

8 SCOB [2016] HCD 93

HIGH COURT DIVISION (Special Original Jurisdiction)

Writ Petition No. 1367 of 2003

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

Shahida Khatun & others ...Petitioners
Versus
Chairman, 1st Court of Settlement and another ...Respondents

Mr. Moksal Islam, Advocate
...For the Petitioners

Mr. Shahidul Islam, D.A.G. with
Mr. Sukumar Biswas, A.A.G.
...For the Respondents

Heard on: 22nd, 25th November, & 1st December, 2015
Judgment on: 7th December, 2015

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Mr. Justice Mahmudul Hoque

The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972

Article 7:

In the present case the Petitioners or their vendor admittedly was not in possession of the property in question at the relevant time, they entered into the possession of the property in the year 1984. Since the property was declared abandoned under the provision of P.O. 16 of 1972, question of service of notice under Article 7 upon the Petitioner or their vendor who were not in possession, active control, supervision and management of the property at the relevant time does not arise. Moreover, decree in a Suit for Specific performance of contract does not reflect a substantive determination of any issue regarding the abandoned character of the property. ... (Para 15)

The Bangladesh Abandoned Buildings Supplementary Provision Ordinance, 1985

Section 5:

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 of the property are required to dislodge the statutory presumption as under Section 5 (2) of the Ordinance that the property in question is not an abandoned property and the same has been wrongly enlisted. ... (Para 18)

Judgment

Mahmudul Hoque, J

1. In this application under Article 102 of the Constitution of Bangladesh Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to

why the Judgment and Order dated 06.11.2002 passed by the 1st Court of Settlement as contained in Annexure-P should not be declared to have been passed without any lawful authority and of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts necessary for disposal of this Rule, in brief, are that the then Government of East Pakistan allotted House No. 27/6, Block-F, Mohammadpur Housing Estate, Dhaka by Memo No. 2136-A.O 3L-388/61 dated 10.10.61 to one Israil the predecessor of the Petitioners. Subsequently a lease deed in between the said Israil and the then Government of East Pakistan was executed and duly registered on 2.6.1962. While the said Israil was in possession and enjoyment of the property, the Administrative Officer, Mohammadpur Housing Estate issued a clearance certificate on 14.10.1970 in favour of the said Israil certifying that the allottee has paid entire amount of money payable by him in respect of the house in question. Thereafter the said Israil transferred the property in question to one Anwar Ali, S/O Jumrat Miah by a registered deed of sale dated 15.1.1970. The said Anwar Ali was a Bangladeshi citizen and he was issued certificate certifying to that effect by the Ministry of Home Affairs vide Memo dated 30.10.1978. The said Anwar Ali while in possession of the property in question died in Bangladesh and was buried in Mirpur grave yard. The certificate to that effect has been issued by the local Commissioner of the then Pourashava, Dhaka. After the death of Anwar Ali his heirs obtained a Succession Certificate from the 3rd Court of Subordinate Judge, Dhaka on 13.1.1981 vide Succession Case No. 1003 of 1980. The said Anwar Ali after purchase while in possession of the property entered into an agreement on 22.02.1970 with Md. Abdul Bari Miah, the predecessor of the present Petitioners to sell the house at a consideration of Tk. 12,000/- out of which said Anwar Ali received Tk. 4,000/- as advance towards total consideration. In the agreement it was stipulated that he will execute the sale deed within 6(six) months after obtaining necessary clearance certificate from the concerned authority.
3. Subsequently, Anwar Ali received Tk. 1,000/- on 23.1.1974 and again Tk. 1,000/- on 31.12.1976 and also Tk. 2,000/- on 27.10.1978 from Md. Abdul Bari Miah as part payment. The said Anwar Ali died on 19.7.1980 and after his death his heirs admitting the bainapatra received Tk. 2,000/- and Tk. 1,000/- by two instalments from the predecessor of the Petitioners and subsequently they also received Tk. 1,000/- in the manner as aforesaid. After receiving consideration money they avoided execution of sale deed in favour of the Petitioners. In this situation the Petitioners finding no way out filed Title Suit No. 534 of 1983 against the heirs of Anwar Ali impleading the Government as proforma Defendant before the First Court of Munsif, Dhaka for a decree of specific performance of contract. In the said suit the Government appeared and took time for filing written statement on 10.11.1983 but subsequently the Government did not appear and consequent upon which the suit was decreed ex parte. Thereafter the Petitioners filed Title Execution Case No. 7 of 1984 to execute the decree passed in Title Suit No. 534 of 1983 and obtained the kabala duly executed and registered through Court and also took delivery of possession on 10.4.1984.
4. The Government filed Miscellaneous Case No. 85 of 1984 under Order 9 Rule 13 of the Code of Civil Procedure ("Code") praying for setting aside the ex parte decree passed in the said Title Suit. The trial Court upon contested hearing dismissed the same, against which the Government preferred Miscellaneous Appeal No. 17 of 1985 before the District Judge, Dhaka which was eventually heard by the 3rd Court of Subordinate Judge, Dhaka

