

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 15538 of 2022.

In the matter of:

An application under Article 102(1) and (2)(a)(ii) of the Constitution of the People's Republic of Bangladesh.

In the matter of:

Mahmudul Abedin and others.

..... Petitioners.

Vs.

Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Ramna, Dhaka and others.

...Respondents.

Mr. Hassan M.S. Azim with Mr. Ashfaqur Rahman, with Mr. Mohammad Miftaul Alam, with

Mr. Sumit Kumar Sarker, with Mr. Shahriar Shahid Saad Advocates

...For the petitioners.

Mr. Amit Talukder, D.A.G with Mr. MMG Sarwar, A.A.G with Mr. Md. Rayhan Kabir, A.A.G with

Mr. Nasim Islam, A.A.G

...For the respondent No. 02.

Heard on 24.01.2024 and 28.01.2024.

Judgment on: 29.01.2024.

SHEIKH HASSAN ARIF, J

1. At the instance of the petitioner, Rule Nisi was issued calling the respondents, including the government and

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Md. Bazlur Rahman

Deputy Commissioner, Mymensingh (respondent Nos. 1 and 2), to show cause as to why the enlistment of land mentioned in the cause title of the writ petition (“the said Land”) as scheduled land in the ‘Ka’ list of the Orpito Sampotti Prattarpon Ain, 2001 vide Correction Notification No. 31.00.0000.045.53.005. 2012-2782 dated 29.11.2012 and publication of the same in the Bangladesh Gazette (Extraordinary issue) on 10.12.2012 (Annexure-H) under Serial No. 6, Page No. 198267, under Mouza-Mymensingh Town, Police Station-Mymensingh Sadar, District-Mymensingh, should not be declared to be without lawful authority and are of no legal effect.

2. Background Facts:

2.1 Facts, relevant for the disposal of the Rule, in short, are that the said land and old dilapidated abandoned building thereon originally belonged to one Shashanka Mohon Ghosh. That one Joynal Abedin, predecessor of the petitioners, was a tenant in the said building under the said original owner. The said property was enlisted as vested property in the year

1968-69, under VP Case No. 216 (Ka). Thereupon, the said predecessor of the petitioners, namely, Joynal Abedin, applied to the concerned authority seeking lease and, accordingly, lease was granted in his favour. That the district committee for the disposal of vested property, presided over by Deputy Commissioner of Mymensingh, decided to sell some dilapidated vested properties, which were no more required by the government, to the existing lessees. Thereupon, the said Joynal Abedin applied to purchase the said property. Accordingly, the officer concerned of the district administration issued demand notice in his favour vide Memo No. 180/1/BP dated 07.04.1984 and, on that demand notice, the said Joynal Abedin paid total consideration money of Tk. 41,689.22 vide two treasury chalans. Accordingly, it is stated, the officer concerned of the district administration, namely, Additional District Commissioner (Revenue), executed a registered sale deed bearing No. 18642 dated 16.10.1984 in favour of the said Joynal Abedin transferring the said property. Accordingly, the said

Joynal Abdein mutated the said land in his favour vide Mutation Case No. 1059/1984-85 and started possessing the same upon payment of development taxes. It is stated further that a four storied building was constructed on the said land upon obtaining necessary permission from the authority concerned and also utility connection etc. were obtained from necessary authorities. That the said building has been rented out to some tenants and the petitioners, as heirs of the said Joynal Abdin, have possessed the remaining property as their homestead. That while the petitioners were enjoying the ownership and possession of the said property, the government listed the same in the 'Kha' list of the abandoned properties in view of provisions under Section 9 of Orpito Sampotti Prattarpon Ain, 2001 ("the said Ain"). The petitioners then filed Orpito Sampotti Prattarpon Case No. 3360 of 2013 before the Tribunal concerned seeking release of the said property. However, during pendency of the said case, the government took decision to release all properties in the 'Kha' list, and thereafter, the Parliament enacted

amending Act No. 46 of 2013, thereby, challenging the 'Ka' list and, accordingly, the case filed by the petitioners before the Tribunal became abated by operation of the said amending Act followed by a formal order dated 07.11.2013 passed by the Tribunal to that effect.

2.2 That in the month of October, 2015, the petitioner came to know that the said property was again enlisted by the government in 'Ka' list upon publishing the impugned corrected gazette notification followed by the publication of the impugned gazette incorporating the said property at Serial No. 6, at Page No. 198267.

