

বাংলাদেশ সুপ্রীম কোর্ট  
হাইকোর্ট বিভাগ  
(বিশেষ মূল অধিক্ষেত্র)

রীট পিটিশন নং ১২৮৮৯/২০১২.

নাদিম জারার

.....দরখাস্তকারী

-বনাম-

বাংলাদেশ সরকার ও অন্যান্য

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এ্যাডভোকেট আক্তার ইমাম সংগে

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এ্যাডভোকেট মোঃ ইকরামুল হক, ডেপুটি এটর্নী জেনারেল  
সঙ্গে

এ্যাডভোকেট পুরবী রানী শর্মা, সহকারী এটর্নী জেনারেল

এ্যাডভোকেট পুরবী সাহা, সহকারী এটর্নী জেনারেল

এ্যাডভোকেট সুকুমার বিশ্বাস সহকারী এটর্নী জেনারেল

.....৩নং প্রতিবাদী পক্ষে

উপস্থিতঃ

বিচারপতি মইনুল ইসলাম চৌধুরী

এবং

বিচারপতি মোঃ আশরাফুল কামাল

আদেশ প্রদানের তারিখ : ১২ বৈশাখ, ১৪২৫

বঙ্গাব্দ (ইংরেজী ২৫.০৪.২০১৯)।

দরখাস্তকারী নাদিম জারার হলফনামা সম্পাদন পূর্বক আবেদন পত্র দাখিলক্রমে আবেদন পত্রে বর্ণিত কারণে অতিরিক্ত রুল ইস্যুর প্রার্থনা করেন।

আবেদনপত্র পর্যালোচনা করা হলো। আবেদনকারীর বিজ্ঞ এ্যাডভোকেট আকতার ইমাম, বিজ্ঞ ডেপুটি এটর্নী জেনারেল, এ্যাডভোকেট মোঃ ইকরামুল হক এবং সহকারী এটর্নী জেনারেল সুকুমার বিশ্বাস এর যুক্তিতর্ক বিস্তারিতভাবে শ্রবণ করা হলো।

বিজ্ঞ সহকারী এটর্নী জেনারেল সুকুমার বিশ্বাস এফিডেভিট-ইন-অপোজিশন দাখিলপূর্বক নিবেদন করেন যে, অত্র রীট পিটিশনের তফসিলে বর্ণিত সম্পত্তি সংশ্লিষ্টতায় প্রথম সেটেলমেন্ট আদালত, ঢাকা কর্তৃক মোকদ্দমা নং ৭৪৪/১৯৮৮- এ প্রদত্ত বিগত ইংরেজী ১৯.০৯.১৯৯৫ তারিখের রায়ে বলেন যে, the case property belonged to K.M. Aref and he being a non-local left Bangladesh before 28.12.72 abandoning the case property. He is not a national of Bangladesh too. Thus, the case property vested in the Govt. as abandoned property by operation of law and the Govt.

**rightly included the same in the Kha list of the Abandoned Buildings. There being no basis for exclusion, the case property shall not be liable to be excluded from the impugned list.**

অতঃপর একটি মামলার অত্র রীট পিটিশনের তফসিল সম্পত্তি সংশ্লিষ্টতায় মহামান্য আপিল বিভাগ বিগত ইংরেজী ২০.০৬.২০১২ তারিখে প্রদত্ত রায়ে বলেছেন যে, **“Property was rightly included in the ‘kha’ list of the abandoned buildings.”** তৎপ্রেক্ষিতে, এটা দিবালোকের মত স্পষ্ট যে, অত্র রীট পিটিশনটি দায়ের করা হয়েছে আপিল বিভাগ কর্তৃক প্রদত্ত উপরিল্লিখিত রায় ও আদেশের পরিপন্থীভাবে। এ্যাডভোকেট সুকুমার বিশ্বাস আরও নিবেদন করেন যে, খাজা মোহাম্মদ আরেফ পাকিস্তানী নাগরিক এবং ১৯৭১ সালের পূর্ব হতেই পশ্চিম পাকিস্তানে বসবাস করতেন এবং পরবর্তীতে কখনই বাংলাদেশে আসেন নাই। খাজা মোহাম্মদ আরেফ এর তথাকথিত পুত্র খাজা মোঃ জারার (কে, এম, জারার) জালিয়াতির মাধ্যমে দানপত্র দলিল সৃজন করে অত্র মোকদ্দমাটি দায়ের করে। যেহেতু আপিল বিভাগ কর্তৃক প্রদত্ত উপরিল্লিখিত রায় ও আদেশকে অকার্যকর করার নিমিত্তে এবং জাল জালিয়াতি মূলক দানপত্র দলিল সৃষ্টি করে অত্র রুলটি হাসিল করা হয় সেহেতু অত্র অতিরিক্ত রুল ইস্যুর আবেদনটি নামঞ্জুর করে খরচাসহ মূল রুলটি খারিজের প্রার্থনা করেন বিজ্ঞ সহকারী এটর্নী জেনারেল এ্যাডভোকেট সুকুমার বিশ্বাস।