who by his Judgment and Order dated 13.5.1989 allowed the appeal and set aside the ex parte decree. Against the said judgment of the appellate court the predecessor of the Petitioners filed Civil Revision No. 592 of 1989 before the High Court Division and the High Court Division after hearing the parties made the Rule absolute and thereby set aside the Judgment and Order of the lower Appellate Court and restored the Judgment and Order of the trial Court. After getting delivery of possession of the suit House through Court the Petitioners through their predecessor Abdul Bari Miah has been possessing the same on payment of rents, taxes and other charges due to different authorities of the Government.

5. Subsequently, it has come to the notice of the Petitioners that the property has been illegally included in the “Ka” list of the abandoned buildings and against the said illegal inclusion the predecessor of the Petitioners filed Case No. 54 of 2001 before the Court of Settlement praying for releasing and or excluding the property from the said list. The Court of Settlement after hearing the parties dismissed the case by the Impugned Judgment and Order dated 6.11.2002 finding that the Petitioners have failed to prove their title and possession in the suit property and the property has been rightly included in the “Ka” list as abandoned property.
6. At this stage the Petitioners being aggrieved by the said Judgment and Order of the Settlement Court moved this Court by filing this Writ Petition under Article 102 of the Constitution and obtained the present Rule.
7. The Respondent No.2 contested the Rule by filing an Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the original allottee Israil transferred the property in question without obtaining permission from the concerned authority in favour of Anwar Ali by a registered deed of sale and as such the transfer is not valid in the eye of law. Moreover, the agreement for sale allegedly executed by Anwar Ali in favour of Md. Abdul Bari Miah is also not true and the said agreement for sale has been created with a motive to grab the Government property. It is also stated that the said Anwar Ali or his Vendor Israil was not in control, occupation, supervision and management of the case property at the relevant time i.e. on or before 28.2.1972. The said Anwar Ali and his vendor Israil were non-Bengali and during the war of liberation they left this country leaving the case property uncared for and as such the property in question was declared abandoned under the provisions of P.O. 16 of 1972. Finally the property as an abandoned property has rightly been included in the “Ka” list under the provision of Article 2(1) of the P.O. 16 of 1972 and duly vested with the Government under Article 4 of P.O. 16 of 1972. The Court of Settlement upon consideration of the respective cases of the Petitioners and upon proper assessment of the documents submitted before it and the evidences so far adduced by the Petitioners has rightly rejected the application of the claimant finding that the Petitioners could not prove whereabouts of the original owners at the relevant time. It is also stated that, it is the duty of the claimants to prove that the property in question is not abandoned property but the Petitioners utterly failed to establish their claim before the Court of Settlement and as such there is nothing to be interfered with by this Court.
8. Mr. Moksal Islam, the learned Advocate appearing for the Petitioners submit that the Court of Settlement wrongly found that the Petitioners have failed to prove their case in true perspective and also failed to consider the papers and documents submitted before it and on a wrong finding most illegally dismissed the case of the Petitioners. He further submits that Article 7 of P.O. 16 of 1972 and Section 5(1)(b) of the Bangladesh

Abandoned Buildings Supplementary Provision Ordinance, 1985 (“Ordinance”) has provided provision for service of notice upon the occupant before declaring the property abandoned and enlistment of the same in the abandoned property list but in the instant case no such notice was issued or served upon the occupant, the Petitioners or their vendor before enlisting the property in the “Ka” list. It is also argued that the Petitioners are claiming the property on the basis of an agreement for sale executed by the owner Anwar Ali in favour of the predecessor of the Petitioners in the year, 1970. Subsequently, the Petitioners got the sale deed duly registered through Court pursuant to a decree passed in Title Suit No. 534 of 1983 and also got delivery of possession through court in the year 1984. Admittedly the Ordinance in question came into force in the year 1985 and the abandoned list in question was published for the first time on 28.4.1986 and finally on 23.9.1986. Since the Petitioners obtained possession of the property in question before the Ordinance came into force and publication of the abandoned property list it was incumbent upon the Government to serve notice upon the Petitioners being possessor in the property in question, but in the instant case before enlistment of the property in the “Ka” list in the year 1986 no notice as prescribed under Section 5(1)(b) of the Ordinance was served upon the Petitioners and as such the enlistment of the property in the “Ka” list is palpably illegal and without jurisdiction.

