

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

Writ Petition No. 7875 of 2022

In the matter of:

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

AND

In the matter of:

Syed Mohammad Rahman represented by his constituted attorney Mohammad Rashed.

..... **Petitioner.**

-Versus-

The People's Republic of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Secretariat Bhaban, Ramna, Dhaka and others.

... **Respondents.**

Mr. Mizanul Hoque Chowdhury with

Mr. Khairul Alam Chowdhury and

Ms. Nashreen Siddiqua(Lina) Advocates

...For the **petitioner.**

Mr. Bepul Bagmar, D.A.G. with

Mr. Nawroz Md. Rasel Chowdhury, A.A.G with

Mr. MMG Sarwar, A.A.G and

Mr. Masud Rana Mohammad Hafiz, A.A.G.

...For the **respondents.**

Judgment on: 12.06.2024

Present:

Mr. Justice Md. Khasruzzaman

and

Mr. Justice K M Zahid Sarwar

Md. Khasruzzaman, J:

In an application under article 102 of the Constitution, on 17.08.2022 the *Rule Nisi* under adjudication was issued 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 as abandoned property in the Ka list of the Gazette Notification dated 23.09.1986 as serial No.16, Plot No. 23/B-1, Road No. 3 of Chattogram Nasirabad Housing Estate (Annexure-L) should not be declared to have been done without lawful authority and is of no legal effect and as to why a direction should not be given upon the respondents to release the property situated at Plot No. 23/B-1, Road No. 3 of Chattogram Co-operative Housing Society, Chattogram from Ka list of abandoned properties and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Facts relevant for disposal of the *Rule Nisi*, in short, are that the predecessor of the writ petitioner namely, Md. Mojibur Rahman got lease of 978 square yards of land being Society Plot No. 23/B-1 appertaining to R.S. Khatian Nos. 72, 3, 94 and 381 and R.S. Plot Nos. 503, 504, 505 and 623 from the Chattogram Co-operative Housing Society Ltd. for 99 years by registered lease deed No.4792 dated 01.09.1959 (Annexure-A). Thereafter, the predecessor of the petitioner took permission of the Divisional Commissioner, Chattogram for construction in the case plot. The father of the petitioner took loan on mortgage of the property and constructed the building and he was in possession of the same. In the B.S. survey, his name was correctly recorded in B.S. Khatian No. 93. It is stated that father of the petitioner died on 20.04.1974 leaving behind his wife and 01 (one) son vide *warishan* certificate dated 30.04.1974 issued by the Commissioner of the Chittagong Municipality, No. 5 Dewan Bazar Union (Annexure-H). Thereafter, mother of the petitioner died on 08.04.1976 leaving behind the

petitioner as her heir to inherit the property (Annexure-I). It is stated on 15.05.2015 that the petitioner paid off the entire outstanding loan to the House Building Finance Corporation which was taken by his deceased father. He came to know that the property was enlisted as abandoned property in 1986 without giving any notice as required under the law. It is stated that the petitioner and his parents were living in Chattogram all the time and they never left the country and as such, there is no scope to raise any question that their whereabouts were not known to anybody. It is further stated that the petitioner earlier filed Writ Petition No.3938 of 2015 challenging the enlistment of the property as abandoned property and obtained the *Rule Nisi*. Subsequently, the *Rule Nisi* was discharged for non-prosecution on 19.06.2022.

After getting the earlier *Rule Nisi* issued in Writ Petition No.3938 of 2015 discharged for non-prosecution, the petitioner again challenged the same enlistment of the property as an abandoned property in the 'Ka list' of the Gazette Notification dated 23.09.1986 by filing the instant Writ Petition No. 7875 of 2022 and obtained the *Rule Nisi* in the manner as quoted hereinabove.

At the time of issuance of the *Rule Nisi*, an interim order was passed directing the parties to maintain *status-quo* in respect of possession of the property initially for a period of 06 months and thereafter, on 13.02.2023 the same was extended for 6 months. Afterwards, the petitioner did not take any step to get the *status-quo* order extended for a further period.

