

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

In the matter of:

WRIT PETITION NO. 10208 of 2017

In the matter of:

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

-And-

In the matter of :

Khaerun Nessa alias Khairun Nessa and
others

..... Petitioners

Versus-

The Government of Bangladesh and
others

..... Respondents

Mr. Md. Imtiazur Rahman Farooqui,
Senior Advocate with

Mrs. Razia Sultana, Advocate

..... For the petitioners

Mr. Sukumar Biswas, Advocate

..... For the respondent No. 1

Mr. Kazi Mynul Hassan, DAG with

Mr. Md. Nasim Islam with

Mr. M Nazrul Islam Khandaker, AAG(s)

..... For the respondent No. 2

Mr. Salahuddin Dolon, Senior Advocate

.... (amicus curiae)

Heard on 14.09.2021, 21.10.2021, 13.01.2022 and
Judgment on 24.02.2022

Present:

Mr. Justice Md. Ashfaqul Islam

And

Mr. Justice Md. Iqbal Kabir

Md. Ashfaqul Islam, J:

This Rule under adjudication, at the instance of the petitioners,
issued on 16.08.2017, was in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the enlistment of the petitioner’s property being House No. 1/10, Pallabi Residential Area, P.S. Pallabi, Dhaka in the ‘Kha’ list of abandoned properties published in Bangladesh Gazette extra-ordinary dated 23.09.1986 at page No. 9764(25) against serial No. 01 under the caption “name of area house No. 1/10, Pallabi Mirpur, Dhaka and as to why the Court of Settlement’s decision dated 27.04.2016 disallowing the petitioner’s application under Section 7 of the Ordinance 54 of 1985 should not be declared to have been done without lawful authority and is of no legal effect and/or pass such other and further order or orders passed as to this Court may seem fit and proper.”

The background leading to the Rule in short is that the petitioners have challenged the decision dated 27.04.2016 of the First Court of Settlement, Dhaka in case No. 21 of 2004 (Kha-1) Pallabi, Mirpur, Dhaka (Annexure-‘D’).

Admittedly, the land in question corresponds to, the piece and parcel of land measuring 5 kathas (8.25 decimals) situated in C.S. Dag No. 42 and 55 of Khatian No. 259 and 334 of Mouza Shenpara, Parbata,

Police Station previously Tejgaon then Mirpur at present Pallabi, District Dhaka being Plot No. 10, Block-I of layout plan of Pallabi Project of Eastern Housing Limited, originally belonged to Eastern Housing Limited. Afterwards, Eastern Housing Limited sold the same land to Dr. Motahar Ali by Deed of Conveyance being No. 10739 dated 26.06.1966. Afterwards, Dr. Motahar Ali mortgaged the land to House Building Finance Corporation (HBFC) by Deed of Mortgage being No. 12471 dated 29.06.1967 and borrowed money from the corporation and built one storied building. Right thereafter, while Dr. Motahar Ali possessing the said plot sold out the house to (1) Shamsur Rahman (2) Khairun Nessa (3) Sadekur Rahman and (4) Obeydur Rahman by way of four separate deeds.

Shamsur Rahman became the owner of land measuring $1\frac{1}{4}$ Katha ($2.06\frac{1}{4}$ decimals) by Deed of Sale being No. 9777 dated 18.12.1981.

Khairun Nessa became the owner of land measuring $1\frac{1}{4}$ Katha ($2.06\frac{1}{4}$ decimals) by Deed of Sale being No. 9778 dated 18.12.1981. Sadekur

Rahman became the owner of land measuring $1\frac{1}{4}$ Katha ($2.06\frac{1}{4}$ decimals) by Deed of Sale being No. 9979 dated 18.12.1981 and Obeydur Rahman

became the owner of land measuring $1\frac{1}{4}$ Katha ($2.06\frac{1}{4}$ decimals) by Deed of Sale being No. 9780 dated 18.12.1981.

The aforesaid property was enlisted in the 'Kha' list of the abandoned property in the official gazette on 23.09.1986. The petitioner No. 1, Khairun Nessa filed an application on 22.11.1986 to the Court of Settlement under the prescribed form under Article 7 of the Ordinance 54 of 1985 to exclude the land in question from the list of abandoned property. Afterwards, on the death of Shamsur Rahman on 04.11.1996 his shares developed upon his wife and two sons and three daughters. The petitioners filed the case before the Court of Settlement in 2004.

