established about one hundred years ago, but subsequently it was also used by local people for the same purpose. So the burden lies upon the plaintiffs to prove that the suit land was a public grave yard at the time of acquisition thereof.

Plaintiff filed a photo copy of the C.S. record (not exhibited). It shows that the suit land was recorded in the names of several persons including plaintiff's predecessor Syed Ali Munshi. But there is no reference in the said C.S record indicating that any part of the suit land was used as graveyard not to speak of a public graveyard.

Plaintiffs have admitted in their plaint (para-1) that the suit land was recorded in the name of the Government Khas Khatian No.1 at the time of preparation of S.A record. However they have not filed the S.A khatian. So the existence of any graveyard at that time is not ascertainable.

According to section 103 of the BT Act the entries in the C.S record are presumed to be correct unless rebutted by a better evidence. Section 144A of the State Acquisition and Tenancy Act, 1950 contains similar provision.

But the plaintiffs did not produce any documentary evidence to rebut the presumption of correctness of the C.S or S.A khatian. The only document (exhibit-1) being their application dated 16-010-2003 sent to the Land Ministry with a request for release of the suit land does not help them in this respect.

However they produced four witnesses including plaintiff No.1 (P.W.1) and three other local witnesses (P.W's2-4). P.W.5 is an employee of the D.C office, who produced the file of the LA case No. 27 of 1959-60.

P.W.1 stated that the suit land belonged to his grandfather from whom plaintiff's father and finally the plaintiff inherited the suit land.

P.W.1 also stated about establishment of the graveyard as family graveyard about 100 years back and also about subsequent use of the land by the local people as graveyard.

The statement of P.W.1 about their acquisition of title is not consistent with the plaint wherein it is stated that there were other co-sharers and by virtue of amicable partition plaintiffs' grandfather alone got the suit land and ultimately it devolved upon the plaintiffs. Plaintiffs did not adduce any evidence about the alleged the amicable partition. It follows that other co-sharers had their share in the suit land upto acquisition. As opposed to this, plaintiffs have claimed exclusive title.

However the prayer portion of the plaint appears to be formulated basically for release of the suit land and yet it contains a reference to their exclusive title. So they must prove it by credible evidence, but they failed to do so. It appears that as per C.S record the suit land was a joint property and it continued to be so till acquisition.

With regard to the principal issue, that is the existence of the grave yard at the time of acquisition P.W.1 and three other local witness (P.W.2-4) stated about the existence of a grave yard and also about burial of their relatives in the grave yard for a long time.

All the four P.W's (Nos.1-4) are aged between 50-60 years. In the absence of any credible documentary or better oral evidence e.g. the specific time of burial of the dead persons it is not believable that the grave yard is 100 years old.

The evidence produced by the plaintiffs is not sufficient to rebut the presumption of corrections of the C.S record which is silent about existence of any grave yard nor it is sufficient to establish that the suit land was "used by the public for the purpose of graveyard" as provided in section 3 (2nd provisio).

However the added opposite parties filed the copies of the R.S. khatian and Mohanagar Jarip Map in this court. These documents were not produced in the courts below nor formally

admitted in this Revision as additional evidence. These documents indicate that there is a graveyard on a portion of the suit land.

Thus the materials on record as a whole suggest that there is a grave yard on part of the suit land but it was established at some point of time after the C.S record. But the plaintiffs failed to prove that it was in existence at the time of acquisition. It follows that the bar under the second Provisio to section 3 of the 1948 was not applicable and the suit land was legally acquired by the Government.

Again without any specific evidence it can not be ascertained as to which portion of the suit land have been used as graveyard. This uncertain situation is also reflected in the judgment of the appellate court which prompted him to direct a local investigation for ascertaining the measurement of the graveyard.

The appellate court committed two errors of law. Firstly his decision indicates that the graveyard portion is unspecified and therefore the court can not a pass decree in the nature of declaration of title and mandatory injunction for release of an unspecified land.

Secondly, the appellate court failed to consider that the suit land has vested in the Government after a lawful acquisition under the Act, 1948 and therefore, the Government has no legal authority under the Act, 1948 or any other law to release or return to the plaintiffs or any other person. .

Because the Act, 1948 as per section 1(3) came into force on 16 August 1948 by virtue of Dacca Gazette Extra order dated 16th August 1948 (vide Obidul Huq's Acquisition and Requisition Mannal Third Edition published by DLR).

As per section 1(4), the validity of the Act, 1948, expired after 34 years, i.e. in August 1982. So the provision of section 8 with

regard to release of a requisitioned property and section 8B with regard to withdrawal from acquisition were no more in force after August 1982.

So the Government has no lawful authority to exercise its power under the said two sections i.e. 8 and 8B to release an admittedly acquired property, simply because the Act itself including sections 8 and 8B is no more in force.

Again there is nothing on record to show that any process of release was initiated before expiry of the Act, 1948. So continuation of the process of the release of the suit land under section 17 is not possible under the expired Act, 1948.

The next the issue is limitation. There is no evidence on record to show that plaintiffs predecessor ever challenged the legality of the acquisition. They all along kept silent after acquisition. The plaintiffs themselves remained silent at least since 1983. This is evident from Exhibit-1 being their application dated 16-10-2003 sent to Land Ministry. They have stated as follows:

“২২-০৮-৮৩ ইং তারিখে অব্যবহৃত হুকুম দখলকৃত সম্পত্তি ফেরত দেওয়ার সরকারি সিদ্ধান্ত হয়। সেই সিদ্ধান্ত অনুযায়ী উক্ত জমি হুকুম দখলমুক্ত করার জন্য আমি নিম্ন স্বাক্ষরকারী গত ২০ বছরে বহুবার আবেদন করিয়াছি। কিন্তু কোন ফল পাই নাই আমার প্রতিটি আবেদনেই আমি উল্লেখ করিয়াছি যে, সরকারি সিদ্ধান্ত অনুযায়ী আমি সকল শর্ত মানিয়া নিতে রাজি আছি।”

It is evident that, according to plaintiffs themselves, initially they thought of release on the ground of non-use of the land. So they were cautious of their right since 1983 and also of the refusal by the Government by keeping silent to the first application and subsequent ones.

So according to them, the cause of action arose at least in 1983. But they filed this suit in 2005. So this case is barred by limitation.

The principle laid down in the case of Abdul Hafeez vs. Lal Meah and others (1988 BLD, page-497) with regard to cause of action and limitation as referred to by Mr. Patwary, the learned Advocate, is not applicable to the present situation. The facts of that case are different from those of the present one.

In view of the above, I hold that the appellate court committed an error of law in passing the impugned judgment and decree and it is not sustainable.

In the result, the Rule is made absolute. The impugned Judgment and decree dated 15.04.2009 passed by the learned Additional District Judge, 6th court, Dhaka in Title Appeal No. 154 of 2008 is hereby set aside with the result that the Judgment and decree dated 30-03-2008 passed by the learned Assistant Judge, 4th Court Dhaka in Title Suit 219 of 2005 is upheld.

The ad-interim injunction granted by this court stands vacated.

No order as to costs.

Send down the LCR with a copy of the judgment and order to the courts below.

The parties may take back the annexures by substituting attested photo copies thereof.

B.Hossain.