The respondent No. 3, Divisional Commissioner, Chattogram filed an *affidavit-in-opposition* denying the material allegations made in the writ petition and thereby contending *inter-alia* that on 24.04.1976 the Deputy Commissioner of Chattogram approved the allotment of the plot in favour of Bangladesh Television, Chattogram and the rent was paid off from June, 1976 to December, 1988. Thereafter, it was approved in the Executive Committee of the National Economic Council (ECNEC) to construct residential flat for Government Officers/Staffs on the 36 abandoned houses in Chattogram including Plot No. 23/B-1, Road No.3, Nasirabad Housing Estate vide Memo No.20.00.0000.411.14.29.18-807 dated 05.12.2018. After exhausting all other formalities including steps to evict the illegal trespasser from the abandoned house, on 17.07.2022 the case property was handed over to M Jamal & Company Limited for construction vide letter dated 17.07.2022 (Annexure-VI). At that stage, the petitioner earlier filed Writ Petition No. 3938 of 2022 and challenged the enlistment of the property as abandoned property and after hearing the Rule was discharged for non prosecution on 19.06.2022. Again he has challenged the same enlistment by filing fresh writ petition on the same ground which is illegal, without lawful authority and not maintainable in law. It is also stated that if the petitioner has any legal right over the property, he should go to the Court of Settlement for mitigating his grievance and as such, the writ petition is not maintainable. In view of the above statements, the respondent No. 3 prayed for discharging the *Rule Nisi*.

By filing an *affidavit-in reply* to the *affidavit in-opposition* the petitioner stated that his father Md. Mozibur Rahman was all along in possession of the property till his death and thereafter, he was in possession with her mother and after the death of his mother, he has been in possession till 2022. The claim of allotting the house to Bangladesh Television was a mere symbolic one and not acted upon. The government could not produce any paper to show that the property was declared as an abandoned property. Rather the petitioner has paid electricity and WASA bills up to 2022. The petitioner's father was a Bangladeshi citizen and he lived in the country throughout his life and he never left the country and he died on 20.04.1974 in Bangladesh and as such the question to be abandoned the property should not be arisen here. Moreover, his father took loan from the House Building Finance Corporation (in short, the HBFC) by mortgaging the property and he paid the full amount, for which the HBFC issued certificate on 23.11.2022. Since the HBFC is a Statutory Corporation, the question to be abandoned the property, is not maintainable at all.

Mr. Md. Mizanul Hoque Chowdhury appearing with Mr. Khairul Alam Chowdhury and Ms. Nashreen Siddiqua (Lina), the learned Advocates on behalf of the petitioner submits that the father of the writ petitioner derived the property from the Chittagong Cooperative Housing Society Limited under the registered lease deed dated 01.09.1959 and as such the writ petitioner being the only son of his deceased father has leasehold right and title in the property. Mr. Chowdhury, the learned

Advocate further submits that the father of the petitioner all along lived in Bangladesh and he never left the country and rather he died in Bangladesh on 20.04.1974 and as such, the question to be abandoned the property is not arisen at all. Mr. Chowdhury, the learned Advocate also submits that the petitioner's father took loan from the House Building Finance Corporation by mortgaging the property and the petitioner paid off the entire loan money to the HBFC and took redemption certificate on 23.11.2022 and as such, the enlistment of the property as abandoned property is without lawful authority. Mr. Chowdhury contends that the lessor, lessee and the writ petitioner are citizens of Bangladesh and the disputed property was in their possession till the writ petitioner has been evicted in 2022 and before making the impugned enlistment of the property as an abandoned property, the government did not serve any statutory notice as required under section 5 of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 and as such, the enlistment of the property as an abandoned property is illegal and without lawful authority. In this regard, the learned Advocate refers to the cases of **Alhaj Mohammad Rahimuddin Bharsha Vs. Bangladesh represented by the Secretary to the Ministry of Works and another, 46 DLR 130, and Government of Bangladesh and others Vs. Bibi Marium and others, 54 DLR (AD) 100.**

On the point of maintainability of the writ petition without availing the forum provided for in the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985, the learned Advocate

for the writ petitioner submits that right to property is a fundamental right of the writ petitioner under article 42 of the Constitution and his right to property has been affected by the impugned enlistment of the same as an abandoned property and as such, the writ petition challenging the enlistment of the property as an abandoned property is maintainable without availing alternative remedy. In this respect, the learned Advocate relied upon the case of **Government of Bangladesh represented by the Ministry of Works and another Vs. Syed Chand Sultana and others, 51 DLR (AD) 24.**

