

3 SCOB [2015] HCD 52

HIGH COURT DIVISION (SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 8925 OF 2012

Manabendra Chakrabarty and others

.....Petitioners

-Versus-

The Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Ramna, Dhaka and others

..... Respondents

Mr. A. B. Roy Chowdhury, Advocate
.....For the petitioners.

Mr. Md. Motaher Hossain (Sazu), DAG with

Ms. Purabi Rani Sharma, AAG and
Mr. A.B.M. Mahbub, AAG

.....For the respondent no. 4.

Heard on 12.02.2015, 15.02.2015 and
08.03.2015.

Judgment on 15.03.2015.

Present:

Mr. Justice Moyeenul Islam Chowdhury

-And-

Mr. Justice Md. Ashraful Kamal

Constitution of Bangladesh

Article 102 and 42

And

অর্পিত সম্পত্তি প্রত্যৰ্পন আইন, ২০০১:

It is a settled proposition of law that an aggrieved party may invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution straightforwardly provided the action impugned is malafide, even though there may be an alternative remedy available for him. Since we have found that the inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property is malafide, the instant writ petition, as we see it, is maintainable. Besides, it has been clearly, categorically and unequivocally held in the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another...Vs...Syed Chand Sultana and others reported in 51 DLR (AD) 24 that the writ-petitioners can come directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. So our definite finding is that the petitioners can come directly to the High Court Division for protection of their right to property as contemplated by Article 42 of the Constitution of Bangladesh, even though an alternative forum, that is to say, অর্পিত সম্পত্তি প্রত্যৰ্পন ট্রাইবুনাল is available for necessary legal redress. ...*(Para 20)*

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioners, a Rule Nisi was issued calling upon the respondents to

show cause as to why the Gazette Notification dated 06.05.2012 published under the authority of the respondent no. 2 showing Holding Nos. 16, 16/A, 16/B, 16/C, 16/D and 16/E, Dinanath Sen Road, Gandaria, Dhaka belonging to the petitioners at serial nos. 468 and 618 in 'Ka' Schedule of the said Notification as a vested property pursuant to E. P. Case No. 152 of 1966 and E. P. M. C Case No. 1057 of 1961 (Annexure-'J' to the writ petition) should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioners, as set out in the Writ Petition, in short, is as follows:

The case property consisting of Dhaka Municipal Holding Nos. 16, 16/A, 16/B, 16/C, 16/D and 16/E, Dinanath Sen Road, Dhaka was originally owned and possessed by one Tarak Bandhu Chakrabarty. Accordingly, the concerned C. S. and S. A. Khatians were correctly prepared in his name. Anyway, on 18.08.1931, he executed a will in favour of his 5(five) sons. Thereafter, he died on 30.05.1964 and his 4th son, namely, Hemendra Kumar Chakrabarty being the executor of the will filed Probate Case No. 21 of 1967 on 06.11.1968 in the Court of District Judge, Dhaka stating that under the will, no one of the sons was given any proprietary right; but only a right of residence and if any of his sons quit, the abandoned portions of the case property would be possessed by others who would be residing there; but they would not be entitled to let out the same to anybody or induct any stranger therein. However, the Additional Deputy Commissioner (Revenue) and Assistant Custodian of Enemy Property (Lands and Buildings), Dhaka declared the case property as an enemy property by his order dated 20th June, 1967. As such, Hemendra Kumar Chakrabarty, grandfather of the petitioners, filed Writ Petition No. 366 of 1967 before the then Dhaka High Court, East Pakistan under Article 98 of the Constitution of the Islamic Republic of Pakistan, 1962 stating that under the will executed by Tarak Bandhu Chakrabarty, Hemendra Kumar Chakrabarty had an exclusive right and possession in the case property and in this perspective, the order of the Assistant Custodian treating the same as an enemy property is illegal. Hemendra Kumar Chakrabarty further stated in the earlier Writ Petition No. 366 of 1967 that the Municipal Holding No. 16 was leased out to one Afazuddin; but on his objection, the lease in favour of Afazuddin was cancelled on 20.06.1967 and by the same order, the case property was treated as an enemy property and the authority asked Hemendra Kumar Chakrabarty to deposit the lease money in order to take lease of the property in question. Eventually the Rule issued in the Writ Petition No. 366 of 1967 was made absolute by the then Dhaka High Court by its judgment and order dated 17th December, 1969. Subsequently the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka released the entire case property from the list of enemy properties by issuing 2(two) Memos dated 05.06.1970 and 24.06.1972. Moreover, the Deputy Commissioner, Dhaka released the same by his Memo No. জেডিপি/অপ্রিত/২৬১৮(৩) ২০০৮ dated 28.08.2008. In due course, Mutation Khatian was made in the names of Santosh Kumar Chakrabarty, Sudhir Kumar Chakrabarty, Ziban Kumar Chakrabarty and Nabo Kumar Chakrabarty, sons of Hemendra Kumar Chakrabarty and being the grandsons of Hemendra Kumar Chakrabarty, the petitioners have been possessing the case property on the basis of the probated will and they have been paying rent to the Government in respect thereof. At one stage, the petitioner no. 4 Jitendra Kumar Chakrabarty, son of late Jibon Kumar Chakrabarty, brought Title Suit No. 291 of 2004 in the 1st Court of Joint District Judge, Dhaka for partition of the case property and allotment of separate sahams by metes and bounds against the present petitioner nos. 1, 2, 3, 5, 6 and 7 and subsequently the suit was decreed in part in respect of the case property on the strength of a solenama dated 30.01.2005. Having obtained a part decree in Title Suit No. 291 of 2004, the petitioners have been possessing the case property and got their names mutated in the