2.3 It is contended by the petitioner that while the government itself released the said properties by abolishing the "Kha" list, such inclusion of petitioners' property in the "Ka" list subsequently was without jurisdiction and arbitrary exercise of power. It is further contended that after publication of the said impugned gazette, the revenue officers have been refusing to receive the land development tax since

1989. It is contended that the Ministry of Land itself recognized the said property being sold property to the petitioners vide its letter dated 15.01.2012. Under such circumstances, the petitioners made representations to the Deputy Commissioner concerned on 18.12.2014 for taking necessary steps in order to take development taxes etc. followed by further representations in this regard. However, according to the petitioner, although the office of Deputy Commissioner, Mymensingh has issued some letters for settling the dispute, the same is yet to be settled. That the petitioner also made representation to the Ministry of Land on 23.11.2021 with request to take necessary steps followed by further representation dated 19.11.2022 seeking fresh publication of gazette upon correcting such mistake. That the petitioner also filed Title Suit No. 244 of 2018 before the Senior Assistant Judge, Sadar Court, Mymensingh challenging the said correction gazette notification, but they were subsequently advised to withdraw the same and, accordingly, the said case was withdrawn vide order

dated 21.06.2021 passed by the learned Senior Assistant Judge, Sadar, Mymensingh in the said suit. With the aforesaid background, the petitioners approached this Court under writ jurisdiction and obtained the aforesaid Rule. At the time of issuance of the Rule, a division bench of this Court, vide ad-interim order dated 03.01.2023, directed the parties to maintain status-quo in respect of possession of the said land for a period of 06 (six) months, which was subsequently extended time to time.

2.4 During pendency of the Rule, the petitioners came up with an application for disposal of the writ petition on the basis of the admitted facts being reflected in Memo dated 09.06.2022 (Annexure-K-2 to the writ petition), as issued by the government, contending, *inter alia*, that the government had admitted that the said property was sold in favour of the predecessor of the petitioners. However, on the serious objections of the learned D.A.G and AAG, present in Court, we have taken up the Rule itself for disposal of the same on merit and, accordingly, the said

application filed by the petitioners has been kept with record.

2.5 It is contended by the petitioners further that in view of the provisions under Section 6(Ga) of the said Ain, there was an embargo on the government itself in enlisting the property in question as vested property, particularly when the said property was transferred in favour of the predecessor of the petitioners. It is contended that enlistment of the said property in the impugned correction gazette is clearly violation of petitioners' fundamental rights guaranteed under Articles 27, 31 and 42 of the Constitution.

2.6 The Rule is opposed by the Deputy Commissioner, Mymensingh (respondent No. 2) by filing affidavit-in-opposition mainly contending that in view of the provisions under Article 10 of the said Ain, this writ petition is not maintainable, particularly when the petitioner did not file any case before the Tribunal concerned seeking release of the said property from the 'Ka' list. It is further contended by this respondent that the said property has been recorded

in the name of the government under khash khatian No. 01/01 and that the petitioner has already filed Civil Suit No. 244 of 2018 challenging the said impugned correction gazette. It is also contended by this respondent that the property being admittedly vested in the government in 1968-69, the same was under the management of the vested and non-resident property management committee at the relevant time as per provisions under Section 3 of the Vested and Non-resident Property Act, 1974 and that as per provision of Section 9(1) of the said Act, the said committee did only have any authority to grant lease in favour of third party and it did not have any authority to transfer the said property by sale.

2.7 By filing affidavit-in-reply, the petitioners contended that the District Committee concerned, in a meeting dated 05.04.1983, decided to sell the said property including other properties and, accordingly, the predecessor of the petitioners purchased the said property and that since the petitioners are not the original owners, rather they are successor in interest

officer of the government, to transfer vested property in favour of any person. This being so, according to him, the officer concerned, who executed the registered deed in favour of the predecessor of the petitioner in order to transfer the said property, did have authority under the law to transfer the same.