Again, whether the petitioner can file a fresh writ petition on the same issue, after getting the earlier writ petition as discharged for non-prosecution, the learned Advocate for the writ petitioner submits that it involves procedural aspect of the writ jurisdiction of the High Court Division as to whether the petitioner shall be precluded from filing a fresh writ petition on the self same issue. The jurisdiction has been provided under article 102 of the Constitution and the same is a constitutional authority vested in the High Court Division. Any Rules or Act of Parliament in the guise of fixing procedure of the writ jurisdiction cannot shorten the fullest exercise of jurisdiction and discretion under article 102 of the Constitution. The High Court Division is the master of its own procedure. In this respect, the learned Advocate relied upon the case of **Serajuddin Ahmed and others Vs. A.K.M.Saiful Alam and others, 56 DLR(AD) 41 and Moni Begum and others Vs. Rajdhani Unnayan Kartipakkha and others, 46 DLR (AD) 154**

wherein it has been held that the Court is the master of its own procedure and it will exercise both its procedural and substantive discretion only on the ground of justice, equity and good conscience. Moreover, the petitioner has a subsisting right in the disputed property and the same is an exception to preclude the writ petitioner from reagitating the self-same issue involved in the *Rule Nisi* issued in earlier writ petition which was discharged for non-prosecution. The principle of justice, equity and good conscience warrants that a citizen of the country should not be deprived of his good title in the property in the name of procedural barriers. The learned Advocate for the petitioner refers to the case of **Messrs World Resources Limited and others Vs. Artha Rin Adalat No. 3, Dhaka and others, Writ Petition No. 7844 of 2013, judgment delivered on 17.04.2014** and submits that the Court has inherent capacity and absolute discretion in the writ jurisdiction to do as necessary in the interest of justice, equity and good conscience because the Court is the master of its own innovation if needed subject to the qualification of such innovation serving the interest of justice, equity and good conscience. Further the learned Advocate submits that right to property is a fundamental right of the petitioner. Rule of interpretation of the statute is that there cannot be any estoppels against the statute and similarly there cannot be estoppels against the fundamental rights guaranteed under the Constitution. In this regard, the learned Advocate relied upon the cases of **Sudhir Chandra Saha Vs. Matiran Bewa, 1986 BLD (AD) 182, The Commissioner of Income Tax Vs. Gulistan**

Cinema Company, 28 DLR (AD) 14 and Olga Tellis Vs. Bombay

Municipal Corporation, AIR 1986 (SC) 180. Accordingly, the learned Advocate for the writ petitioner submits that the petitioner is not precluded from enforcing his fundamental rights to property and this Court has ample jurisdiction to entertain the writ petition although the *Rule Nisi* issued in earlier writ petition on the self same ground was discharged for non prosecution. In making his elaborate submissions as noted above, the learned Advocate for the writ petitioner submits that the *Rule Nisi* may kindly be made absolute.

Mr. Bepul Bagmar, the learned Deputy Attorney General for the respondents submits that the writ petition is not maintainable because of three grounds, firstly challenging the similar enlistment of the property as abandoned property on similar grounds the petitioner earlier filed Writ Petition No. 3938 of 2015 and obtained the *Rule Nisi* which was discharged for non-prosecution on 19.06.2022 and as such, the instant writ petition on the same ground relating to identical property is barred by the principle of constructive *resjudicata* under section 11 of the Code of Civil Procedure as well as not permissible under sub-rule (7) of rule 3 of Chapter IVA of the High Court Division Rules, 1973 (Amended upto 12.11.2012). Secondly, specific alternative forum is available under the Vested Property Return Act, 2001, and thirdly, the lessor from whom the predecessor of the petitioner took lease of the disputed property namely- Chittagong Co-operative Housing Society Limited filed several writ petition challenging the enlistment of several

properties including the present property as abandoned properties and ultimately failed upto the Appellate Division. Referring to the case of Government of Bangladesh and others Vs. Md. Parvez Alam and another, Civil Appeal No. 69 of 2012 (Judgment delivered on 16.11.2016), the learned Deputy Attorney General submits that the lists published in the official gazette by the Government is the conclusive evidence of fact that the disputed property included in the list is abandoned property and has vest upon the Government and as such, there being no illegality in the impugned enlistment, the *Rule Nisi* may kindly be discharged. Moreover, the learned Deputy Attorney General by producing a photo copy of the certified copy of the judgment and order dated 30.11.2014 and 13.08.2018 passed by this Division in Writ Petition No.10709 of 2013 and Review Petition No.20 of 2016 submits that enlistment of the plot was challenged by the lessor Chittagong Co-operative Housing Society Limited and ultimately the *Rule Nisi* was discharged which was affirmed by the Appellate Division. So, the *Rule Nisi* issued in the present writ petition is liable to be discharged.

We have considered the submissions of the learned Advocate for the petitioner and the learned Deputy Attorney General for the respondent, perused the writ petition, *affidavit-in-opposition* along with all papers annexed thereto and the decisions referred to above by the parties.