records of the Government and have been paying rent to the Government in respect of the same. While the petitioners have been owning and possessing the case property as per the terms and conditions of the solenama dated 30.01.2005 filed in Title Suit No. 291 of 2004, the respondent no. 2 published a Gazette Notification on 06.05.2012 showing the case property as a vested property along with other properties of Dhaka District under Schedule 'Ka'. The listing of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property is without lawful authority and of no legal effect.

3. The respondent no. 4 has contested the Rule by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in short, is as follows:

4. The owner of the case property left Bangladesh for India during the communal disturbance of 1947 and the same became an evictee property. In 1961, the Government took over the management of the case property vide E.P.M.C. Case No. 1057 of 1961 and the same was leased out to its existing occupants. The Assistant Custodian and Additional Deputy Commissioner (Revenue), Dhaka can not release the case property from the list of enemy/vested properties. Over and above, the Municipal Holding No. 16/D, Dinanath Sen Road, Gandaria, Dhaka appears to have been allotted to one Abdus Salam long before the promulgation of the Defence of Pakistan Ordinance, 1965 and the Defence of Pakistan Rules, 1965. The treatment of the case property as an enemy/vested property vide Gazette Notification dated 06.05.2012 in 'Ka' Schedule is valid and lawful. As such, the Rule is liable to be discharged.

5. At the outset, Mr. A. B. Roy Chowdhury, learned Advocate appearing on behalf of the petitioners, submits that by filing Writ Petition No. 366 of 1967 before the then Dhaka High Court, East Pakistan, the grandfather of the petitioners, namely, Hemendra Kumar Chakrabarty challenged the order dated 20th June, 1967 passed by the Additional Deputy Commissioner (Revenue) and Assistant Custodian, Enemy Property (Lands and Buildings), Dhaka treating the case property as an enemy property and after final hearing, the Rule issued therein was made absolute and in that view of the matter, the case property can not be treated as an enemy/vested property and its inclusion in 'Ka' Schedule in the Gazette Notification dated 06.05.2012 is ex-facie without lawful authority and of no legal effect.

6. Mr. A. B. Roy Chowdhury further submits that by Memo No. 2020 E. P. dated 05.06.1970 and by Memo No. 1575 H. P. dated 24.06.1972 (Annexures- 'E' and 'E-1' to the writ petition), the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka released the case property from the list of enemy/vested properties and finally by Memo No. জেঃপঃসঃ/অর্পিত/২৬১৮(৩) ২০০৮ dated 28.08.2008 (Annexure- 'E-2' to the writ petition), the Deputy Commissioner, Dhaka clearly held that in spite of release of the case property by the Ministry of Land, it was enlisted as an enemy/vested property through inadvertence and he directed the Assistant Commissioner (Land), Kotwali Circle, Dhaka to do the needful and given this scenario, it does not lie in the mouth of the Government to say that the case property is an enemy/vested property.