The case of the petitioners is that the predecessor-in interest of the petitioners, namely Dr. Motahar Ali was a Bengali by birth and on independence on 26th March, 1971, he became a Bangladeshi citizen by operation of law. He was in possession of his property up to 18.12.1981 and after selling the house to the petitioners he shifted to another place and he died on 10.06.2005 in Bangladesh and buried in Dhaka. It also stated that no statutory notice was ever served as required under Article 7 of Bangladesh Abandoned Property (Control, Management and disposal) Order, (PO 16 of 1972) and under Section 5(1)(b) of the Abandoned Building (Supplementary Provisions) Ordinance 54 of 1985.

It is the further case of the petitioners that the court of settlement while deciding the issue has seriously infringed the petitioner's

fundamental rights guaranteed under Article 31 and 42 of the Constitution of Bangladesh.

It has also been stated that the original owner of the house was a Bengali and a Bangladeshi National by birth having his permanent address at village Sridhara, P.S. Bianibazar of District Sylhet, who had his LMF degree from East Bengal Council of Medical Registration; and his wife was also owner of a holding in Dhaka City being holding No. 275, Elephant Road, P.S. Dhanmondi, Dhaka. All the Children of Dr. Motahar Ali were born in Bangladesh and they have studied from primary education to higher education in various institutions in Dhaka City. Dr. Motahar Ali being a Bengali and Bangladeshi national went to United States of America and got American citizenship. Dr. Motahar Ali being a Bengali and Bangladeshi national his name was included in the voter list as well as published on 07.12.1976 and 05.08.1983 confirming his address at 275, Elephant Road, Dhanmondi, Dhaka.

After conclusion of the hearing the First Court of settlement, Dhaka by its decision dated 27.04.2016 disallowed the case with a findings that the petitioners have hopelessly failed to prove the possession of the predecessors-in-interest Dr. Motahar Ali over the suit house as well as house No. 275, Elephant Road, during the period of war of Liberation. Against the said judgment and order of the Court of

settlement the petitioners moved this Division and obtained the present Rule and order of stay.

Mr. Md. Imtiazur Rahman Farooqui, the learned Senior Advocate appearing with Mrs. Razia Sultana, the learned Advocate upon placing the petitions, supplementary affidavit with reply and other materials on record submits that petitioner's predecessors-in-interest Dr. Motahar Ali being a Bengali and Bangladeshi national by birth purchased the land from the Eastern Housing Limited in 1986 and constructed a building and had been possessing and owning the same as absolute owner till he sold the same to the petitioners.

The petitioners thereafter, were enjoying and possessing the said house with the knowledge of the government by mutating their names and on this ground the President's Order No. 16 of 1972 or for that matter Ordinance 54 of 1985 would not be applicable and if the criteria set forth in Article 2 of President's Order 16 of 1972 are not fulfilled with regard to character of any house that house cannot be treated or enlisted as abandoned house in the list of "abandoned house" under Section 5 of the Ordinance 54 of 1985 and in the Gazette Notification dated 23.09.1986 and for the said reason the same is liable to be declared to have been made illegally without jurisdiction and lawful authority having no legal effect.

The learned Senior Advocate further submits that nothing is there before the government on record to form any opinion that the owner was ever absent from the country and his absence was prejudicial to the interest of Bangladesh within the meaning of Article 2(1)(a) of the President's Order No. 16 of 1972 and as such very enlistment of the petitioners house in question as abandoned property is illegal.

He contends that from oral and documentary evidence it is crystal clear that predecessors-in-interest of the petitioners Dr. Motahar Ali was a Bengali and Bangladeshi National by birth and he died in Dhaka and buried in Dhaka and that he was never engaged with the subversive activities during the Liberation period or any time of his life. He never left the country at the time of liberation war is the precise submissions. As Bangladeshi national he obtained American Passport where his permanent address was shown as Bangladesh but Court of settlement without considering all these aspects and in total disregard of the proposition of law about citizenships of a person illegally decided the case against the petitioners.

He has also argued that the very enlistment of the property of the question in the 'Kha' list of abandoned properties without serving any notice was without lawful authority and it was preliminary duty of the Tribunal to enquire into the matter of jurisdiction of facts before entering

the merit of the case but the Tribunal assume the jurisdiction without such preliminary enquiry and passed the impugned decision and as such committed an error of law. Certainly it has infringed the fundamental rights of the petitioners guaranteed under Article 31 and 42 of the Constitution.

