15 SCOB [2021] HCD 21

HIGH COURT DIVISION

(Special Original Jurisdiction)
WRIT PETITION NO. 13133 OF 2015

Md. Lutfor Rahman and others
…..PETITIONERS
-Versus-
Govt. of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Ramna, Dhaka and others.
….RESPONDENTS

Mr. Md. Bazlur Rashid, Advocate
.... For the Petitioners

Mr. Md. Mokleshur Rahman,
... For the Respondent No. 1.

Heard on: 06.04.2017, 04.06.2017 & 25.01.2018
Judgment on: 07.02.2018

Present:
Ms. Justice Naima Haider
&
Mr. Justice Zafar Ahmed

Editor's Note:

This Writ Petition was filed challenging the enlistment of the disputed property in the Bangladesh Gazette dated 23.09.1986 as abandoned property under Section 5 (1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985. The contention of the petitioners was that as the Government did not have any possession in the property, the alleged inclusion of the property under Section 5(1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985 is illegal. The Petitioners also stated that land tax had been paid by the predecessors of the petitioners prior to inclusion of the property in the Bangladesh Gazette. Furthermore, the Government accepted land tax on the property till 2015. Apart from that RAZUK issued permission for construction of multistoried building over the property in question. Thereby, they have control and possession over the alleged property.

The Division Bench of the HCD considering the aforementioned documents stated that there is a presumption of possession in favour of the petitioners and their predecessors. But the Government did not annex any document to show that the Government took possession of the property in question. It is clear from the wordings of Section 5 (1) (a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985 that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. Accordingly, the Honorable Court directed all the respondents not to treat the property in question as abandoned property and formally release the property in question. Thereby, Honorable Court made the Rule absolute with observation and directions.

Key Words:
Abandoned Property; Section 5(1)(a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985; P.O. 16 of 1972;

Section 5(1)(a) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985:

It is clear from the wordings of Section 5(1)(a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985 that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. This is also the consistent view of both Divisions of the Supreme Court of Bangladesh. The Hon'ble Appellate Division, in the case of Marzina Khatun vs Bangladesh [13 BLC (AD) 140] took the view that in certain circumstances, actual possession is not necessary; constructive possession would suffice. ... (Para 11)

This Division is of the view that in case of dispute, the Government must show that the possession of property has been taken by it. The onus is upon the Government because the Government has the relevant documents which would prove that it has taken possession. In the instant case, land tax had been paid by the predecessor of the petitioners prior to inclusion of the property in the Bangladesh Gazette. This prima facie show that the Government did not take possession of the property in question. It also noted that RAJUK issued permission for construction of multistoried building over the property in question. Therefore, there is a presumption of possession in favour of the petitioners and their predecessors. Now, the issue is whether the respondent No.1 provided any documents to controvert the presumption of possession in favour of the petitioners. In the Affidavit in Opposition, the respondent No.1 did not annex any document(s) which show that the Government took possession of the property in question. The respondent No.1 did not even make such assertion. We are therefore, inclined to hold that the petitioner has prima facie satisfied this Division of the continued possession of the property in question. ... (Para 12)

The settled position of law is that two legislations dealing with the same subject matter should be interpreted harmoniously. ...(Para 14)

Section 5(1)(a) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 and Order 7 and 18 of P.O 16 of 1972:

Section 5(1)(a) of the 1985 Ordinance is attracted if and only if the Government took possession of the property. So the attributable interpretation is that Section 5(1)(a) of the 1985 Ordinance can be applied if the possession has been taken by the Government under Order 7 of P.O. 1972. Order 18 of P.O. 16 of 1972 provides that the Government shall maintain a separate account for each abandoned property. P.O. 16 of 1972 also provides that Government shall impose fine on tress passers on abandoned property. In respect of the property in question, the respondents failed to show that the Government took possession in accordance with the provisions of P.O. 16 of 1972. The respondents also failed to show the account for the property in question. If the predecessors of the petitioners were infact unlawfully occupying the property in question, then the Government would have proceeded against them. No such evidence was shown. To the contrary, the petitioners have annexed documents which suggest that even in 1979, the predecessor of the petitioners was the owner on record of the property in question; even in 1979 the Government received land tax from the predecessor of the petitioners. Therefore, the only logical conclusion that this Division has arrived is that the property in question is not an abandoned property and the property was erroneously included in the impugned Gazette. ...(Para 14)

JUDGMENT

Naima Haider, J:

1. In this application under Article 102 of the Constitution, 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 inclusion 7.50 decimals of land, Housing No. 1088/1 Mouza-Ibrahimpur, J.L. No. 269, C.S. Khatian No. 11, C.S. Plot No. 268, S.A. Khatian No. 8, S.A. Plot No. 268, R.S. Khatian No. 365, R.S. Plot No. 1106, Police Station-Kafrul, Dhaka Cantonment Area, Dhaka having been enlisted in "Ka" list of Abandoned Building published in Bangladesh Gazette dated 23.069.1986 under serial No. 12, page No. 9762(4) under the provision of Abandoned Building (Supplementary Provisions) Ordinance, 1985(Ordinance LIV of 1985) should not be declared to have been made without lawful authority and is of no legal effect and as such the case prosperity in question, shall not be excluded from the said list of Abandoned Building (as contained in Annexure-J) and/or pass such other or further order or orders as to this Court may seem fit and proper.*