নথি পর্যালোচনায় এটা স্পষ্ট প্রতীয়মান যে, অত্র রীট পিটিশনের তফসিল বর্ণিত সম্পত্তি সংশ্লিষ্টতায় ১৯৮৮ সালে ঢাকার প্রথম স্টেটমেন্ট আদালতে ১৯৮৫ সালের অধ্যাদেশ নং ৫৪ এর ধারা ৭ উপধারা (১) মোতাবেক দরখাস্ত দাখিলের পর আবেদনকারী খাজা মোঃ জারার একেবারে কর্পুরের মত উবে যান। প্রথম স্টেটমেন্ট আদালত বিগত ইংরেজী ২০.১০.১৯৯৪ তারিখে খাজা মোঃ জারারকে চিঠি পাঠালে তা ফেরত আসে। বিগত ইংরেজী ২৫.১০.১৯৯৪ তারিখে প্রসেস সার্ভারের প্রতিবেদন মোতাবেক নালিশী তফসিল সম্পত্তিতে কে, এম, জারার কে পাওয়া যায় নাই। একইভাবে ডাকযোগে পাঠানো পত্রও ফেরত আসে। খাজা মোঃ জারার ১৯৮৮ সালে প্রথম স্টেটমেন্ট আদালত, ঢাকায় ১৯৮৫ সালের অধ্যাদেশ ৫৪ এর ধারা ৭ উপধারা (১) মোতাবেক দরখাস্ত দাখিল করার পর নিশ্চুপ ছিলেন। নথিদৃষ্টে এটা স্পষ্ট যে, খাজা মোঃ জারার প্রথমে ঢাকার প্রথম স্টেটমেন্ট আদালতে অত্র রীট পিটিশনের তফসিল সম্পত্তি সংশ্লিষ্টতায় মোকদ্দমা নং ৭৪৪/১৯৮৮ দাখিল করেন বেআইনীভাবে। কারণ অত্র রীট পিটিশনের তফসিল সম্পত্তির বরাদ্দ গ্রহীতা কে, এম, আরেফ যিনি স্বীকৃতভাবে ১৯৬৯ সালে পশ্চিম পাকিস্তানে চলে যান এবং পাকিস্তানের নাগরিকত্ব গ্রহণ করেন। সুতরাং খাজা মোঃ জারার আইনসম্মতভাবে তফসিল সম্পত্তির মালিকানা অর্জন না করে জাল দলিল সৃজন করে মামলাটি দায়ের করে। অত্র রীট পিটিশনের তফসিল সম্পত্তি তথা ধানমন্ডি থানাধীন সড়ক নং ২১

এর উপরিস্থিত প্লট নং ২৪০ সংশ্লিষ্টতায় প্রথম সেটেলমেন্ট আদালত, ঢাকা কর্তৃক মোকদ্দমা নং ৭৪৪/৮৮-এ প্রদত্ত বিগত ইংরেজি ১৯.০৯.১৯৯৫ তারিখের রায়টি বিশেষ উল্লেখযোগ্য এবং গুরুত্বপূর্ণ। রায়টি প্রদান করেছে তিন সদস্য বিশিষ্ট প্রথম সেটেলমেন্ট আদালত, ঢাকা যার চেয়ারম্যান ছিলেন খন্দকার মুসা খালেদ (পরবর্তীতে অত্র বিভাগের মাননীয় বিচারপতি এবং বর্তমানে Judicial Administration Training Institute এর মহাপরিচালক)। অত্র দরখাস্তটি নিষ্পত্তিতে গুরুত্বপূর্ণ বিধায় উপরিলিখিত রায়টি অবিকল নিম্নে উদ্ধৃত হলঃ-

*“Md. Taha Molla-Member: This under section 7(1) of the Ordinance no. 85 of 1985 was **filed by Khaja Md. Zarrar** for exclusion of house no. 744/88 from the ‘Kha’ list of Abandoned Buildings.*

*The short facts of the case is that the petitioner got the case property by way of gift from his father on 20.11.70 and got possession of all the title deeds of the case property on the same date. The petitioner was serving as an architect and as stranded in Pakistan. He escape from Pakistan and reached Bangladesh via Kabul and New Delhi in December, 1972. He got possession of the case property from his tenant Piotr lackiewicz a Poush national. The house in question was under possession of the said tenant before commencement of P.O. 16/72. The possession of case house has never been taken over by the Government.*

*The Government entered appearance but did not submit any written statement. The case that appears from the submission of the ld. Advocate is that the owner K.M. Aref was a non-local. He left Bangladesh during war of liberation in 1971. The alleged gift by him is false. The petitioner has acquired no right and title in the case property. The property has vested in the Govt. by operation of law as a abandoned property.*

*The only point for consideration is whether the disputed house is abandoned one or whether the petitioner has basis for getting it excluded from the ‘Kha’ list of the abandoned property.*

*Admittedly, the case property was leased out in favour of Khaja Md. Arif on 24.03.1959 and admittedly the case property has been included in the Kha list of the Abandoned Buildings.*

*On perusal of record it appears that the petitioner is found absent on many dates of hearing. The petitioner last prayed for adjournment on 12.12.1991. The petitioner has not come to court and took any step thereafter. So, the case was taken up for hearing and disposal on 12.09.95 hearing only the Government.”*

*The claim of the petitioner on the basis of oral gift appears highly questionable. The attested photocopy of memorandum of gift shows neither it was registered no authenticated by notary public and the petitioner filed no original document to substantiate his claim. If he was gifted on 20.12.70 his father would not have appointed him attorney by power of Attorney on 03.09.70. This power of Attorney was filed by petitioner in the Ministry and is available in the Government file. The petitioner only filed attested photo copy of his documents. But such attested photo copies are not reliable because of their inherent weakness of being manipulated and fabricated. Moreover, no landed property can legally be transferred without registered of the deed. The petitioner has stated in his petition that the property in question has been acquired by him by way of gift*

from his father on 20.11.70. If it was so, the ownership developed upon the petitioner. In that event, the petitioner had to obtain citizenship vis-e-vis nationality certificate for himself and not for his father. On perusal of his documents it does not appear to us that the petitioner has ever obtained nationality certificate after creation of Bangladesh. On the other hand, the petitioner obtained a citizenship certificate for his father. It was not necessary by obtaining this citizenship certificate the petitioner made it clear that his father is still owner. Thus it follows that the fact on gift is a device to grab the case property.

The petitioner claimed that he obtained title documents from his father K.M. Aref. But from the documents filed in court we do not find any such original documents. The papers like receipts of rents taxes including income tax of the case property paid by K.M. Aref have not been submitted to show custody of the documents. These all suggest that the alleged gift was not a real one.