In support of his contention he has relied on several decisions such as No. (1) M/s. Speed Bird Navigation Co. and another Vs. Respondent: Bangladesh & ors. 27 DLR 1975 170, Government of Bangladesh Vs. Mirza Shahab Ispahani 40 DLR AD 116, Fakir Anjuman Ara Vs. Bangladesh and Ors. 8 MLR 2003 (AD) 184 and also Shahidul Haque's case 69 DLR AD 241 on the point of notice.

Mr. Sukumar Biswas, the learned Advocate appearing for the respondent No. 1 by filing affidavit-in-opposition has opposed the Rule. He submits that the petitioners by filing the application for releasing their property from 'Kha' list of abandoned building have stepped into the shoes of their predecessors Dr. Motahar Ali and the onus squarely lies upon them to prove that the property is not an abandoned property and the government has no obligation either to deny the facts alleged by the claimant or disclose the basis of treating the property as abandoned property. The enlistment of the case property in 'Kha' list of the abandoned buildings has been made observing all the legal process

which is lawful and sustainable in law. The petitioners did not submit any document before the court of settlement regarding possession of the case property at the material point of time that is 28.02 1972 rather they tried to shift their onus by showing some documents in pursuant to House No. 275, Elephant Road, Dhanmondi, Dhaka which are not at all relevant and subject matter of the case holding.

The petitioner filed an application on 20.11.1986 before the Court of settlement for exclusion of the case House from the 'Kha' list of abandoned buildings but did not fulfill the requirements of application under Section 8(1) of the Ordinance, 1985. The application made under Section 7 ought to have been contained some particulars, which are within the ambit of Section 8(1)(d)-(h). Those are important and necessary but the applicant did not fulfill those by mentioning the particular date which are very much important for proper disposal of the case. In paragraph 13 of the writ petition, as Mr. Biswas submits, statements regarding documentary evidences of title deeds in respect of the year of 1966 and 1967 though have been adduced but after coming into force of President's Order No. 16 of 1972. Those were not relevant for proving the possession of the case property of the original lessee that whether he had seized to occupy supervise, control and manage the case property in person, no documentary evidences pursuant to case property

was ever produced before the court of settlement and the petitioners have hopelessly failed to prove their onus for taking release of their property.

The petitioners failed to prove the possession of the predecessors-in-interest Dr. Motahar Ali over the case house since 25th March, 1971 to 28 February 1972 by producing any piece a document for paying utility bills like rent, land development tax, wasa bills, Gas Bills, Electricity bills, Telephone bill etc.

Original owner Dr. Motahar Ali did not file any application by invoking provision of Article 15(2) of the President's Order No. 16 of 1972 claiming any right or interest in the abandoned property to the proper authority, that is the Sub-Divisional Officer, on the ground that the property was not abandoned property or his interest on the property had not been affected by the provisions of this order within 3 months with effect from 1st March, 1972.

He also submits that non-service of notice upon the real owner or transferee under sub-section 1(b) of Section 5 of Ordinance 54 of 1985 of surrendering or taking over possession of the property in question before enlisting the same in the 'Kha' list has been raised by the claimant before this Division for the first time without challenging the same before the court of settlement by preferring application under section 7(1) read with section 8(1) of the Ordinance and by a majority

view this issue has already been settled by our apex Court reported in 69 DLR AD 241 on assessing all the earlier decisions of the Appellate Division on the said issue and as such question of service of notice does not arise at all in the present case.

He finally submits that a writ of certiorari is maintainable only when it can be shown that the Court of Settlement erroneously held that the property was legally declared as abandoned property without admitting legal evidence or rejecting the legal evidence or it has misconstrued the law. He relied on the decision of Shahidul Haque Bhuiyan vs. Chairman, First Court of Settlement 69 DLR AD 241 on this point. The petitioner having hopelessly failed to discharge their onus to rebut the presumption of correctness of Gazette, the Court of settlement has rightly rejected their plea.

The learned Deputy Attorney General Mr. Kazi Mynul Hassan appearing with the learned Assistant Attorney General(s) Mr. Md. Nasim Islam and Mr. M Nazrul Islam Khandaker for the respondent No. 2 also endorsed the argument of Mr. Sukumar Biswas and adopted the same.

