

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

PRESENT:

**Mr. Justice Obaidul Hassan, Chief Justice**  
**Mr. Justice M. Enayetur Rahim**  
**Mr. Justice Md. Ashfaqul Islam**  
**Mr. Justice Md. Abu Zafor Siddique**  
**Mr. Justice Jahangir Hossain**

**CIVIL APPEAL NO. 375 OF 2015**

(Arising out of C.P. No. 1797 of 2014)

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Shahbag, Dhaka and others . . . . Appellants

-Versus-

Belal Uddin, represented by his Constituted Attorney Murtaza Zakir Hossain . . . . Respondents

For the Appellants : Mr. SK. Md. Morshed, Adl. AG with Mr. Samarandra Nath Biswas, DAG, Mr. Mohammad Saiful Alam, AAG and Mr. Sayem Mohammad Murad, AAG instructed by Mr. Hairdas Paul, Advocate-on-Record

For Respondent : Mr. Kamal-ul-Alam, Senior Advocate with Ms. Shahnaj Akhter, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record

Date of Hearing : 03.01.2024 and 07.02.2024

Date of Judgment : 27.02.2024

**J U D G M E N T**

**Md. Ashfaqul Islam, J:** This civil appeal by leave is directed against the judgment and order dated 10.04.2014 passed by the High Court Division in Writ Petition No.5218 of 2012 making the Rule absolute.

The present respondent Belal Uddin as petitioner filed the aforesaid writ petition challenging inclusion of the property measuring 12 decimals of land of B.S. plot No.157 appertaining to B.S. Khatian No.9 recorded in the name of predecessor of the writ-petitioner/transferor corresponding to P.S. Plot No.99 of P.S. Khatian No.52 transformed from R.S. Plot Nos.87/104 as appeared in item No.98 mentioning Plot No.9, Mouza-Pahartali under P.S. Doublemooring at page 15656 (Kha) published in the Bangladesh Gazette on 26.12.1988 vide S.R.O. dated 25.12.1988 under section 5(1) of the Abandoned Buildings (Supplementary Provision) Ordinance, 1985.

The case, made out in the Writ Petition, in brief, is as follows:

The property in question originally belonged to Lalit Mohan Roy and others, recorded in the names of Amin Sharif and Serajul Haque as rayati tenants during the R.S operation. Upon Amin Sharif's demise, his daughter Sajeda Khatun became the sole heir. Sajeda Khatun then transferred 1.12 acres of land, including the case land, to Anwara Ahammed Cowdhury via registered sale deed No. 2951 dated 16.04.1956, delivering possession to the

transferee. Subsequently, the writ-petitioner purchased the property through registered sale deed No. 478 dated 08.01.1985 from Anwara Ahammed Chowdhury and got possession. However, without issuing any notice, the property was listed as abandoned. Due to non-service of notice and being abroad, the writ-petitioner couldn't approach the Court of Settlement, leaving no alternative but to file an application under Article 102 of the Constitution and obtained Rule.

Upon hearing the parties, the High Court Division made the Rule absolute. Against which the writ-respondents filed civil petition for leave to appeal and obtained leave giving rise to this appeal.

Mr. SK. Md. Morshed, the learned Additional Attorney General appearing for the appellants, contends that the writ petitioner failed to provide evidence refuting the absence of the original owner, Anwara Ahammad Chowdhury, in Bangladesh when President's Order 16 of 1972 took effect. Therefore, inclusion of the property as abandoned under the Supplementary Provisions Ordinance, 1985 was lawful. The High Court Division erred by overlooking this crucial point in its consideration of the case.

He finally submits that, being a Court of Appeal, the High Court Division was not mandated to conduct factual determinations of its own. However, its failure to adequately address pertinent evidence prejudicial to the complaining party, or any indication of mala fide conduct or infringement of the principles of natural justice, renders the impugned judgment required to be set aside.

On the other hand Mr. Kamal-ul-Alam, the learned Senior Advocate for the respondent-writ petitioner, contends that the enlistment of the land in question as abandoned property constitutes a clear violation of the principle of natural justice, as stipulated in Article 7(3) of the Bangladesh Abandoned Property Order, 1972 (P. O. No. 16 of 1972), and Section 5(1)(b) of the Bangladesh Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. LIV of 1985). He argues that neither prior notice for enlistment nor subsequent notice for surrender or transfer of possession was served to the respondent or his transferor. He emphasizes that the gazette notification dated 26.12.1988 cannot serve as a substitute for such statutory notice, rendering the enlistment illegal.