The petitioner claimed to be a Bangladesh National. But he produced no paper in proof of his nationality. He produced Photosat paper showing his escape from Pakistan via Kabul and New Delhi, a certificate from Chief Architect showing his joining and his service as Asstt. Architect in the department of Architecture under the Ministry of Public Works and Urban development Bangladesh. And Photostat copy of his pass port. The genuineness of these three documents cannot be ascertained on the basis of Photostat copies. The petitioner has not given the court any scope to peruse original of these documents as he did neither file originals nor file originals nor he become available in court on the day of hearing.

Perused a communication addressed to Mr. Kamrul Hasan section of officer by the petitioner on 26.04.86. In this communication he stated that he returned to Bangladesh from Kuwait in 1983. The similar copy is available in the Govt. file corresponding finding is also available in the order sheet of the Govt. file but with difference. The difference is that the Government cast doubt on the genuineness of the heba. So the Govt. decided to retain it in the Kha list. Now, the question of the return of the petitioner from Kuwait and also the filing of this case in his name are doubtful. It he was in Bangladesh since 1983, then he could produce certificate of his living in this country from any authority since then. He would have been available in the list of Voters but such information has not come. Against, ordersheet of the case record shows that the petitioner was absent in the court on many occasions. **After 12.12.91, the petitioner marked himself totally absent in court all along. The court tried to make his presence in court ensured by a issuance of official letters but failed. The letter dated 20.10.94 returned unserved. The report of the process sarver date 25.10.94 shows that the petitioner in the address of the case property was not available. Similarly, letter by post addressed to the petitioner in the address of the case property returned unserved with postal report.**

**The above discussions make it clear that the case was not filed by Khaza Md. Zarrar rather some one might filed this case in his name.**

**In our earlier discussions we have cast doubt on the genuineness of the alleged gift of the case property in favour of Khaza Md. Zarrar by K.M. Aref. Moreover there is no registered instrument. So, in our considered opinion, the**

*ownership of the property has not passed from K.M. Aref to Khaza Md. Zarrar. It has been raised by petitioner that K.M. Aref has been stranded in Pakistan. We do not believe it. If K.M. Aref was stranded in Pakistan in the early part of the independence of Bangladesh, there can not be any reasonable ground for his absence in Bangladesh for such a long period. He never came to this country.*

*Having due regard to the above facts and findings, we are constrained to say that **the case property belonged to K.M. Aref and he being a non-local left Bangladesh before 28.12.72 abandoning the case property. He is not a national Bangladesh too. Thus, the case property vested in the Govt. as abandoned property by operation of law and the Govt. rightly included the same in the Kha list of the Abandoned Buildings. There being no basis for exclusion, the case property shall not liable to be excluded from the impugned list.***

অপরদিকে, “Orex Network Limited” নামক কোম্পানী অত্র রীট পিটিশনের তফসিলে বর্ণিত সম্পত্তি সংশ্লিষ্টতায় মালিক দাবী করে পরিত্যক্ত সম্পত্তির ‘খ’ তালিকা থেকে মুক্ত করার জন্য রীট পিটিশন নং ১৮০৬/২০০০ দাখিল করেন। অতঃপর উক্ত রীট পিটিশন শুনানীঅন্তে বিচারপতি শাহ আবু নায়েম মমিনুর রহমান এবং বিচারপতি মোঃ আরায়েস উদ্দিন সমন্বয়ে গঠিত অত্র বিভাগের একটি দ্বৈত বেঞ্চ বিগত ইংরেজী ১৬.০৪.২০০২ এবং ১৭.০৪.২০০২ তারিখে রুলটি চূড়ান্ত করে আদেশ প্রদান করেন যে,

*“Accordingly, the Rule is made absolute without any order as to costs. The enlistment of the case property being House No. 240 in Road No. 2(old) 11/A (New) in Dhanmondi Residential Area, Dhaka, in the ‘Kha’ list of notification dated 23.09.86 published in the Bangladesh Gazette dated 23.9.86 at page 9764 as item No. 14 is declared to be without laful authority and of no legal effect and the respondents are directed to delist the case property from the aforesaid ‘Kha’ list of the abandoned property.”*

উপরিলিখিত রায় ও আদেশে সংক্ষুদ্ধ হয়ে সরকার পক্ষ আপিল বিভাগে সিভিল আপিল নং ১৩৩/২০০৪ দায়ের করেন। অতঃপর উক্ত সিভিল আপিল নং ১৩৩/২০০৪ শুনানীঅন্তে আপিল বিভাগের তৎকালীন মাননীয় বিচারপতি সৈয়দ মাহমুদ হোসেন (বর্তমানে বাংলাদেশের প্রধান বিচারপতি) বিগত ইংরেজী ২০.০৬.২০১২ তারিখে প্রদত্ত রায়ে নিম্নোক্ত উপায়ে নিষ্পত্তি করেনঃ-

*This appeal, by leave, by the appellant, arises out of the judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April, 2002 passed by a Division Bench of the High Court Division in Writ Petition No. 1806 of 2000 making the Rule absolute.*

*The writ petition was filed questioning legality of listing House No. 240 at Road No.  $\frac{21 \text{ (Old)}}{11/A \text{ (New)}}$  in Dhanmondi Residential Area in the ‘Kha’ list of the abandoned buildings published in the Bangladesh Gazette.*

*The facts figured in this appeal are summarized below:*

*The writ petition was filed stating, inter alia, that the then Government of East Pakistan leased out the property mentioned before to Khawaja*