The disputed property was leased out to the father of the writ petitioner. The Chittagong Co-operative Housing Society Limited is the lessor of the disputed property. We have noticed that the lessor

has already filed Writ Petition No. 10709 of 2013 challenging the impugned inclusion of the plot in the 'Ka' list of abandoned buildings by notification dated 23.09.1986 published in the Bangladesh Gazette on 23.09.1986 and ultimately failed up to the Appellate Division.

However, it is an important question to us whether this *Rule Nisi* for determination of the disputed property as an abandoned property is illegal and without lawful authority and the writ petition is maintainable or not.

First of all, let us take up the question of maintainability of the writ petition. Admittedly, the writ petitioner earlier filed Writ Petition No. 3938 of 2015 challenging the enlistment of the disputed property as abandoned property and obtained *Rule Nisi*. Long after 07 years, the petitioner got the *Rule Nisi* issued in Writ Petition No. 3938 of 2015 discharged for non-prosecution on 19.06.2022. Thereafter, the writ petitioner filed the present writ petition on the same and similar ground by challenging the same enlistment of the property as abandoned property. In the circumstances, the learned Deputy Attorney General for the respondent submits that the petitioner is barred from filing the instant writ petition on the principle of constructive *res judicata*. In this respect, the learned Deputy Attorney General refers to the case of **Bangladesh Vs. Luxmi Janardhan Jew Thakur, 7 BLC (AD)**

In section 11 of the Code of Civil Procedure, it has been provided that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

It further appears from section 11 of the Code of Civil Procedure that six explanations have been attached with the section. The relevant explanation is explanation No. IV which reads as follows:

Explanation IV- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

If the explanation IV is read together with the main provision of section 11, it would clear that if it is found that the matter directly and substantially involved in the suit or issue has been directly and substantially in issue of a former suit between the same parties, the Court shall not try such suit. The principle is very clear that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. This view finds support in the case of **Forward Construction Company Vs.**

Probhat, AIR 1986 SC 391. Again in the case of **Nagarbhusana Vs. Karnataka, AIR 2011 SC 1113** the Indian Supreme Court observed that the owner of the land unsuccessfully challenged the acquisition of the land in the first round and thereafter, in the subsequent case the owner of the land took plea that his land is far away from the project for which the land was being acquired and this subsequent plea was barred by constructive *resjudicata*. In the case of **Hafizuddin Vs. Bangladesh 1989 BLD (AD) 164** the fact was that the earlier suit for declaration of title was dismissed and thereafter suit for declaration of title as well as recovery of possession was filed. The Appellate Division observed that the fresh suit for declaration of title and recovery of possession was barred by principle of constructive *resjudicata*.

By relying upon the **judgment and order dated 17.04.2014 passed by this Division in Writ Petition NO.7844 of 2013** the learned Advocate for the writ petitioner tried to submit that this Division entertained the subsequent writ petition despite Rule Nisi issued in earlier writ petition was discharged for non-compliance and as such, the writ petition is maintainable although the petitioner non prosecuted the earlier writ petition. Let us go through the judgment and order relied upon the learned Advocate for the writ petitioner to appreciate whether the same is applicable in the instant case.

On perusal of the judgment in Writ Petition No. 7844 of 2013 it appears from the facts of the case that earlier the petitioner

challenged the Order No. 40 dated 09.11.2010 passed by the respondent No. 1 in Artha Execution Case No. 48 of 2004 issuing certificate under section 33 (7) of the Artha Rin Adalat Ain, 2003 by filing Writ Petition No. 4591 of 2012. When the *Rule Nisi* was issued, an interim order of stay of operation of the impugned order was passed with certain condition to pay off the decretal amount within a certain period with default order. Subsequently, for non-compliance of the order, the *Rule Nisi* of that Writ Petition No. 4591 of 2012 was discharged. It appears that after discharging the *Rule Nisi* for non-compliance, the petitioner went to the Artha Rin Adalat and filed an application on 10.07.2013 for recalling the sale certificate under section 33 (7) of the Ain. The application being rejected by Order No. 74 dated 10.07.2013, the petitioner challenged the order dated 10.07.2013 by filing Writ Petition No. 7844 of 2013. So, the orders challenged in those two writ petitions were different order although relating to issuance of certificate under section 33(7) of the Artha Rin Adalat Ain, 2003. Accordingly, this Division allowed the petitioner of that writ petition to get his mortgage property redeemed from the Bank adjusting all loan liabilities. So, the facts and circumstances of that writ petition are quite different from the facts and circumstances of the instant case.