7. Mr. A. B. Roy Chowdhury next submits that in view of the provisions of Section 6(ka) of **অর্পিত সম্পত্তি প্রত্যুপন আইন, ২০০১** and the judgment and order dated 17.12.1969 passed in the Writ Petition No. 366 of 1967 (Annexure- 'D' to the writ petition), the case property can not be enlisted as an enemy/vested property.

8. Mr. A. B. Roy Chowdhury further submits that as the Government released the case property from the list of enemy/vested properties, it is bound by promissory estoppel and that being so, it cannot deny the right, title and interest of the petitioners in the case property. In support of this submission, Mr. A. B. Roy Chowdhury has drawn our attention to the decision in the case of Nasir Hossain (Md)...Vs...Bangladesh represented by the Secretary, Ministry of Housing and Public Works, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka and others reported in 49 DLR (HCD) 557.

9. Mr. A. B. Roy Chowdhury also submits that since the treatment of the case property as an enemy/vested property is malafide, the petitioners did not approach the concerned অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইবুনাল, ঢাকা and this is why, the petitioners came directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. To buttress up this submission, Mr. A. B. Roy Chowdhury has adverted to the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another...Vs...Syed Chand Sultana and others reported in 51 DLR (AD) 24.

10. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 4, submits that the authority rightly and lawfully treated the case property as an enemy/vested property as per the Official Gazette dated 06.05.2012 and no exception can be taken thereto in this regard.

11. We have heard the submissions of the learned Advocate Mr. A. B. Roy Chowdhury and the counter-submission of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition and relevant Annexures annexed thereto.

12. Indisputably Hemendra Kumar Chakrabarty, son of late Tarak Bandhu Chakrabarty and grandfather of the petitioners filed Writ Petition No. 366 of 1967 in the then Dhaka High Court challenging the order dated 20th June, 1967 passed by the Additional Deputy Commissioner (Revenue) and Assistant Custodian, Enemy Property (Lands and Buildings), Dhaka treating the case property as an enemy property and ultimately the Rule issued therein was made absolute by the judgment and order dated 17.12.1969. Subsequent to the judgment and order dated 17.12.1969 rendered in Writ Petition No. 366 of 1967 (Annexure- 'D' to the writ petition), the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka issued Memo No. 2020 E. P. dated 05.06.1970 and Memo No. 1575 H. P. dated 24.06.1972 (Annexures- 'E' and 'E-1' to the writ petition) releasing the case property from the list of enemy/vested properties. In this respect, the most vital document appears to be the Memo No. জেঃপঃঢঃ/অর্পিত/২৬১৮(৩) ২০০৮ dated 28.08.2008 issued by the Deputy Commissioner, Dhaka addressing the Assistant Commissioner (Land), Kotwali Circle, Dhaka (Annexure- 'E-2' to the writ petition).

13. For proper and effectual adjudication of the Rule, the Annexure- 'E-2' dated 28.08.2008 may be quoted below verbatim:

“গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
জেলা প্রশাসকের কার্যালয়, ঢাকা।
(অর্পিত সম্পত্তি শাখা)

স্মারক নং- জেঃপঃঢঃ/অর্পিত/

২০০৮-

তা:-

বিষয়ঃ সুত্রাপুর থানাধীন ১৬, ১৬/এ, ১৬/সি এবং ১৬/বি, ১৬/ডি, ১৬/ই, দীন নাথ সেন রোডস্থ ভি.পি কেস

নং ১৬৯/৬৬ ভূত্ত সম্পত্তি অর্পিত সম্পত্তির তালিকা হইতে অবযুক্ত হওয়ার পরিপ্রেক্ষিতে নামজারী ও জমাভাগ পূর্বক ভূমি উন্নয়ন কর গ্রহণ প্রসংগে।