*Mohammad Aref by the registered deed of lease dated 02.03.1959. He gifted the said property to his son Khawaja Md. Zarrar by a memorandum of Heba dated 01.01.1971. The donee recorded and mutated his name in the records of the Ministry of Works. He got his name mutated in the revenue records on 02.01.1980. On 01.07.1985, Khawaja Md. Zarrar gifted the property to his wife and the said donee got her name recorded in the Ministry of Works and also mutated her name in the revenue records. Khawaja Md. Zarrar's wife appointed one Mr. Ahmedure Rashid Chowdhury as her attorney for the purpose of transfer of the property in favour of one Mr. Fazlul Quadir Chowdhury. Upon procuring approval from the Ministry of Works, the attorney transferred the property to Mr. Fazlul Quadir Chowdhury by way of gift and the donee's name was recorded in the Ministry of Works as well as in the revenue records. On obtaining permission from the Ministry of Works, Fazlul Quadir Chowdhury transferred the property to writ petitioner No. 1 (respondent No.1 herein) by a registered deed on 30.11.1998. The purchaser got his name recorded in the records of the Ministry of Works and also mutated his name in the revenue records. While respondent No.1 was owning and possessing the property, the same was listed as abandoned buildings. The petitioner had no knowledge of enlistment of the property in the 'kha' list of the abandoned buildings since it was never pointed out either by the Ministry of works and by the Revenue Authority that the property is an abandoned property. In the early part of 2000 AD, the writ petitioner came to know that the property has been enlisted in the 'kha' list and thereupon he served legal notice demanding justice upon the writ-respondents by delisting the property from the list of the abandoned building but to no avail.*

*Being aggrieved by and dissatisfied with the gazette notification dated 23.09.1986 and for delisting of the House No. 240 at Road No.  $\frac{21 \text{ (Old)}}{11/A \text{ (New)}}$  in Dhanmondi Residential Area in the 'Kha' list of the*

*abandoned building, the writ-petitioner moved the High Court Division by filing Writ Petition No.1806 of 2000 and obtained Rule Nisi.*

*The Rule was contested by writ-Respondent No.1 (appellant No.1 herein) by filling an affidavit-in- opposition as well as supplementary affidavit-in-opposition. The case of the appellant, in short, is that during the war of Liberation, Khawaja Mohammad Aref left Bangladesh leaving the property uncared for and when the P.O. (President's Order) 16 of 1972 was promulgated neither the owner nor anybody on his behalf was there to look after, manage or control the property in question and as such, the property by operation of law became an abandoned. The memorandum of gift dated 01.01.1971 is an anti-dated and manufactured document to raise claim in the property. The so called gift is hit by the provision of clauses 20 and 21 of the leased deed. Recording of the names in the records of Ministry of works was an act of collusion with the personnel of the Ministry. The gift alleged to have been made by Khawaja Md. Zarrar to his wife had no legal validity as said Khawaja Md. Zarrar was not the lawful owner of the case property. Therefore, he had no authority to make gift of the property in favour of his wife and the said transfer was a malafide act to grab the property. As the property became abandoned making of gift by Khawaja Md. Zarrar did not change the nature and character of the property as abandoned. Writ petitioner No.1 by his purchase did not acquire any right, title and interest in the case property and because of the said purchase by writ petitioner No.1 the character of the property was not changed. On 07.04.1973, the Government took possession of the property and Khawaja Md. Zarrar applied to the Government for allowing him to stay in his father's property. Accordingly Khawaja Md. Zarrar was allowed to stay in the property in question. Khawaja Md.*

*Zarrar at one time described himself as an attorney or his father and filed settlement Case No.744 of 1988 in the Court of Settlement seeking release of the property from the list of abandoned building. The Court of Settlement found the property as an abandoned property and thereupon Court of Settlement dismissed the Case on 19.09.1995. Suppressing the said facts, the writ-petitioner filed the writ petition and as such he was not entitled filed the writ petition and as such he was not entitled to any relief. Prior to listing of the property in the 'Kha' list, notice was issued on 01.04.1986 and the occupant replied thereto on 26.04.1986.*

*The learned Judges of the High Court Division upon hearing the parties made the Rule absolute by the judgement and order dated 16<sup>th</sup> and 17<sup>th</sup> April, 2002. Feeling aggrieved by and dissatisfied with judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April, 2002 passed by the High Court Division, writ-respondent No.1 moved this Division by filing Civil Petition for leave to Appeal No. 1314 of 2002 in which leave was granted resulting in Civil Appeal No. 133 of 2004.*

*Mr. Murad Reza, learned Additional Attorney General, appearing on behalf of the appellant, submits that the writ-petitioner, Orex Network Limited, did not challenge the judgment passed by the Court of Settlement and therefore that judgement remains valid till date and that the writ-petitioner only challenged the gazette notification dated 23.09.1986 in which the property was listed as abandoned in 'kha' list and that so long the judgment of the Court of Settlement stands the writ-petitioner cannot claim that the property is not abandoned and that without considering this aspect of the case the High Court Division made the Rule absolute and as such, the impugned judgment should be set aside. He further submits that the High Court Division having not a Court of appeal, it could not adjudicate the facts which have already been decided by the Court of Settlement and as such, the judgment delivered by the High Court Division should be set aside. He then submits that no original documents relating to the abandoned building were produced by the writ petitioner and that even those deeds were not produced before the Court of Settlement and without taking into consideration this broad aspect of the case, the High Court Division made the Rule absolute declaring that the property is not abandoned. He also submits that the oral gift in favour of Khawaja Md. Zarrar by his father Khawaja Mohammad Aref dated 01.01.1971 and the oral gift date 01.01.1988 by Khawaja Md. Zarrar in favour of his wife were not proved and that the High Court Division without giving any finding in respect of the oral gifts found that the disputed property was wrongly listed in the 'kha' list of the abandoned buildings. He goes on to submit that subsequent events i.e. according permissions transfer of the disputed property by some unscrupulous employees of the Ministry should not be taken into account while deciding the question of whether the property is abandoned or not.*

*Mr. Mahmudul Islam, learned Senior Advocate appearing on behalf of respondent No.1, on the other hand, submits that the disputed property was not listed in the 'kha' list in compliance with the requirements of section 4 of the Ordinance No. 54 of 1985. He further submits that the actions of the concerned Ministry led the writ-petitioner to believe that the disputed property is not abandoned property and that the writ petitioner being a bonafide purchaser for valuable consideration should not suffer for the actions of the concerned Ministry. He lastly submits that before treating a property as abandoned property, the Government is to form an opinion that the property assumed the character of abandoned property and in the case of the instant property, formation of opinion is lacking, treating the property as abandoned property and listing of the same in the 'kha' list was illegal and as such, the judgment should not be set aside.*