- 2) Further referring to the definition of the term “মালিক”, as provided by sub-clause Da () of Clause ‘Kha’ of Section 2 of the said Ain, he submits that the petitioners are admittedly not the original owners of the property, or successor in interest from the original owners. Rather, the petitioners are successor in interest from the government. This being so, according to him, the petitioners are not in a position to approach the Tribunal seeking release of the said property.
- 3) Further drawing this Court’s attention to the decisions of the District Committee for disposal of the vested property held on 05.04.1983 and

Memo dated 28.05.1984 (Annexure-N and O to the affidavit-in-reply of the petitioners), he submits that it is apparent from the said decision and the Memo issued by the Mymensingh District Administration at the relevant time that the decision to sell the property in question was properly taken in accordance with the aforesaid provisions of law under the authority of the Act of Parliament and, according to him, such transfer, having been made through registered deed of more than 30 years old, has presumption of law under Section 90 of the Evidence Act, unless the government can provide any evidence to rebut such presumption. According to him, since the execution of the deed in question was an act of public functionary, it also has legal presumption in its favour under Clause-(E) of Section 114 of the Evidence Act. In support of his such submissions, he has referred to two decisions of our Appellate Division in **Shishir Kanti Pal vs. Nur Muhammad, 55 DLR (AD)-39** and **Md.**

Sirajul Islam vs. Taimuddin, XIII ADC (2016)-

349.

3.2 As against above submissions, learned A.A.G present in Court, representing the respondent No. 02, finds it difficult to produce any evidence to show that the officer concerned at the relevant time did not have authority under the law or the government circular, to execute the said registered deed in order to transfer the said property in favour of the predecessor-in-interest of the petitioners. However, he submits that the writ petition is not maintainable.

4. Deliberations, Findings and Orders of the Court:

4.1 To address the point of maintainability of the writ petition, let us first examine whether the petitioner in fact had alternative remedy to move the Orpito Sampotti Prattarpon Tribunal in view of Section 10 of the said Ain. Accordingly, the relevant portion of Section 10 of the said Ain is reproduced below for our ready reference:

“১০। (১) ধারা ৯ এর অধীন গেজেটে প্রকাশিত ক তফসিলভুক্ত অর্পিত সম্পত্তির মালিক উক্ত সম্পত্তি তাহার অনুকূলে প্রত্যর্পণের জন্য, উক্ত সম্পত্তির তালিকা প্রকাশের ৩০০ (তিনশত) দিনের মধ্যে, ট্রাইব্যুনালের

নিকট আবেদন করিতে পারিবেন এবং আবেদনের সহিত তাহার দাবীর সমর্থনে সকল কাগজপত্র সংযুক্ত করিবেন।”

4.2 It appears from the above quoted provision that the owner (মালিক) of the property may approach the Tribunal seeking release of the same from the list of vested properties. The term ‘owner’ has been defined by sub-clause-() of Clause ‘Kha’ under Section 2 of the said Ain in the following manner:

“() ‘মালিক’ অর্থ যে ব্যক্তির সম্পত্তি অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত হইয়াছে সেই মূল মালিক বা তাহার উত্তরাধিকারী, বা উক্ত মূল মালিক বা উত্তরাধিকারীর স্বার্থাধিকারী (Successor in interest), বা তাহাদের অনুপস্থিতিতে তাহাদের উত্তরাধিকার সূত্রে এমন সহ-অংশীদার যিনি বা যাহারা ইজারা গ্রহণ দ্বারা বা অন্য কোনভাবে সম্পত্তির দখলে রহিয়াছেন (Co-sharer in possession by lease or in any form) যদি উক্ত মূল মালিক বা উত্তরাধিকারী বা স্বার্থাধিকারী (Successor in interest) বা উত্তরাধিকারসূত্রে সহ-অংশীদার (Co-sharer in possession by lease or in any form) বাংলাদেশের নাগরিক ও স্থায়ী বাসিন্দা হন।”

4.3 The words used by the Legislature in the above quoted definition of the term মালিক (owner) reflects that only the original owner, or the successor in interest from the original owner, has been given the legal right to approach the Tribunal in order to seek

release of the property concerned from the vested property list. However, the claim of the petitioners in the entire writ petition is that their predecessor, Md. Joynul Abedin, was neither the original owner of the property, nor was he successor-in-interest of the said original owner. The case of the petitioners is based on the premise that their predecessor-in-interest was the successor-in-interest of the government, given that the property in question was admittedly vested in the government by operation of law. Therefore, on this point, we find substance in the submission of the learned advocate for the petitioner to the effect that since the petitioners are not claiming as successor in interest in respect of the said property from the original owner of the property, they cannot approach the Tribunal seeking release of the said property. If we examine the definition of the term 'উত্তরাধিকার সম্পত্তি' (returnable property) as defined by sub-clause (T) under Section 2 of the said Ain, in particular the explanation to the said definition (খ) it appears that the properties falling under