সূত্রঃ সহকারী কমিশনার (ভূমি), কোত্যালী সার্কেল এর স্মারক নং- সঃকঃতঃ/কোত/২০০৬-৬৭৫ (সং) তারিখঃ ০৭/১২/২০০৬ ইং এবং কোত্যালী সার্কেলের নামজারী জমাভাগ কেস নং- ২০৭৩/৮৫-৮৬।

সূত্র উল্লেখিত স্মারকের পরিপ্রেক্ষিতে তাহাকে অবহিত করা যাচ্ছে যে, বিষয়ে বর্ণিত তিপি কেসভূক সম্পত্তি ভূমি মন্ত্রণালয়ের ০৮/০৪/৭০ ইং তারিখের ৯৩৪-৮০৭/৬৭ ইপি নং স্মারক এবং ১২/০৬/৭২ ইং তারিখের ৫৩৩ ইপি ৪০৭/৬৭ নং স্মারকে অর্পিত সম্পত্তির তালিকা হতে দরখাস্তকারীগংদের পূর্বঙ্গী হেমেন্দ্র কুমার চক্রবর্তী এর বরাবরে অবযুক্ত করা হয়েছে (কপি সংযুক্ত)। অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ এ বলা আছে যে, অর্পিত সম্পত্তির তালিকা হতে ইতিপূর্বে অবযুক্তকৃত সম্পত্তি প্রত্যর্পন তালিকায় অর্তভূক্ত হবে না। কিন্তু বর্ণিত সম্পত্তি ইতিপূর্বে ভূমি মন্ত্রণালয় হতে অবযুক্ত হলেও ভুলবশতঃ অর্পিত সম্পত্তির প্রত্যর্পন তালিকায় অর্তভূক্ত করা হয়েছে।

এমতাবস্থায় ভূমি মন্ত্রণালয় কর্তৃক বর্ণিত হোল্ডিং সমূহের অবযুক্তকৃত সম্পত্তি দরখাস্তকারীগনের নামে নামজারী জমাভাগ পুনঃবহাল পূর্বক ভূমি উন্নয়ন কর গ্রহনের জন্য নির্দেশ প্রদান করা হলো।

সংযুক্তঃ বর্ণনা মতে.....ফর্দ।

স্বা/-
(কামাল উদ্দিন)
জেলা প্রশাসক
ঢাকা।
ফোন নং-৯৫৫৬৬২৮

সহকারী কমিশনার (ভূমি),
কোত্যালী সার্কেল, ঢাকা।

স্মারক নং- জেঃপঃঢাঃ/অর্পিত/২৬১৮(৩) ২০০৮-

তাঃ- ২৮/৮/০৮

অবগতির জন্য অনুলিপি প্রেরণ করা হলোঃ

- ১। উপ-সচিব, শাখা-৬, ভূমি মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা। ইহাতে তাহার কার্যালয়ের ৩০/০৬/২০০৮ ইং তারিখের ভূঃ মঃ/শা-৬/অর্পিত/চাকা/অবযুক্তি/৯৩/২০০৭-৮৩১ নং স্মারকের সহিত যোগসূত্র আছে।
- ২। ইউনিয়ন ভূমি কর্মকর্তা, সুত্রাপুর, ঢাকা।
- ৩। মানবেন্দ্র চক্রবর্তী গং, ১৬ নং দীন নাথ সেন রোড, সুত্রাপুর, ঢাকা।

স্বাক্ষর
২৭/৮/০৮
(কামাল উদ্দিন)
জেলা প্রশাসক
ঢাকা।
ফোন নং- ৯৫৫৬৬২৮”

14. From a bare reading of the Annexure- ‘E-2’ dated 28.08.2008, it transpires that the case property had already been released in favour of Hemendra Kumar Chakrabarty and the same was erroneously listed as a vested property. Taking the Annexure- ‘E’ series and considering them in conjunction with the judgment and order dated 17.12.1969 rendered in Writ Petition No. 366 of 1967 (Annexure- ‘D’), we are left with no option but to hold that the case property is not an enemy/vested property and erroneously the same was listed as a vested property as is apparent from Annexure- ‘E-2’ to the writ petition. This being the position, the Government cannot now make a volte-face and say that the case property is an enemy/vested property. It seems that Mr. A. B. Roy Chowdhury has rightly contended that the Government is bound by promissory estoppel and that being so, it cannot deny the right and interest of the petitioners in the case property (49 DLR (HCD) 557). On this point, we are at one with Mr. A. B. Roy Chowdhury.