*We have considered the submissions of the learned Additional Attorney General for the appellant and Mr. Mahmudul Islam, learned Senior Advocate for the writ respondent No.1, perused the impugned judgment and the papers incorporated in the paper-book.*

*To begin with, it is necessary to have a glimpse on the submissions on which leave was granted by this Division.*

*The submissions on which leave has been granted are quoted below:*

- I. The High Court Division failed to appreciate that the case property having been enlisted in the 'kha' list published under the provisions of Ordinance No. 54 of 1985 if shall be presumed that the property is an abandoned property and it is the obligation of the claimant to prove that the same is not an abandoned property.*
- II. The High Court Division failed to consider that K.M. Zarrar did not disclose even on 7.4.73 that he got a power of attorney from his father and/or he became the owner of the case property by virtue of a gift as alleged and in the circumstances the judgment and order of the High Court Division is not sustainable in law and liable to be set aside.*
- III. The requirements of Section 4 of the Ordinance, 54 of 1985 in order to enlist the case property in the 'kha' list were fulfilled and therefore the legality of the enlistment of the case property in the 'kha' list as abandoned property has been proved and as such cannot be challenged.*
- IV. The successive transfers as evidenced by Annexure D, E(1) and G (to the writ petition) were the acts of collusion and fraud on the part of some of employees of the present petitioner and it was/is not the fault of the present petitioner, which was not erroneously considered by the High Court Division and thus there has been occasioning of failure of justice.*
- V. The High Court Division erred in law in not considering whether a property is an abandoned property or not, depends on the definition clause of P.O. 16 of 1972 and admittedly the owner was not in Bangladesh in 1972 and there is no document to show that the case property was under occupation of the tenant of the real owner in February, 1972 and that the claim of Mr. K.M. Zarrar that the polish national occupying the case property was a tenant under his father was not proved by any document or material and therefore the claim of possession of the predecessor-in-interest of the petitioner has not been proved.*
- VI. In view of the admitted fact that the original lessee of the property in question left Bangladesh during the period of liberation leaving the property uncared for and the said lessee was neither present in Bangladesh nor there was any body to look after his property at the time of promulgation of P.O. 16 of 1972, the property assumed the character of abandoned property assumed the character of abandoned property by operation of law and thus the High Court Division erred in law in failing to decide the correct legal position in the facts and circumstances of the present case.*
- VII. In view of the inconsistent and contradictory claim made by K.M. Zarrar, son of original lessee ( as evident from Annexures-x,x-I & x-II of the affidavit-in-opposition and Annexure-'C' of the writ petition), the said K.M. Zarrar acquired no right, title, interest and possession to cause transfer of the property in question and consequently the alleged transferee from said K.M. Zarrar acquired no right, title, interest in the property in question and as such, the High Court Division erred in law in failing to consider the aforesaid aspect of the case thereby erroneously made the Rule absolute.*
- VIII. Serious disputed question of the facts being involved and collusion with the government staff being apparent in*

*manufacturing papers, the High Court Division erred in law in not holding that neither the Government is bound by the illegal acts of its officials, nor the abandoned character of the property in question has been changed by such acts of government officials and the writ petitioner having not come with clean hands, he is not entitled to get equitable relief.*

*Admittedly, the property belonged to Khawaja Mohammad Aref, who got the same by a registered deed of lease dated 24.03.1959. Respondent No.1 claims that Khawaja Mohammad Aref gifted the said property to his son Khawaja Md. Zarrar by a memorandum of hiba dated 01.01.1971 and that the donee got his name recorded and mutated in the record of the Ministry of Works.*

*The appellant annexed the judgment delivered by the First Court of Settlement in Case No. 744 of 1988 with its affidavit-in-opposition. From the judgment, it appears that Khawaja Md. Zarrar filed the above case for delisting the disputed property from 'kha' list of the abandoned buildings. The Court of Settlement found that the petitioner Khawaja Md. Zarrar was absent on many dates of hearing. Khawaja Md. Zarrar as the petitioner lastly prayed for adjournment on 12.11.1991 and that, after that date, Khawaja Md. Zarrar did not come to the Court for taking further step. The Court of Settlement found that the claim of Khawaja Md. Zarrar on the basis of oral gift appeared to be highly questionable and that Khawaja Md. Zarrar did not file any original document to substantiate that he was appointed attorney of his father by power of attorney dated 03.09.1971. When Khawaja Md. Zarrar claimed to have acquired the property by way of oral gift from his father on 20.11.1970 his appointment as the attorney of his father by the power of attorney dated 03.04.1971 is mysterious. The Court of Settlement noticed that the power of attorney was available in the file of the Ministry.*

*The Court of Settlement tried to procure attendance of Khawaja Md. Zarrar in the Court of Settlement by issuance of official letter but failed. The Court of Settlement observed that the report of the process server dated 25.10.1994 revealed that Khawaja Md. Zarrar was not available at the address of the case property and that the registered letter addressed to him at the address of the case property returned unserved with the postal report. On 01.07.1985, Khawaja Md. Zarrar was stated to have gifted the disputed property to his wife. When the Court of Settlement could not secure the attendance of Khawaja Md. Zarrar by issuing notice by normal course and by registered post at the address of the disputed property, the question of making gift of the disputed property by him to his wife on 01.07.1985 was highly doubtful. The Court of Settlement came to a definite finding that the alleged gift by Khawaja Mohammad Aref in favour of Khawaja Md. Zarrar was not genuine and that the ownership of the property did not pass from Khawaja Mohammad Aref to Khawaja Md. Zarrar.*

