IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION No. 2771 OF 2020

In the matter of:
An application under article 102 of the Constitution of the People's Republic of Bangladesh.

AND
In the matter of:
Khan Mohammad Ahsan

....**Petitioner**

-***Versus***-

The Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Ramna, Dhaka and others

..... **Respondents**

Mr. M. Anisuzzaman, Advocate
..... For the **Petitioner**.
Mr. Bepul Bagmar, DAG
.... For the **Respondent No.1**.
Mr. Md. Imam Hasan, Advocate
.... For the **Respondent No.2**.

Judgment on: 03.02.2022

Present:
Mr. Justice Md. Khasruzzaman
And
Mr. Justice Md. Mahmud Hassan Talukder

Md. Khasruzzmaman, J:

On an application under article 102 of the Constitution, on 05.10.2020 the *Rule Nisi* was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned bearing Memo No. RAJUK/Estate and Land-2(Uttara)/414 dated 02.02.2020 issued by the respondent No.5 (Annexure-E) purporting to

issuance of letter to produce the legal heirs of the deceased wasiyatnama executor cum lease holder of eastern units of 6(six) storied building situated at Plot No. 01, Road No.05, Nikunja, Uttara Residential Area, Dhaka for giving no objection in Taka 300/- stamp with specimen signatures and other title documents with warishan sanad of the deceased wasiyatnama executor cum lease holder in order to get mutation in the name of wasiyatnama beneficiary shall not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as this Court may seem fit and proper."

The facts relevant for disposal of the case, in short, are that on 07.03.1991 one Md. Yunus Ali Sheikh took allotment of 2.08 kathas of land in Plot No.1, Road No.5, Nikunja-02, Gulshan, from the Rajdhani Unnayan Kartipakkha(RAJUK) which was registered with the Sub Registry Office, Gulshan vide deed No. 2133 dated 07.03.1991 (Annexure-A). While enjoying the said property Md. Yunus Ali Sheikh got his name mutated and paid land revenue to the government. Thereafter, on 25.02.2004 Md. Yunus Ali Sheikh on taking prior approval from RAJUK transferred the said land to Md. Maksudul Alam and Nowshin Sultana by registered deed No. 2273 (Annexure-A-1) and handed over possession to them. Thereafter, on the application being filed by the transferees Md. Maksudul Alam and Nowshin Sultana, RAJUK authority vide Memo No. RAJUK/Estate/3995 dated 21.10.2004 mutated the names of

the applicants in the relevant records. Thereafter, Md. Maksudul Alam and Nowshin Sultana obtained approval from RAJUK and built 06(six) storied building having 02(two) units on the said land and Md. Maksudul Alam got units of the eastern side of the said plot and Nowshin Sultana got units of the western side of the said plot. It is stated that on 02.10.2011 Md. Maksudul Alam in his lifetime executed a registered *wasiyatnama* being deed No. 26 dated 02.10.2011 in favour of the petitioner namely, Khan Mohammad Ahsan (Annexure-A-2). That on 05.08.2016 the *wasiyatnama* executor cum lease holder Md. Maksudul Alam has died and thereafter, on 27.04.2017 Khan Mohammad Ahsan filed Probate Case No. 83 of 2017 before the learned Joint District Judge, Court No.1, Nayayanganj impleading heirs of the deceased *wasiyatnama* executor as defendants in the said case. The learned Joint District Judge, Court No.1, Narayanganj after hearing the petitioner allowed the case ex parte and issued probate certificate and also directed the concerned Sub Registry Office to report of evaluation of the land for calculation and determination of the court fees vide Order No.33 dated 24.03.2019. Accordingly, the RAJUK on 30.05.2019 submitted evaluation report mentioning mouza value of the will property amounting to TK.67,57,940/-on which the court fees is calculated to TK.5,96,000/- which the petitioner has deposited in respect of the said probate case through Sonali Bank Limited on 09.07.2019. Thereafter, on 07.08.2019 the learned Joint District Judge, Court No.1, Narayanganj issued final

Grant of Probate of Will under section 289 of the Succession Act, 1925 in the said probate case. Accordingly, on 09.09.2019 the petitioner filed an application along with required documents before the Assistant Director (Estate and Land-2) RAJUK Zonal Office, Uttara, Dhaka (respondent No.5) for getting mutation of the will property in his name (Annexure-D). The respondent No.5 vide Memo No. RAJUK/Estate and Land-2(Uttara)/414 dated 02.02.2020 directed the petitioner to produce the legal heirs of the deceased *wasiyatnama* executor cum lease holder of the eastern units of 6(six) storied building situated at Plot No.1, Road No.5, Nikunja Uttara Residential Area, Dhaka for giving no objection on the stamp valued at TK.300/- with specimen signatures and other title documents with *warishan sanad* of the deceased *wasiyatnama* executor cum lease holder (Annexure-E).