15. Although it has been argued on the side of the respondent no. 4 that the case property is an enemy/vested property and the Government leased out some portions thereof to different persons including one Abdus Salam; yet strangely enough, no paper or document has been annexed to the Affidavit-in-Opposition in support thereof. What we are driving at boils down to this: the respondent no. 4 has signal failed to substantiate his case by annexing the necessary papers or documents. In such a posture of things, we have no hesitation in holding that the case of the respondent no. 4 has no legs to stand upon and as such it stands discarded. As a natural corollary thereto, we can not accept the submission of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) that the case property is a vested property.

16. It is an indubitable fact that the petitioners did not approach the concerned অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইবুনাল in Dhaka for necessary legal redress for inclusion of the case property in ‘Ka’ Schedule of the Gazette Notification dated 06.05.2012. According to the learned Advocate Mr. A. B. Roy Chowdhury, as the treatment of the case property as a vested property is clearly malafide, he invoked the writ jurisdiction of the High Court Division under Article 102 of the Constitution by filing the instant writ petition.

17. It is often said that malafides or bad faith vitiates everything and a malafide act is a nullity. Now a pertinent question arises: what is malafides or bad faith? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held, “It is commonplace to state that malafides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order.” (Ram Chandra...Vs...Secretary to the Government of W.B, AIR 1964 Cal 265)

18. To render an action malafide, “There must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act” (Punjab...Vs... Khanna, AIR 2001 SC 343).

19. Reverting to the case in hand, there is no gainsaying the fact that the case property was released from the list of enemy/vested properties by Annexures- ‘E’ and ‘E-1’ and subsequently by Annexure- ‘E-2’, the Government necessarily admitted that the listing of the case property as a vested property was through inadvertence. The release of the case property from the list of enemy/vested properties as evidenced by Annexures- ‘E’ and ‘E-1’ was in consequence of the judgment and order dated 17.12.1969 rendered in the earlier Writ Petition No. 366 of 1967 (Annexure- ‘D’). The Annexure- ‘E-2’ clinched the whole matter.

20. Taking the entire gamut of the situation enumerated above and in the facts and circumstances of the case, a man of ordinary prudence will necessarily come to the conclusion that the authority concerned was prompted by malafides or bad faith in including the case property in ‘Ka’ Schedule as a vested property in the Gazette Notification dated 06.05.2012. In this context, we feel tempted to say that it is a settled proposition of law that an aggrieved party may invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution straightaway provided the action impugned is malafide, even though there may be an alternative remedy available for him. Since we have found that the inclusion of the case property in ‘Ka’ Schedule of the Gazette Notification dated 06.05.2012 as a

vested property is malafide, the instant writ petition, as we see it, is maintainable. Besides, it has been clearly, categorically and unequivocally held in the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another...Vs...Syed Chand Sultana and others reported in 51 DLR (AD) 24 that the writ-petitioners can come directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. So our definite finding is that the petitioners can come directly to the High Court Division for protection of their right to property as contemplated by Article 42 of the Constitution of Bangladesh, even though an alternative forum, that is to say, অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইবুনাল is available for necessary legal redress.

21. Section 6(ka) of অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ contemplates that প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না, যথাঃ- (ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি. As the then Dhaka High Court made the Rule absolute in Writ Petition No. 366 of 1967 and held the treatment of the case property as an enemy property without lawful authority, the provisions of Section 6(ka) of অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ will, for certain, come into play in this case. On this count also, the inclusion of the case property in ‘Ka’ Schedule of the Gazette Notification dated 06.05.2012 as a vested property cannot be sustained in law.

22. From the foregoing discussions and regard being had to the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

23. Accordingly, the Rule is made absolute without any order as to costs. The inclusion of the case property at serial nos. 468 and 618 in ‘Ka’ Schedule of the Gazette Notification dated 06.05.2012 pursuant to E. P. Case No. 152 of 1966 and E. P. M. C. Case No. 1057 of 1961 (Annexure-‘J’ to the writ petition) is declared to be without lawful authority and of no legal effect.