*The appellant in its affidavit-in-opposition before the High Court Division referred to the judgment of the Court of Settlement (Annexure-x-2) to the affidavit-in-opposition which fact was concealed by the writ-petitioner. The writ-petitioner did not controvert the facts alleged in the affidavit-in-opposition about the judgment of the Court of Settlement. Keeping the judgment of the Court of Settlement intact the writ petitioner cannot have any declaration that enlisting of the disputed property in the 'kha' list of the abandoned buildings was illegal and without jurisdiction. The High Court Division noticed the existence of the judgment of the Court of Settlement but did not give any finding about it. Therefore, even after pronouncement of the judgment by the High Court Division, the findings of the Court of Settlement remain intact.*

*On consideration of note No. 2 dated 24.06.1973 of the file of the Ministry of Works, the High Court Division came to a finding that the Ministry of Home Affairs admitted that father of Khawaja Md. Zarrar was a Bangladeshi and that the Ministry issued a certificate to that effect and that in note No. 13 dated 17.07.1973 the then Secretary of the Ministry of Works confirmed that the Ministry of Home Affairs issued citizenship certificate in favour of the owner of the case house. The High Court Division made futile exercise in holding that the original allottee, Khawaja Mohammad Aref was a Bangladeshi and that the property was under his control and management through his tenant till 1973 and that subsequently, the possession of case property being with the legal heirs of Khawaja Mohammad Aref and the successor – in-interest and as such, the case property could not be said to have been left uncared for as alleged by the appellant. When Khawaja Md. Zarrar was stated to have got the property by a memorandum of heba dated 01.01.1971 from his father what was the necessity of obtaining the citizenship certificate of Khawaja Mohammad Aref on 17.07.1973 was mysterious.*

*It is contended that without complying with the requirements of section 4 of the Ordinance No. 54 of 1985, the disputed property was enlisted in the ‘kha’ list of the abandoned buildings. It is now well settled that the property having been enlisted as abandoned property and the list having been published in the official gazette, the Government has no obligation either to deny the facts alleged by the claimants or disclose the basis for treating the property as abandoned property merely because the same is disputed by the claimants.*

*Section 3 of the Ordinance of 1985 provides that the provisions of this Ordinance shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force. Therefore, the provisions of the Ordinance of 1985 shall have overriding effect over the provisions of the Bangladesh Abandoned Property Order, 1972.*

*Admittedly, the original lessee of the property in question left Bangladesh during the period of liberation leaving the property uncared for and the said lessee was neither present in Bangladesh nor there was any body to look after his property at the time of promulgation of P.O. 16 of 1972, the property assumed the character of abandoned property by operation of law.*

*In the case of Government of Bangladesh represented by the Secretary, Ministry of Works Vs. Md. Jalil and others (1996) 48 DLR (AD)10, this Division held as under:*

*“The onus, therefore, is squarely on the claimant of the building to prove that the building is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned property merely because the same is disputed by the claimant.”*

*Reliance may be made in the case of the Government of Bangladesh represented by the Secretary, Ministry of Works v. K.M. Zaker Hossain and others (2003) 8 BLC (AD) 27, it has been held as under:*

*“18. Since the property has been listed under section 5 (1) of the Ordinance as abandoned property and the said list has been published in the official Gazette, the claimant to the property i.e. respondent No.1 was required to dislodge statutory presumption as under section 5 (2) of the Ordinance that the property in question was not an abandoned property and that the same has been wrongly listed as abandoned property.”*

*It has been further held as under:*

*“19. The listing of an abandoned property either in the ‘Ka’ list or in the ‘Kha’ list is not a mistake or a default of the kind that makes the list so prepared illegal. Once a particular property is abandoned property then listing thereupon either in the ‘Ka’ list or in the ‘Kha’ list as provide in section 5(1) of the Ordinance is not of vital importance or, in other words, is not material. In this connection reference may be made to the case of Hazerullah vs. Chairman, 1<sup>st</sup> Court of Settlement and another reported in 3BLC (AD) 42. In the reported case it was contended that although the property is in possession of the appellant which as per provision of section 5(1) (a) of the Ordinance in the ‘ka’ list. In the background of the said contention, it has been observed in the aforesaid case this contention will stand only when the claimant can prove that the disputed building was not an abandoned property.*

*In the case of Government of Bangladesh represented by the Secretary, Ministry of Works vs. Md. Jalil and others, (1997) 49 DLR (AD) 26, this Division held as under :*

*“14.....Section 5(2) of the Ordinance clearly provides that the list published under subsection (1) shall be conclusive evidence of the fact that the buildings included therein are abandoned property and have vested in the Government as such. Section 7 says that a person claiming any right or interest in any such building may make an application to the Court of Settlement for exclusion of the building from such list etc. on the ground that the building is not an abandoned building and has not vested in the Government under President’s Order No. 16 of 1972 or that his right or interest in the building has not been affected by the provisions of that Order. The onus, therefore, is squarely on the claimant of the building to prove that the building is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned property merely because the same is disputed by the claimant. ”*

*In the case of Hazerullah vs. Chairman, 1<sup>st</sup> Court of Settlement and another (1998) reported in 3 BLC (AD) 42, it has been held that onus lies upon the claimants of the building to prove that the building is not an abandoned property and that the appellant having failed to discharge such onus the High Court Division rightly upheld the order of inclusion of the disputed property in the list of abandoned buildings. The principals expounded in the cases referred to above do not require further elucidation.*

*Admittedly, the disputed property was enlisted in the ‘kha’ list of the abandoned buildings on 23.09.1986 and the case was challenging the enlistment was filed before the Court of Settlement in 1988 and the judgment was delivered on 19.09.1999 holding that the Government rightly included the case property in the ‘Kha’ list of the abandoned buildings. The writ-petitioner contended that Khawaja Mohammad Aref gifted the disputed property to his son Khawaja Md. Zarrar on 20.11.1970 and confirmed the gift by a memorandum of Heba dated 01.01.1971. Khawaja Md. Zarrar was alleged to have gifted the disputed property by way of oral gift to his wife Mrs. Saima Zarrar on 01.07.1985. Subsequently, Saima Zarrar obtained permission to transfer the disputed property from the Ministry of Works on 07.04.1991. Admittedly, the disputed property was enlisted in the ‘Kha’ list of the abandoned building on 23.09.1986 and how the Ministry of Works could accord permission to Saima Zarrar to transfer the*