9. Mr. Moksaful Islam also argued that the Petitioners acquired title in the property through Court and also got possession by way of execution of the decree and as such the possession of the Petitioners cannot be in any way treated as unauthorized. He further submits that the property can be included in the “Ka” list where the Government took over the possession of the property and Supervising, managing and controlling the same. But in the instant case it is apparent from the papers and documents and the statements made in the Affidavit-in-Opposition, there is no taking over of possession by the Government and as such the enlistment of the property in “Ka” list is illegal and without lawful authority. Mr. Islam further submits that the petitioner got the registered Sale Deed through Court by way of execution of a decree passed in Title Suit No. 534 of 1984 against the government and as such the Government is legally stopped from raising the claim that the case property is an abandoned property. It follows, Mr. Islam submits, that in view of the said decree the Government cannot claim that the property is an abandoned one and the Court of Settlement’s Judgment and Order is submitted to be a perverse one and liable to be declared illegal and passed without lawful authority. In support of his submissions he has referred to the case of Abdur Rashid Mollah Vs. Bangladesh reported in 58 DLR (AD), 20.
10. Mr. Shahidul Islam, the learned Deputy Attorney General with Mr. Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent No.2 submit that the original lessee Israil and alleged purchaser Anwar Ali were non-Bengali and they left this country leaving the property uncared for immediate after the war of liberation in the year 1971. The said owner of the property was not in occupation, management and supervision of the property in question on the relevant date i.e. on 28.2.1972 and as such the property under the provision of P.O. 16 of 1972 was declared abandoned and subsequently, the property has been enlisted in the “Ka” list of the abandoned buildings of the Government. In this situation the onus is on the claimant to prove that the building in question 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 merely because the same has disputed by the claimant. They also argued that the Petitioners are claiming the property on the basis of a decree passed in Title Suit No.

534 of 1983. Decree in a Suit for Specific Performance of Contract does not debar the Government in any way from including the property in the list of abandoned buildings. It is also argued that the Petitioners have totally failed to prove before the Court of Settlement the whereabouts of the original owner Anwar Ali or Israil at the relevant time. They further submit that enlistment of a property in the abandoned buildings list under Section 5(1) of the Ordinance raises a presumption of law that the property is an abandoned property under Section 5(2) and this presumption will continue until the complainant prove otherwise. It is also submitted that a decree passed in a Suit for Specific Performance of Contract does not mean that the property is not an abandoned property. Therefore, the said decree is not in any way binding upon the Government as there was no declaration to the effect that the property in question is not abandoned property. At best it can be said that the Petitioners got a kabala through Court in respect of the abandoned property and for the reason of having kabala through Court, character of the building has not been changed.

11. Heard the learned Advocates, perused the Application, Affidavit-in-Opposition and other relevant documents available in file called for by this courts.
12. A perusal of the documents annexed to the Petition such as the decree passed in Title Suit No. 534 of 1983 and the other documents relating to the property in question show that admittedly the property in question, originally belonged to one Israil who got the same by a registered deed of lease in the year 1962 executed by the then Government of East Pakistan. The said Israil by a deed of sale dated 14.1.1970 transferred the property to one Anwar Ali. The Petitioners claim that the said Anwar Ali executed a bainanama in favour of their predecessor Md. Abdul Bari Miah on 22.2.1970. Admittedly the Petitioners or their predecessor was not in active control, supervision and management of the property till 1984. The Petitioners claim that the said Anwar Ali received part payment from the predecessor of the Petitioners in the year, 1974, 1976 and 1978. Subsequently, after his death his heirs also received part payment out of the balance consideration in the year 1981 and 1983 but the Petitioners could not explain why their predecessor or they themselves awaited for such a long time with a hope to get the Kabala registered from Anwar Ali or his heirs. We have gone through the Judgment and Order passed by the Court of Settlement and it appears that the Court of Settlement in its Impugned Judgment clearly observed that,

‘জনাব আনোয়ার আলী। উত্তরাধিকারীদের সাথে বর্তমান দরখাস্তকারীর পূর্ববর্তী দাবীকৃত করা বায়না দলিলের বরাতে বিক্রী দলিল সম্পাদিত হয় ২১/২/১৯৮৪ ইং তারিখে। সরকার উল্লেখিত সম্পত্তি পরিত্যক্ত সম্পত্তি হিসাবে ঘোষণা করা হয়েছে। সেই সময় উক্ত সম্পত্তিতে কে দখলে ছিলেন, সেই সময় জনাব আনোয়ার ইপ্লিজিম হি জনাব আনোয়ার আলী কোথায় ছিলেন এসমস্ত তথ্য দালিলিক বা মৌখিক কোনো প্রার্থীপক্ষ আদালতে উপস্থাপন করেন নাই। বায়না পত্র Execution HI Serial No. ১৯৮৪ ইং সনে। এতে ১৯৭১-৭২ খ্রিস্টাব্দে সেই সময়ে জনাব আনোয়ার আলী উক্ত বাড়িতে বসবাস করতেন কিনা প্রমাণিত হয়েছে। ১৯৭১-৭২ সনে সরকার যখন তৎকালীন অধিকারীদের সম্পত্তি পরিত্যক্ত ঘোষনা করেন, তা করা হয় মূলতঃ সম্পত্তি দখলে কে ছিলেন তার উপর ভিত্তি করে। এখানে Presumption সরকার পক্ষে যাই যে, সেই সময় উক্ত সম্পত্তিতে জনাব ইসরাইল বা জনাব আনোয়ার আলী গং দখলে ছিলেন এই উপর দায়বদ্ধতার সূষ্টি করে না এই মর্মে ৪৭ ডিএলআর (এডি) পৃষ্ঠা ৭১ প্রণীধান কর্তৃপক্ষ’