Furthermore, He asserts that the land in question does not meet the criteria or definition of abandoned property. He argues that its enlistment was based on assumptions and mistaken beliefs without any factual basis, as neither the respondent nor his transferor nor any previous owner were engaged in activities detrimental to the state's interests.

Next he submits that the writ petitioner and his transferor both are the citizen of Bangladesh, they were born in Bangladesh and they were always present in Bangladesh, their whereabouts were never unknown and they never ceased to occupy, supervise or manage the property in person deserting the same before the commencement of P. O. No. 16 of 1972 and as the land in question does not fall within the purview of P. O. No. 16 of 1972 and therefore, the enlistment of the land in question as abandoned property being illegal, the instant appeal is without any merit and liable to be dismissed.

He also placed reliance upon a series of decisions, such as Bangladesh represented by the Secretary, Ministry of Works and others vs. Helaluddin Ahmed 4 MLR (AD) 140, where it was unanimously held that prior notice for

enlistment or treatment of properties as abandoned property is a condition precedent. Since this condition precedent was not fulfilled in the present case, Mr. Kamal-ul-Alam asserts that the enlistment of the respondent's property as abandoned property is inherently illegal. Therefore, he argues that there is no merit in the appeal and it should be dismissed accordingly.

We have heard the learned Advocates of both sides and perused the impugned judgment and order of the High Court Division.

The High Court Division noted that no notice was served upon the writ-petitioner prior to the enlistment of the property as an abandoned property. It is also noted that as per documents presented in the writ petition the petitioner was found to be in possession of the property in question, and no notice for surrendering or taking over possession of the disputed building could be produced by the Government, as mandated by Section 5 of Ordinance No.54 of 1985. Section 5 of the Ordinance stipulates that listing in the official gazette of house buildings as abandoned property requires issuance or service of notice, or taking possession pursuant to such

notice. The absence of such notice renders the listing illegal. Citing the precedent set in the case of Bangladesh represented by the Secretary, Ministry of Works and others Versus Helaluddin Ahmed, reported in 4 MLR AD 140, this court underscored the necessity of serving notice before treating a property as abandoned.

It was also held that despite being unaware of the inclusion of the property until March 1, 2009, when the time for seeking remedy through the Court of Settlement had expired, the petitioner's right to challenge the inclusion was upheld under Article 102(2)(a)(ii) of the Constitution. The court affirmed the maintainability of the petitioner's application challenging the inclusion of the disputed property in the impugned Gazette under Article 102(2)(a)(ii) of the Constitution, considering the non-existence of an alternative remedy due to the expired timeframe.

It is absolutely incumbent upon the claimant who claims the property to be illegally included in the gazette to prove the said property not to be abandoned. The fact of proving that the property is not an abandoned one and not vested in the Government is totally on the

person who challenges the same to be not an abandoned property and intends 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 reported in 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 is whether the writ-petitioner was able to prove before the High Court Division that original owner Anwara Ahammed Chowdhury from whom the property had been purchased by the writ petitioner was

present at the relevant time, that is March 1971 to February 1972.

Mr. Kamal-ul-Alam, the learned Senior counsel for the respondent-writ-petitioner on this score has strenuously tried to impress upon us that the writ petitioner and his transferor both are the citizen of Bangladesh, they were born in Bangladesh and they were always present in Bangladesh, their whereabouts were never unknown and they never ceased to occupy, supervise or manage the property in person deserting the same before the commencement of P. O. No. 16 of 1972 but no rebuttable evidence could be adduced to show that the transferor Anwara Ahammed Chowdhury was present in Bangladesh for the purpose of proving that the property was not an abandoned property. It is our considered view that the writ-petitioner is not absolved from the burden of proving to the hilt the whereabouts of Mr. Anwara Ahammed Chowdhury during the relevant period as hinted above. Almost in a similar facts and circumstances this Division came down heavily in the case of Bangladesh, represented by the Secretary, Ministry of Public Works Department and Urban Development

vs. Md. Suruzzamal and others reported in 48 DLR AD 1. In paragraph 19 of the said reference it has been observed:

"This Division has held in the case of Gannyson vs. Sonali Bank, 36 DLR AD 146, that once a property vests in the Government under President's Order No. 16 of 1972 no legal proceedings can be taken against such property. The money decree obtained by Rupali Bank against Dr. Shamim, the execution thereof and the auction sale of the suit property are all void and will not divest the Government of its title to the suit property and the auction-purchaser has acquired no title to the same by his auction purchase."