The court of settlement after hearing the parties observed that the petitioners failed to establish their continuous possession in the land in question through his predecessors-in-interest. The petitioner Khairunnesa did not depose herself but a power of attorney holder of Mr.

Md. Zahidul Islam has been examined as PW-1. It would not be safe to rely upon the exhibit 20 only as to residing of Dr. Motahar Ali at 275, Elephant Road, Dhaka with his families during the period of liberation war. The petitioners have hopelessly failed to prove the exclusive possession of the predecessors-in-interest of the petitioners Dr. Motahar Ali either in the suit house as well as the House No. 275, Elephant Road during the period of Liberation war since 25th March 1971 to December 1971. Therefore, enlistment of house as abandoned property in the 'Kha' list is correct and genuine.

We have gone through the petition and other materials on record and considered the submissions of the learned Senior Advocate for the petitioner and the learned Counsel Mr. Sukumar Biswas appearing for the respondent No. 1 at length. We have also examined the impugned Judgment delivered by the Court of Settlement meticulously and other connected papers, that is supplementary affidavit, affidavit in opposition, written submissions by the parties.

Further, to have a positive assistance, we appointed the learned Senior Advocate Mr. Salahuddin Dolon as amicus curiae in this case. Mr. Dolon was candid enough to attend the course of proceedings and also submitted a written argument. We have noted his contention written there with all importance to relate the same with the issue before us.

In a recently passed two unreported decisions by this Bench in writ petition No. 3784 of 2018 (Md. Habibur Rahman and others vs. the Government of Bangladesh) and writ petition No. 9923 of 2006 (Free School Street vs. Chairman, Court of Settlement) we have mainly emphasized the question in respect of onus of proving whether the property is an abandoned one or not. The onus of proving whether a particular property is not an abandoned one and not vested in the government is totally upon a person who challenges the same not to be an abandoned property and intend to take such property out of the list of the abandoned property published in the official Gazette or for any other relief as detailed in Section 7 of the Ordinance 54 of 1985. In the case of the Government of Bangladesh vs. Md. Jalil and others 48 DLR AD 10 it was held:

“The High Court Division, in our opinion, stated with a wrong premise holding that the presumption of correctness of the entries in the Gazette notification does not absolve the Government from denying the facts alleged by the claimant or from disclosing the basis of treating the property as abandoned property when it is disputed. Section 5(2) of the Ordinance clearly provides that the list published under sub-section (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."

The stringent provisions of law that the onus lies upon the claimant of the building to prove that the building is not an abandoned property have been settled by plethoras of decisions.

Now the core question that comes for consideration before us is whether the petitioners are able to prove before the court of settlement

that claim in respect of the property only through their predecessors-in-interest Md. Motahar Ali was appreciated correctly or not by the court of settlement. On the question of proving the property being abandoned property it is absolutely upon the claimant of the building to prove that the building is not an abandoned property as we have already mentioned. Following are the decisions on the point:- Hazerullah Vs. Chairman, 1st Court of Settlement 3 BLC AD 42, Government of Bangladesh Vs. Ashraf Ali and another 49 DLR AD 161, Rowshan Ara Begum Vs. Secretary, Ministry of Works and Urban Development and others 59 DLR AD 165, Government of Bangladesh Vs. Orex Network Limited 10 ADC 2013(1), Government of Bangladesh Vs. ATM Mannan 1 BLC AD 2013(8), Shahidul Haque Vs. Chairman First Court of Settlement 69 DLR AD 241, Government of Bangladesh Vs. Md. Abdul Mannan 71 DLR AD 338 and so on.

To appreciate how this aspect of proving the onus have been considered by the court of settlement it is worthwhile to quote a pertinent portion from the judgment of the Court of settlement itself:

“Now we would like to go through the documentary evidence in respect of possession of the predecessor-in-interest of the petitioner Dr. Motahar Hossain in the suit house particularly during the period of Liberation War in

1971. The petitioner side has submitted as many as 21 documents which have been admitted into evidence and marked exhibits with chronological numerical numbers in the examination-in-chief of the PW-1 Md. Zahidul Islam.

The exhibits 1-10 are the documents namely, power of attorney, registered sale deeds, deed of conveyance and Notarized agreement etc. which lend support to the ownership of late Dr. Motahar Ali in the suit house by way of purchase. The ownership of late Dr. Motahar Ali over the suit house is admitted by the Government. As such, the documents which have been marked exhibit 1-10 are not disputed at all.