13. The aforesaid observations of the Court of Settlement show that it has considered the case of the Petitioners and upon consideration observed that the owner of the property in question left the country leaving the property uncared for and was not in active control, supervision, management and possession of the property in question at the relevant time.
14. The paramount question to be considered in the instant case is that whether the Petitioners or their vendor Anwar Ali or Israil was in active control, supervision and management of the property at the relevant time. From the papers available on record, we do not find anything to support the Petitioners claim that the property is not an abandoned property. The property in question has not been declared abandoned in the year 1986, it was declared abandoned under P.O. 16 of 1972 which came into force on 28.2.1972. The Petitioners could not prove that till their taking over possession through Court the property in question was under the possession, control and management of the original owner or their alleged vendor. In the absence of any evidence to that effect the contention of the Respondents-Government stand good. As per law the Petitioners as claimant cannot depend on the weakness of the Government but they are to prove their claim independently by producing relevant documents in support of their claim establishing that the property is not an abandoned property. In the instant case the obligation of the Petitioners has not been properly discharged and the documents produced before the Court of Settlement does not prove the claim of the Petitioners that the property has been illegally included in the “Ka” list.
15. We have gone through the decision cited by the learned Advocate for the Petitioners. The fact of the said case is a bit different from the present one. In the aforesaid case the claimant admittedly was in active possession, control and management of the property since 17.12.1971 i.e., at the relevant time. But in the present case the Petitioners or their vendor admittedly was not in possession of the property in question at the relevant time, they entered into the possession of the property in the year 1984. Since the property was declared abandoned under the provision of P.O. 16 of 1972, question of service of notice under Article 7 upon the Petitioner or their vendor who were not in possession, active control, supervision and management of the property at the relevant time does not arise. Moreover, decree in a Suit for Specific performance of contract does not reflect a substantive determination of any issue regarding the abandoned character of the property. In this regard the *ratio decidendi* of the Judgment passed in the cases of CQMH Md. Ayub Ali Vs. Bangladesh and others reported in 47 DLR (AD) 71 and Bangladesh Vs. ATM Mannan and others reported in 1 BLC (AD) 8 are relied upon.
16. The preamble of the Gazette published on 23.09.1986 shows that the declaration by its own express terms permits of construction to the effect that the properties listed in the Notification have already been taken control of by the government and that the Notification is predicated on that essential fact of control assumed over such property. Furthermore, this has to be read with Section 114, illustration (e) of the Evidence Act, 1872 that permits of a presumption of regularity to be attached to all governmental function discharged in due course. Furthermore, the petitioner could not satisfy the Court of Settlement by producing any evidence that the vendor Md. Anwar Ali was in possession of the property in question at the time of execution of the alleged bainanama in the year 1970 or indeed before or after the P.O. 16 of 1972 came into force. From this, it is to be deduced that the Notification as above records not only the listing of certain properties as abandoned properties but more importantly the fact of these having passed

into the control, supervision and management of the Government at the material date in due course.

17. We have gone through the Judgment and Order of the Court of Settlement and this Court finds that the Court of Settlement considered all the crucial questions raised before it and the Court of Settlement rightly decided the questions considering all the papers and evidences placed before it on the very day of the delivery of judgment.
18. Therefore, the contention of the learned advocate for the Petitioners finds no merit. 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 of the property are required to dislodge the statutory presumption as under Section 5 (2) of the Ordinance that the property in question is not an abandoned property and the same has been wrongly enlisted.
19. In view of the above facts, this Court finds that the case of the petitioners in its entirety is nothing but a castle in the air having no leg to stand and as such we find that the Court of Settlement committed no illegality and find no reason to interfere with the judgment passed by the Court of Settlement.
20. In the result, the Rule is, hereby discharged, however, without any order as to costs.
21. Communicate a copy this Judgment and send down the lower court's records at once.