2. In this writ petition, the dispute arises out of inclusion of the property/land in question, measuring 7.50 decimals, in the Bangladesh Gazette on 23.09.1986. Through this Gazette, the Government treated the property in question as abandoned property under Section 5(1) (a) of The Abandoned Buildings (Supplementary Provisions) Ordinance 1985 ("the 1985 Ordinance").

3. In the instant writ petition, the petitioners claim that they are the owners of the property in question. In support, the petitioners elaborately states, with supporting documents, how the property devolved in their favour. Essentially, the petitioners acquired the property in question after the death of their father Md. Shamsul Haque. Mr. Haque became the owner of the property further to a gift from one Md. Main Uddin. The petitioners' father had been in possession of the property during his lifetime. The petitioners have been in possession after their father's death. On the land/property in question, building was constructed after obtaining permission from RAJUK. The tax for the land/property was also paid to the Government regularly till 1421 B.S. The petitioners became aware of the inclusion of the property in the Bangladesh Gazette in 1422 B.S. when the tahsilder office refused to accept the rent on the plea that the property was declared abandoned property through the Bangladesh Gazette dated 23.09.1986. Being aggrieved by the inclusion, the petitioners moved this Division and obtained the instant Rule.

4. The learned Counsel for the petitioners, taking us through the writ petition and the documents annexed, submits that the petitioners and their predecessors were in possession of the property in question and therefore, treating the property as abandoned property was illegal. He further submits that the petitioners and the predecessors paid land taxes to the Government till 1422 BS and therefore, the property cannot be treated as abandoned property. He also submits that the record of rights is in favour of the petitioners, the petitioners constructed multi storied building on the land after obtaining permission from the regulators and therefore, the land in question cannot be treated as abandoned property. On these, among other counts, the learned Counsel submits that the Rule should be made absolute with appropriate direction upon the respondents.

5. The Rule is opposed by the respondent No.1. An Affidavit in Opposition was filed. The learned Counsel appearing for the respondent No.1, taking us through the Affidavit in Opposition submits that the property in question is abandoned property under P.O. 16 of 1972. The learned Counsel also submits that the writ is not maintainable as the petitioners did not agitate their grievance before alternative forum, being the Court of Settlement. The learned Counsel further submits that the instant writ petition gives rise to disputed questions of fact regarding the ownership of the property and therefore, this Division should not interfere. On these, among other counts, the learned Counsel submits that the Rule should be discharged.

6. We have heard the learned Counsels at length and perused the pleadings and the documents annexed.

7. In the event a property is treated as abandoned property, the person aggrieved is required to agitate the grievance before the Court of Settlement within a stipulated time. This is a statutory requirement. The issue is whether the petitioners ought to have or could have referred the dispute before the Court of Settlement.

8. Section 7 of the 1985 Ordinance gives opportunity to the persons claiming any right or interest in a property to apply to the Court of Settlement to exclude the particulars of the property from the list of abandoned property. However, such application is required to be filed within one hundred and eight days from the date of publication of the official Gazette. Admittedly the petitioners have not done so. The issue is whether this should bar to exercise of our supervisory jurisdiction under Article 102 of the Constitution.

9. Since Section 7 of the 1985 Ordinance provides an opportunity to apply to the Court of Settlement to exclude property from the list of abandoned property, the said provision also implies that the person must know of the inclusion. How else can he apply? Why else should he apply? The issue before us is whether the petitioners could be construed to have knowledge of the inclusion. We note from the documents annexed that the Government accepted land tax till 2015. Furthermore, RAJUK also issued permission for construction of multi storied building on the land in question. If the authorities treated the property as abandoned property, they would neither have accepted rent from the petitioners nor would have issued construction permit. Thus the petitioners had no reason to believe that the property in question was included in the list. By the time the petitioners realized that the property was included in the list, it became too late for the petitioners to avail the alternative remedy. The petitioners could not have agitated the grievance before the Court of Settlement. Furthermore, since the Court of Settlement had been specifically empowered by statute to exclude any property from the list of abandoned property, the petitioners could not have agitated their grievance before any other Court. This is set out in Section 6 of the 1985 Ordinance. Unless this Division interferes, the petitioners, who for bona fide reason did not agitate grievance before the Court of Settlement, would be without forum. This Division cannot permit this to happen. Accordingly, this Division is of the view that it should exercise jurisdiction over the matter. We therefore hold that in the present circumstances, that the writ petition is maintainable.