The exhibit 11 is a mutation Khatian No. 343/8 of dag nos. 55 and 42 measuring 0.0825 cents of land Mouza Senpara Parbota and nature of that land is nal. --The exhibits 12 is a duplicate carbon copy (DCR) of the of Khatian No. 343/8 of dag Nos. 55 and 42 of Mouza Senpara and the exhibit No. 13 is a rent receipt of the said land. The exhibit 14 is the receipt of payment of tax to Dhaka City Corporation of the suit house for the year 2005-2006 B.S. The exhibit 15 is a Electricity bill of the disputed house for the month of

April, 2005 and exhibit 16 is the water and sewerage bill of the disputed house for 2006 B.S. On going through exhibit 12 to 16 it transpires that the mutation Khatian has been prepared in the names of the petitioners and rent was also paid by them in respect of the disputed house for the year of 1996, 2005 and 2006 B.S which are long after of the liberation war of 1971.

The exhibit 17 is Bangladeshi passport of the predecessor-in-interest of the petitioners named Dr. Motahar Ali which was issued on 25th August, 1990 from Dhaka. The exhibit 18 is the pass book of postal department. The exhibit 19 is the Passport of U.S.A in the name of the said Dr. Motahar Ali. Which indicates that Dr. Motahar Ali Subsequently left this country.

The exhibit 20 is the payment of Dhaka Municipal Tax of house No. 275, Elephant Road for the year of 1971-1973 which was paid on 31.03.1973. On the other hand, the exhibit 21 is the provisional certificate of SSC of one of the sons of Dr. Motahar Ali named Golam Mawla Ali (Pw-2).

The exhibit 20, the receipt of payment of Municipal Tax of the house No. 275 of Elephant Road indicates that the same

was paid by one Rizina Ali who was the wife of Dr. Motahar Ali. But the petitioner could not adduce any other utility bills like electricity bills, water bills, telephone bills (if any) etc. In such view of the matter, we are of the opinion that only one Municipal Tax bill which was paid in 1973 is not enough to prove the possession of the of the Predecessor-in-interest of the petitioner named Dr. Motahar Ali during the period of liberation, rather it can be presumed that if Dr. Motahar Ali lived at 275, Elephant Road with his family then he would pay all other utility bills particularly electricity and water bills without which they could not live.

This being the position, we are of the opinion that it would not be safe to rely upon the exhibit 20 only as to residing of Dr. Motahar Ali at 275, Elephant Road Dhaka with his family as the Predecessor-in-interest of the petitioners.”

Upon consideration of all these things the Court of settlement conclusively held that the petitioners have hopelessly failed to prove the possession of the predecessors-in-interest Dr. Motahar Ali neither in the property in question nor in the House No. 275 of the Elephant Road, Dhaka during the war of liberation.

The Judgment of the Court of settlement is a self-contained one which has pin pointedly addressed the question of onus of the claimant in proving whether the property in particular is abandoned or not.

Article 2 of the PO 16 in clear terms has spelt out the definition of abandoned property which is as under:-

“(i) “abandoned property means any property owned by any person who is not present in Bangladesh or whose whereabouts are not known or who has ceased to occupy, supervise or manage in person his property, including-

(i) any property owned by any person who is a citizen of a State which at any time after the 25th day of March, 1971, was at war with or engaged in military operations against the People's Republic of Bangladesh;

(ii) any property taken over under the [Bangladesh \(Taking Over of Control and Management of Industrial and Commercial Concerns\) Order, 1972](#) (Acting President's Order No. 1 of 1972), but does not include- (a) any property the owner of which is residing outside Bangladesh for any purpose which, in the opinion of the Government, is not prejudicial to the interest of Bangladesh;

(b) any property which is in the possession or under the control of the Government under any law for the time being in force.”

Though it will be repetition but still we want to reiterate that it is the claimant who shall have to prove to the hilt that the property in question is not an abandoned property. The decision of the Court of Settlement on that score is well-founded. In the instant case the petitioners could not prove their possession in the land in question during the war of liberation through their predecessors-in-interest Dr. Motahar Ali at all.

That being the situation we hold that in all fairness this Rule should be discharged.

In the result the Rule is discharged, however, without any order as to cost. The order of stay granted at the time of issuance of the Rule is hereby recalled and vacated.

Communicate at once.

Md. Iqbal Kabir, J:

I agree.