*disputed property on 07.04.1991 is not comprehensible on 01.07.1993, by a power of attorney Saima Zarrar appointed Ahmedur Rashid Chowdhury as her attorney who was stated to have gifted the disputed property to Fazlul Kadir Chowdhury by an oral gift and in support of that gift he swore an affidavit before the Notary Public on 08.07.1993. On 17.07.1993, the Ministry of Works accorded permission to mutate the name of Fazlul Kadir Chowdhury in the record of the Ministry of Works. On 04.10.1998, the Ministry of Works accorded permission to transfer the disputed property in favour of the writ-petitioner. Accordingly, Fazlul Kadir Chowdhury transferred the disputed property to the writ-petitioner by a registered deed of sale dated 30.11.1998.*

*Having considered the affidavit appended to the deed of sale dated 30.11.1998, it appears that Fazlul Kadir Chowdhury made a statement in the affidavit in clause 'kha' " তাহা বাংলাদেশ পরিত্যক্ত আইন, ১৯৭২ সনের ১৬ নং আদেশের বলে পরিত্যক্ত নহে।" Admittedly, the disputed property was published in the 'kha' list of the abandoned buildings by a gazette notification dated 23.09.1986. Therefore, all the permissions accorded by the Ministry of Works on and from 23.09.1986 allowing mutation and transfer were void and those orders were obtained by collusion and fraud. Even when the court of Settlement declared that the disputed property was rightly included in the 'kha' list of the abandoned buildings, the Ministry of Works accorded permission to Md. Fazlul Kadir Chowdhury to transfer the disputed property to the writ-petitioner No.1 on 30.11.1998. According such permission of transfer even after the judgment of the Court of Settlement is collusive and mala fide having no legal effect in the light of above finding, it cannot be said that writ-petitioner No.1 is a bona fide purchaser of the disputed property for valuable consideration and that he has acquired no title in pursuance of the disputed deed. The writ-petitioner made inconsistent statements at different stages and such inconsistencies are reflected in the averments of the writ-petition itself.*

*In the light of the findings, we find that the High Court Division failed to appreciate the materials on record and the law involved in this case and erroneously came to a finding that the disputed property was wrongly included in the list of the abandoned buildings. Therefore, the appeal is allowed and the impugned judgment is set aside. The disputed deed being No 4196 dated 30.11.1998 is declared void. There is no order as to costs.*

রীট পিটিশন নং ১৮০৬/২০০০- এ দরখাস্তকারী 'ওরেঞ্জ নেটওয়ার্ক লিমিটেড' এর বক্তব্য এই যে,

খাজা মোঃ জারার তার পিতা থেকে দানসূত্রে বিগত ইংরেজী ০১.০১.১৯৭১ তারিখে সম্পত্তিটি প্রাপ্ত হয়ে পরবর্তীতে তার স্ত্রী মিসেস সায়মা জারারকে বিগত ইংরেজী ০১.০৭.১৯৮৫ তারিখে মৌখিকভাবে দান করেন। অতঃপর সায়মা জারার মৌখিক দানসূত্রে নালিশী সম্পত্তিটি প্রাপ্ত হয়ে আহমেদ রশিদ চৌধুরীকে এটর্নী নিযুক্ত করলে তিনি জনৈক ফজলুল কাদের চৌধুরীকে মৌখিকভাবে দান করেন। অতঃপর উক্ত ফজলুল কাদের চৌধুরী বিগত ইংরেজী ৩০.১১.১৯৯৮ তারিখে দরখাস্তকারী 'ওরেঞ্জ নেটওয়ার্ক লিমিটেড' বরাবরে হস্তান্তর করেন।

প্রকৃতপক্ষে, খাজা মোঃ জারার জাল জালিয়াতির মাধ্যমে বেআইনীভাবে নিজেকে তফসিল সম্পত্তির মালিক বানিয়ে স্ত্রীকে বেআইনীভাবে মৌখিক দান করেন। একইভাবে তার স্ত্রী বেআইনীভাবে ফজলুল কাদের চৌধুরীকে হস্তান্তর করেন। ফজলুল কাদের চৌধুরীও বেআইনীভাবে ‘ওরেন্স নেটওয়ার্ক লিমিটেড’ কে দলিলমূলে হস্তান্তর করেন। উক্ত জাল ও বেআইনী দলিলের ভিত্তিতে ‘ওরেন্স নেটওয়ার্ক লিমিটেড’ রীট পিটিশন নং ১৮০৬/২০০০ দাখিল করেন।

অর্থাৎ পাকিস্তানী নাগরিক কে, এম, জারার সরাসরি সেটেলমেন্ট মোকদ্দমা নং ৮৪৪/১৯৮৮ এবং পরোক্ষভাবে রীট পিটিশন নং ১৮০৬/২০০০ দাখিল করেন। সেটেলমেন্ট ৮৪৪/১৯৮৮ নং মোকদ্দমাটিতে বিগত ইংরেজী ১৯.০৯.১৯৯৫ তারিখে পরাজয় বরণ করে খাজা মোঃ জারার পরোক্ষভাবে “ওরেন্স নেটওয়ার্ক লিমিটেড” এর মাধ্যমে রীট পিটিশন নং ১৮০৬/২০০০ দাখিল করে আপিল বিভাগ হতে বিগত ইংরেজী ২০.০৬.২০১২ তারিখে পুনরায় পরাজিত হন।