Facts and circumstances of the above case are almost similar to that of the case in hand. Admittedly, the property is enlisted in the list of abandoned property. Therefore, non service of notice upon the writ-petitioner is of no avail.

In the case of Rawsanara vs. Bangladesh 59 DLR AD 165 it has been held that-

"In the instant case the petitioner having not been able to establish before the Court of Settlement that the claimant of the property or for that matter her vendor Anwari Khatun were present in Bangladesh on 28-2-1972 and consequent thereupon the property having had assumed the character of abandoned property, the listing of the property in question, even if without service of notice as per provision of Ordinance No. 54 of 1985, is not material as the property because of non-service of notice for listing in the list of abandoned properties would not cease to be an abandoned property and consequent thereupon the claim of title made by the petitioner in the property in question is not legally sustainable or, in other words, the petitioner cannot raise any claim of title in the property in question since said property is an abandoned property."

This proposition of law has been endorsed by a subsequent decision of Shahidul Haque Bhuiyan and others vs. Chairman, 1st Court of Settlement and another 69 DLR AD 241 and finally set at rest. In that decision it has been observed in paragraph Nos. 23 and 24 by this Division:-

"Next point raised by the Counsel is that since no notice was served upon the appellants before the publication in the gazette, the listing of the buildings is illegal. There is no dispute that the property has been listed in the 'Kha' list. Service of notice is required under clause (b) (1) of section 4 for surrendering or giving possession of the buildings upon the person in legal possession and the notice for surrendering possession shall have to be issued within the specific time. Law does not provide for service of notice upon any person who is not in possession of the buildings. Both the learned Counsel submit that since no notice has been issued upon the appellants, there has been violation of law. In this connection they have referred to Article 7 of PO 16 of 1972 read with Rule 3(1)(8) of the Bangladesh Abandoned Property (taking over possession Rules 1972).

Article 7(2) provides service of notice upon the person in possession of the property within seven days by the Deputy Commissioner or the authorized person for taking possession. Similar provision has been inserted in clause (b) of section 4 of the Ordinance with the exception that under the latter provision if the

possession is to be taken such notice be issued upon him. In order to bring the case under Article 7, the appellants must prove that they are in possession of the building but if they fail to prove possession, the claim of service of notice upon them is redundant for, if they are not in possession how the government can infer that they have right or interest in the buildings. More so, section 4 is a non-obstante clause overriding the provisions contained in the President's Order 16 of 1972. The rules frames under the President's Order cannot supersede the parent law. In the premises, the High Court Division is perfectly justified in holding that the appellants are not entitled to any notice since they are not in possession of the property. In this regard, the Court of Settlement held that the question of non-service of notice required under section 4(1)(b) of the Ordinance was not challenged in the case. Similar views have been taken in Rowshan Ara vs. Bangladesh, 59 DLR (AD) 165. It has been held that if the property has assumed the character of abandoned property, 'the listing of the property in question, even if without service of notice as per provision of Ordinance No. 54 of 1985, is not material as the property because of non-service of notice of listing in the list of

abandoned properties would not cease to be an abandoned property.....'"

As long as the property has attained the status and character of an abandoned property through the operation of law, any argument concerning the non-service of notice upon the writ-petitioner holds no merit. In such circumstances, the procedural lapse regarding notification becomes inconsequential and cannot be invoked to challenge the legal disposition of the property. Consequently, the arguments presented by Mr. Kamal-ul-Alam, addressing the issue of notice, bereft of any consideration. The legal principle here is clear: the designation of a property as abandoned supersedes and nullifies any procedural objections related to notice, rendering them legally ineffective and immaterial.

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."

Therefore, the irresistible inference which follows that in any course of event the bounden duty to be discharged by the claimant for taking out a property from the clutch of 'abandoned property' has been time and again decided in one line. 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. In the instant case the petitioner could not prove that his transferor Anwara Ahammed Chowdhury was present at the relevant time as required under law and interpreted by several decisions as discussed above.



Accordingly, the appeal is allowed without any order as to costs. The impugned judgment and order passed by the High Court Division is hereby set aside.

CJ.

J.

J.

J.

J.

The 27<sup>th</sup> February, 2024  
/Nayem Firoz, RRO & Ismail, B.O./2085\*