10. The property in question was listed in the Bangladesh Gazette under Section 5(1)(a) of the 1985 Ordinance. This is set out in the impugned notification (Annexure-J). Section 5(1)(a) of the 1985 Ordinance is set out below for ease of reference:

> *" 5(1) The Government shall, after the commencement of this Ordinance and before the 31st day of December, 1988, publish, from time to time in the official gazette-*
>
> *(a) list of buildings the possession of which have been taken as abandoned property, under the President's Order;* (emphasis added)

11. It is clear from the wordings of Section 5(1)(a) of the 1985 Ordinance that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. This is also the consistent view of both Divisions of the Supreme Court of Bangladesh. The Hon'ble Appellate Division, in the case of Marzina Khatun vs Bangladesh [13 BLC (AD) 140] took the view that in certain circumstances, actual possession is not necessary; constructive possession would suffice. The issue before this Division is whether the Government took possession of the property in question, either actual or constructive.

12. This Division is of the view that in case of dispute, the Government must show that the possession of property has been taken by it. The onus is upon the Government because the Government has the relevant documents which would prove that it has taken possession. In the instant case, we note that land tax had been paid by the predecessor of the petitioners prior to inclusion of the property in the Bangladesh Gazette. This prima facie show that the Government did not take possession of the property in question. Had it been otherwise, the Government would not have accepted land tax from the predecessors of the petitioners. Furthermore, we also note that the Government accepted tax on the property till 2015. We also note that RAJUK issued permission for construction of multistoried building over the property in question. Therefore, there is a presumption of possession in favour of the petitioners and their predecessors. Now, the issue is whether the respondent No.1 provided any documents to controvert the presumption of possession in favour of the petitioners. In the Affidavit in Opposition, the respondent No.1 did not annex any document(s) which show that the Government took possession of the property in question. The respondent No.1 did not even make such assertion. We are therefore, inclined to hold that the petitioner has prima facie satisfied this Division of the continued possession of the property in question.

13. The learned Counsel for the respondent No.1 submits that the property in question is abandoned property within the meaning of P.O. 16 of 1972 and therefore, the property had been correctly included in the impugned Gazette.

14. The settled position of law is that two legislations dealing with the same subject matter should be interpreted harmoniously. The relevant legislations are P.O. 16 of 1972 and the 1985 Ordinance. Under P.O. 16 of 1972 a property can be regarded as abandoned property subject to certain conditions. Order 7 of P.O. 16 of 1972 contains the functions of the Government in respect of abandoned properties. Under P.O. 16 of 1972, the Government is required to take possession of abandoned properites. Section 5(1)(a) of the 1985 Ordinance is attracted if and only if the Government took possession of the property. So the attributable interpretation is that Section 5(1)(a) of the 1985 Ordinance can be applied if the possession

has been taken by the Government under Order 7 of P.O. 1972. Order 18 of P.O. 16 of 1972 provides that the Government shall maintain a separate account for each abandoned property. P.O. 16 of 1972 also provides that Government shall impose fine on tress passers on abandoned property. In respect of the property in question, the respondents failed to show that the Government took possession in accordance with the provisions of P.O. 16 of 1972. The respondents also failed to show the account for the property in question. If the predecessors of the petitioners were infact unlawfully occupying the property in question, then the Government would have proceeded against them. No such evidence was shown. To the contrary, the petitioners have annexed documents which suggest that even in 1979, the predecessor of the petitioners was the owner on record of the property in question; even in 1979 the Government received land tax from the predecessor of the petitioners. Therefore, the only logical conclusion that this Division has arrived is that the property in question is not an abandoned property and the property was erroneously included in the impugned Gazette.

15. The learned Counsel further submits that there are disputed questions of facts. Accordingly, intervention is uncalled for. This argument is misconceived. The issue before this Division is whether the inclusion of the property in question in the impugned Gazette Notification was in accordance with law. As stated above, for the inclusion to be in accordance with law, the Government must take possession. The respondent No.1 despite having all the documents relating to this property, failed to produce a single document which shows that the Government took possession of the property in question, either actual or constructive. To the contrary, the petitioners have shown evidence of possession, pre 1986 as well as post 1986. Therefore, we are not entirely sure how a disputed issue arose in the given facts and circumstances.

16. In light of the above, we are inclined to hold that the inclusion of the property in question in the impugned Gazette Notification was illegal and without lawful authority.

17. This Division therefore, disposes the Rule. This Division holds that the property in question was wrongly treated as abandoned property through Bangladesh Gazette dated 23.09.1986. All executives, who are not impleaded in the instant writ petition, are directed not to treat the property in question as abandoned property. The writ respondents are directed to formally release the property in question (particulars are set out in Bangladesh Gazette dated 23.09.1986 in page 9764(2) under serial No. 12) from Bangladesh Gazette dated 23.09.1986 within 1 (one) month from the date of receipt of our Judgment and order without fail. (emphasis added)

18. With the aforesaid observation and directions, the Rule is disposed of without any order as to costs.

19. Communicate our Judgment and Order at once for immediate compliance.