প্রথম সেটেলমেন্ট আদালত এবং আপিল বিভাগ কর্তৃক অত্র রীট পিটিশনের নালিশী তফসিল সম্পত্তি সংশ্লিষ্টতায় দু-দুবার পরাজিত হওয়া সত্ত্বেও আদালতকে উপরিলিখিত রায় ও আদেশের বিষয়ে অন্ধকারে রেখে পুনরায় সংবিধানের অনুচ্ছেদ ১০২ (২)(ক)(আ) মোতাবেক দরখাস্ত দাখিল করে বিগত ইংরেজী ১১.১১.২০১২ তারিখ অত্র বিভাগ হতে রুলটি প্রাপ্ত হন। রুলটি অবিকল নিম্নে উদ্ধৃত হলোঃ

*“Let a Rule Nisi issue calling upon the respondents to show cause as to why the inclusion of the scheduled property of the petitioner measuring 1 Bigha alongwith one storied two building situated at Dhanmondi Residential Zone, Mouza-Dhanmondi, Police Station-Dhanmondi, Road No. 21 (Old), 11/A(New) Plot No. 240 in the “Kha” list by the Notification No. S.R.O. 365-L/86 dated 23.09.86 issued and published in the official Gazette by the Respondent No.1 under the signature of the Respondent No.2 (Annexure-Q) should not be declared to have been made without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.”*

অর্থাৎ অত্র রীট পিটিশনটি তথাকথিত খাজা মোঃ জারার এর তফসিল সংশ্লিষ্ট সম্পত্তি নিয়ে তৃতীয় মামলা।

অত্র রীট পিটিশনের ১০ প্যারায় প্রদত্ত বক্তব্য এবং সংযুক্তি এইচ (H) মোতাবেক কে, এম, আরেফ ১৯৬৯ সাল থেকে ৩০.১১.১৯৭২ পর্যন্ত পশ্চিম পাকিস্তানে ছিলেন। অপরদিকে, সংযুক্তি আই (I) মোতাবেক কে, এম, আরেফ বিগত ইংরেজী ০১.০১.১৯৭১ তারিখে ঢাকায় বসে তার পুত্র খাজা মোহাম্মদ জারার-কে প্লট নং ২৪০ দান করে “Memorandum of Hiba (Gift)” সম্পাদন করেন। অর্থাৎ সংযুক্তি এইচ (H)

এবং আই (I) মোতাবেক কে, এম, আরেফ বিগত ইংরেজী ০১.০১.১৯৭১ তারিখে একই সাথে পশ্চিম পাকিস্তানে এবং পূর্ব পাকিস্তানে (বর্তমানে বাংলাদেশ) ছিলেন। এতে এটা স্পষ্ট যে, খাজা মোঃ জারার আদালতে এসে হলফপূর্বক মিথ্যা বর্ণনা প্রদান করেছেন তথা অত্র আদালতে অপরিষ্কার হাতে এসেছেন।

আইনের সুপ্রতিষ্ঠিত নীতি এই যে, যিনি আদালতে হলফপূর্বক মিথ্যা বর্ণনা করবেন এবং অপরিষ্কার তথা অপরিচ্ছন্ন হাতে আসবেন তিনি আদালত থেকে কোন প্রতিকার পেতে হকদার নন।

নথিপত্র বিশ্লেষণে এটা স্পষ্ট প্রতীয়মান যে, প্লট নং ২৪০ এর মূল বরাদ্দ গ্রহীতা কে, এম, আরেফ ১৯৬৯ সালে পশ্চিম পাকিস্তানে চলে যাওয়ার পর জেনে, শুনে এবং বুঝে বাংলাদেশের নাগরিকত্ব পরিত্যাগ করে পাকিস্তানের নাগরিকত্ব গ্রহণ করেছেন। ফলশ্রুতিতে, ২৪০ নং প্লটটি ১৯৭২ সালের রাষ্ট্রপতির আদেশ ১৬ মোতাবেক পরিত্যক্ত সম্পত্তি হিসেবে সঠিকভাবে এবং আইনসম্মতভাবে ঘোষণা করা হয় এবং পরবর্তীতে ১৯৮৫ সালের অধ্যাদেশ ৫৪ মোতাবেক আইনানুগভাবে ‘খ’ তালিকাভুক্ত করা হয়।

সার্বিক পর্যালোচনা ও বিচার বিবেচনায় আমাদের অভিমত হল এই যে, অত্র রীট পিটিশনের তফসিল সম্পত্তির মূল বরাদ্দ গ্রহীতা কে, এম, আরেফ (পাকিস্তানের নাগরিক) এর তথাকথিত পুত্র খাজা মোঃ জারার (পাকিস্তানী নাগরিক) তফসিল বর্ণিত সম্পত্তি অবৈধভাবে আত্মসাৎ করার মানসে আদালতের সাথে প্রতারণা করা হেতু এবং খাজা মোঃ জারার এর স্থলাভিষিক্ত তার তথাকথিত পুত্র নাদিম জারার কর্তৃক তফসিল বর্ণিত সম্পত্তি আত্মসাৎ এর নিমিত্তে জাল দলিলপত্র সৃজন করার জন্য বর্তমান দরখাস্তকারী নাদিম জারার-কে দৃষ্টান্তমূলক শাস্তি প্রদান করা উচিত বলে আমরা মনে করি। আবেদনপত্রটি অবশ্যই প্রত্যাখ্যাত হবে এবং অত্র রুলটি আদালতের সাথে প্রতারণামূলকভাবে প্রাপ্ত হেতু খরচাসহ খারিজযোগ্য।

অত্রএব, আদেশ হয় যে, নাদিম জারার কর্তৃক দাখিলকৃত অতিরিক্ত রুল প্রার্থনার আবেদনপত্রটি সরাসরি প্রত্যাখান করা হল এবং সাথে সাথে অত্র রুলটিও ৫,০০,০০০/- (পাঁচ লক্ষ) টাকা খরচাসহ খারিজ করা হলো।

অত্র আদেশের অনুলিপি সংশ্লিষ্ট সকলকে দ্রুত অবহিত করা হোক।