Finding no other alternative the petitioner has challenged the memo dated 02.02.2020 issued by the respondent No.5 (Annexure-E) in Writ Petition No. 2771 of 2020 under article 102 of the Constitution and obtained Rule Nisi in the manner as quoted hereinabove.

Respondent No.2 has filed an affidavit-in-opposition denying the material allegations made in the writ petition and thereby contending *inter alia* that the deed of will and recital thereof itself is improper wherein it has been stated that নিকুঞ্জ-২, বাসা নং-৫, বাড়ী নং-০১, এ আমার ছোট বোন সুলতানা নওশিনের সাথে যৌথভাবে একটি ০৬(ছয়) তলা (অসম্পুর্ন) বাড়ী নির্মাণ করিয়াছি, বাড়িটির অর্ধাংশে আমার নামে আছে। যেহেতু বাড়ীটি নির্মাণ করিতে আমার শ্রদ্ধেয় বড় বোন জেবুন খানের নিকট

হইতে টাকা নিয়েছি এবং এখনও তাহার টাকা পরিশোধ করিতে পারি নাই, সেহেতু বাড়িটির উপর তাহার হক রহিয়াছে। and as such, the will given to Khan Mohammad Ahsan being the son of his sister in lieu of consideration or exchange is not a will according to the Muslim Law, and rather it is mere a sale or exchange and accordingly, the probate case and the certificate thereon has no legal force in case of a Muslim. It is further contended that it is stated in the *wasiyatnama* dated 02.10.2011 that the *wasiyatnama* will be treated as effective in case the *wasiyatnama* executor did not return to Bangladesh from Saudi Arabia or has died there but admittedly the testator after performing his holly hajj back to Bangladesh and has died on 05.08.2016 and as such, the alleged deed of will became invalid. It is further stated that the alleged deed of will was not proved as per sections 67 and 68 of the Evidence Act and sections 59 and 63 of the Succession Act, 1925. It is also stated that there were 8 defendants in the case but none of them entered appearance to contest the case and as such the petitioner managed to obtain an *exparte* order which results in heavy doubt over the grant of probate of will. It is further stated that the legal heirs of executor of the *wasiyatnama* cum lease holder has been staying in USA, Canada and Australia, and as such on a fixed date and time the physical presence of the legal heirs of the will executor deceased of the *wasiyatnama* is neither practically possible nor required in law is not tenable. If anyone cannot come to Bangladesh to complete legal formalities, he may physically present before the concerned

embassy or High Commission or Consulate Office in order to prove their genuineness as the heirs of the said will executor. It is also stated that it is very common Rule of RAJUK that in case of any type of transfer or mutation, the transferor or the owner of the property as the case may be present before the RAJUK for authentication and avoidance of multiplicity of suit and further inconvenience arising out of the process and as such it is prayed that the *Rule Nisi* is liable to be discharged.

Mr. M. Anisuzzaman, the learned Advocate appearing on behalf of the petitioner submits that with regard to the formalities concerning the making of a will two conditions are there to be followed i.e. declaration must be there of the intention to confer an interest and, disposition with regard to the property takes place after the death of the one making the will and as such, since the *wasiyatnama* executor cum lease holder has died, the petitioner filed the probate case and obtained order pursuant to which probate certificate has been issued in his favour and as such, there arises no point of confusion regarding the share and as such, the RAJUK has committed illegality in issuing the impugned memo which is like a mere half bite on the cherry which is not well founded reason to suffice the rebuttal of overriding objectives on the enforcement of the judgment. He further submits that since the *wasiyatnama* was duly registered under section 17B of the Registration Act, 1908 and since a registered document conferring the rights of estate of the deceased after his demise is also

regulated by law and therefore no revocation or cancellation of the said *wasiyatnama* was held by the testator and as such the authority cannot say that the *wasiyatnama* was not effective after the performance of pilgrimage by the testator. He also submits that since the *wasiyatnama* in question has already been proved to be genuine in the Court of law, the respondents ought to have considered the same in mutating the will property in the name of the petitioner. Referring to the impugned order he contends that the authority committed illegalities in taking no objection from the heirs of the deceased testator in non judicial stamps and also in asking personal appearance of the said heirs to give oral testimony before the RAJUK and as such the same can be said to the judging of a judgment of the Court of law in the disguise form by the executive authority which is contrary to the norms and notions of constitutionalism and rule of law and as such he has prayed for making the *Rule Nisi* absolute.