In the said judgment, this Division correctly and consistently viewed that *the petitioners before us remain barred from challenging the legality or otherwise of the issuance of Certificate under section 33(7) of the Ain commonly raised in the writ petition as well as in the earlier writ petition.* Even then, considering the earlier interim order

of payment of liabilities passed in earlier writ petition (Writ Petition No. 4591 of 2012) and also considering the petitioner's right of redemption of mortgage, the subsequent writ petition was disposed of allowing the petitioner to get the property redeemed from mortgage by meeting the outstanding liabilities of the bank. So, the circumstance under which the said writ petition was entertained was an exceptional one.

Whereas, issue involved in the instant writ petition as to whether the enlistment of the property as an abandoned property is lawful, was also the subject matter of the earlier writ petition which was non prosecuted by the petitioner. It appears that the *Rule Nisi* issued in earlier Writ Petition No. 3938 of 2015 was discharged by the volition of the petitioner. This non-prosecution of the *Rule Nisi* has been made in 2022 i.e. after seven years from the date of obtaining the *Rule Nisi* in 2015. The moment the petitioner got his *Rule Nisi* discharged for non-prosecution without seeking any permission to file a fresh writ petition, the presumption of law is that he has abandoned his right or waived his right in the subject matter of the case. If the *Rule Nisi* was discharged with a permission to file a fresh writ petition, there would not have any question. In the absence of any permission to file a fresh writ petition, the petitioner is barred from filing the instant writ petition on the self same ground between the same parties challenging the same enlistment of the property as an abandoned property on the principle of estoppels and constructive *resjudicata*. Thus the judgment and order dated 17.04.2014 passed in Writ Petition No.

7844 of 2013 has no manner of application in the facts and circumstances of the present case.

Moreover, the writ petition is not maintainable on the ground of alternative remedy provided in the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. LIV of 1985). The Ordinance has been promulgated by the Government for exclusion of the building from the abandoned property list or return or restoration of the building to the claimant or for any other relief on the ground that the building is not an abandoned property and has not been vested in the Government under the President's Order or the right or interest in the building has not been affected by the provisions of the Order. Since alternative remedy is available in the Ordinance No. LIV of 1985, filing of the writ petition without availing the forum of alternative remedy is not permissible in law. In that score, the writ petition is not maintainable. However, the Ordinance is a special law and there is a limitation prescribed in section 7 of the Ordinance, 1985 that any person claiming any right or interest in any building which is included in the list may, within a period of 180 days from the date of the publication of the list in the official gazette make an application to the Court of Settlement for exclusion of the building from such list. In this regard the following decisions are relevant: 42 DLR (AD) (1990) 86, 89; 46 DLR (1994) 634, 637; 19 BLD (1990) 432, 435; 52 DLR (2000) 67; 18 BLD (AD) (1998) 274; 51 DLR (AD) (1999) 24, 25.

Since it is a Special law and as such after expiry of 180 days claimant can file writ petition.

Be that as it may, admittedly, the writ petitioner's father got the disputed land from the Chittagong Co-operative Housing Society Limited under lease deed and as such, he claims that he has lease hold right in the disputed property and as a lessee he filed the present writ petition.

It is interesting to note that the lessor of the writ petitioner i.e. Chittagong Co-operative Housing Society Limited filed Writ Petition No. 10709 of 2013 challenging the inclusion of 43 plots including the present plot No.23/B-1 as abandoned property and obtained a *Rule Nisi*. The *Rule Nisi* was made absolute by judgment and order dated 30.11.2014. Thereafter, the Government filed Review Petition No. 20 of 2016 for reviewing the judgment and order dated 30.11.2014. Ultimately, this Division by judgment and order dated 13.08.2018 allowed the review application and set aside the judgment and order dated 30.11.2014 by reviewing the same and thereby the *Rule Nisi* of Writ Petition No.10709 of 2013 was discharged.

Thereafter, the judgment and order dated 13.08.2018 was challenged in Civil Petition for Leave to Appeal No. 870 of 2019 at the instance of Chittagong Co-operative Housing Society Limited. On 10.12.2020 the Appellate Division dismissed the leave petition finding no legal infirmity in the impugned judgment and order factually and legally calling for interference. So, when the point was

settled by this Division at the instance of the lessor of the disputed land and affirmed by the Appellate Division, there is nothing left for adjudication in the *Rule Nisi*. In view of the facts and circumstances of the present case, we are also of the view that the decisions relied upon by the petitioner in support of his case have no manner of application. Accordingly, the *Rule Nisi* is liable to be discharged.

In the facts and circumstances stated above, we do not find any merit in the *Rule Nisi* as well as substance in the submissions of the learned Advocate for the petitioner.

In the result, the *Rule Nisi* is discharged.

Send down the records.

Communicate the judgment.

K M Zahid Sarwar, J:

I agree.