Mr. Md. Imam Hasan, the learned Advocate appearing on behalf of the respondent No.2 submits that as per Muslim Law, a bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator and as such, no injustice was caused upon the petitioner and no illegality was committed by the RAJUK in issuing the memo requiring the concerned heirs of the testators to present before the RJUK with relevant documents. Referring to the deed of will he further submits that the deed of will was executed on 02.10.2011 with clear expressions that the will

would be effective in case the testator did not come to Bangladesh or has died in Saudi Arabia and when admittedly the testator after performing holly hajj came back to Bangladesh and died on 05.08.2016 i.e. long after the returning to Bangladesh and as such, the alleged deed of will became invalid. Moreover, the alleged deed of will was not proved as contemplated under section 67 and 68 of the Evidence Act and sections 59 and 63 of the Succession Act, 1925. As such, he has prayed that the Rule Nisi is liable to be discharged.

Heard the learned Advocate and perused the writ petition, supplementary affidavit, affidavit-in-opposition along with all annexures appended thereto. It appears from the impugned order (Annexure-E) that the respondent No.5 has issued the order in reference to the application filed by the petitioner on 09.09.2019 regarding mutation of the will property in the name of the petitioner. It appears that the respondent No.5 has considered the said application and as a next steps to be taken by him, he has directed the petitioner to produce the legal heirs of the testator requiring no objection on a stamp valued at TK.300/- along with title document and *warishan* certificate for disposal of the prayer for mutation of the will property in the name of the petitioner.

So, the only question to be answered by this Court is whether the respondent authority has committed illegality in law in issuing the impugned memo.

It is claimed by the petitioner that the property sought to be mutated in his name is the property at will given by the testator (Annexure-A-2). After demise of the testator in 2016, the petitioner filed probate case in 2017 and obtained order and also obtained grant of probate of will (Annexure-C). The petitioner claims that since the deed of will is lawful as evident from the judgment of the Court of law, he has rightly filed the application for mutation of the property in his name. The authority without considering the same has issued the impugned order requiring no objection from the legal heirs of the testator and personal appearance along with title documents which according to the petitioner cannot ask and the same is violation of the judgment and order of the Court of law.

The respondent No.2 claims that the deed of will is itself invalid on returning to Bangladesh after performing holly hajj. Because from the recital of the deed of will it is clear that the testator said that he is going to perform holly hajj and if he does not return to Bangladesh or if he dies in Saudi Arabia then and there the deed of will be effective. The deed of will has been executed on 02.10.2011 and he has come back to Bangladesh and died in Bangladesh long after the execution of the deed of will and the performance of the holly hajj. So, in that case the deed of will cannot be said to be valid one.

However, under the Mohammedan Law every Mohammedan of sound mind, and not a minor, may dispose of his property by will either verbally or in writing subject to some limitations. According

to Mohammedan Law- *"a bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share."*

The provision of law has been fortified by the Hon'ble Appellate Division in the case of **Md. Rahamat Ullah and others Vs. Mosammat Sabana Islam and others, Civil Appeal No. 127 of 2006** wherein it has been held:

> "*So, from the above, it is evident that both the impugned deeds of will in favour of heirs of the testator are invalid since the other heirs of testator Zohurul Islam did not give consent to these bequests after the death of Zahirul islam."*

So, the consent of other heirs of the testator is a must in case of a valid deed of will. In that case, the petitioner has to prove that the legal heirs of the testator have given their consent after the death of the testator. Nowhere in the writ petition the petitioner has stated about the consent of the legal heirs of the testator. Rather, the petitioner has stated in the writ petition that the legal heirs of the testator are residing in USA, Canada and Australia and their physical presence is not practically possible nor required in accordance with law. Under such circumstances, it is clear that the petitioner has failed to show that the legal heirs of the testator have consented to the deed of will after the demise of the testator.

As such, we are of the view that the RAJUK authority did not commit any illegality in issuing the impugned order dated 02.02.2020 directing the petitioner to produce the legal heirs of the

testator requiring no objection on a stamp valued at TK.300/- along with title document and *warishan* certificate for disposal of the prayer for mutation of the will property in the name of the petitioner.

Accordingly, we do not find any substance in the submissions of the learned Advocate for the petitioner and as such the *Rule Nisi* is liable to be discharged.

In the result, the Rule Nisi is discharged without any order as to costs.

The Rajuk authority is directed to preserve a copy of the judgment in the concerned file for future action.

Communicate the order.

Md. Mahmud Hassan Talukder, J:

I agree.