Clause 'Ka' to 'Cha' of Section 6 shall not be deemed to be returnable properties. Clause 'Ga' of Section 6 of the said Ain particularly prohibits the government from including the property transferred permanently in favour of some person in the list of 'returnable property'. Therefore, it is also questionable whether the property in question can be termed as 'returnable property (ငံ့လှုပ်ရှားနိုင်သော မြေပိုင်ဆိုင်မှု)' at all as defined by Clause (T) under Section 2 of the said Ain.

4.4 It cannot be denied that the right to property is one of fundamental rights guaranteed by our Constitution, and such right may only be restricted by law. On the other hand, such law restricting such right to property has to be reasonable law in view of the provisions under another fundamental right guaranteed by the Constitution under Article 31. This being the position, we are of the view that this writ petition is maintainable in that apart from moving this writ petition, the petitioners in fact do not have any other alternative remedy, particularly

when Section 7 has debarred the petitioner from approaching the civil Court.

4.5 Now, the substantive merit of the writ petition. It is specifically stated by the petitioners in the writ petition that the committee for disposal of the vested properties in Mymensingh, headed by the Deputy Commissioner of Mymensingh, decided to sell some vested properties in favour of the lessees of the said properties, particularly when the said properties were not required by the government anymore. We find substance of such contention of the petitioners in the minutes of the said committee meeting dated 08.06.1983 (Annexure-N), wherein the property concerned in this writ petition has also been included in the table along with other properties in order to sell the same. We find further support of such fact from memo dated 28.05.1984 (Annexure-O to the affidavit-in-reply of the petitioner) as issued by the said District Management Committee issuing the allotment letter in favour of the said Joyal Abdin to sell the said property mentioning the consideration money etc.

for such sale. These two documents, as annexed to affidavit-in-reply filed by the petitioner, in particular, the contents of the same, have not been denied by the respondent No. 02 either by swearing affidavit or by way of oral submissions.

4.6 It further appears from memo dated 07.08.1984, issued by the Deputy Commissioner of Mymensingh himself (Annexure-B to the writ petition), demanding the consideration money from the predecessor-in- interest of the petitioner, the chalans, annexed to the writ petition as Annexures- C and D showing payment of such consideration money have also not been denied by the contesting report. Now, the very registered sale deed, the copy of the original deed dated 16.10.1984, as annexed to the writ petition as Annexure-E and contents thereof, have also not been denied by the respondent. The only objection raised by the respondent is that the Additional Deputy Commissioner, Revenue, who executed the said deed was not duly authorized at the relevant time to sell the said property.

4.7 To address the issue raised by the respondent, we have examined the averments in the said sale deed, in particular paragraph Nos. 1-3 of the said deed, which are reproduced below:

“১। যেহেতু নিম্ন তফছিল বর্ণিত অর্পিত সম্পত্তি ১৯৭৪ ইং সালের ৪৫ নং অধ্যাদেশের ৩ (১) ধারামতে বাংলাদেশ সরকারে বর্তাইয়াছে,

২। যেহেতু ১৯৭৬ ইং সালের ১৩ নং অধ্যাদেশের ২ নং ধারামতে বাংলাদেশ সরকার অত্র সম্পত্তি হস্তান্তরের সিদ্ধান্ত গ্রহণ করিয়াছেন এবং ঐ সিদ্ধান্ত কার্যকরী করার নিমিত্ত ১ম পক্ষ দলিল দাতা অত্র মংমনসিংহ জেলার কালেক্টর হিসাবে প্রতিনিধি হইয়া দলিল সম্পাদনের ক্ষমতা প্রাপ্ত হইয়াছেন,

৩। যেহেতু আপনি দ্বিতীয় পক্ষ মোঃ জয়নুল আবেদীন, পিতা- মরহুম আবদুল মজিদ অখন্দ সাং-৩৪ এ.বি.গুহ রোড, ময়মনসিংহ, প্রথম পক্ষের প্রস্তাব মোতাবেক নিম্ন তফছিল বর্ণিত সম্পত্তির মোট মূল্য টাঃ ৪১,৬৮৯/২২ (টাকা একচল্লিশ হাজার ছয়শত উননব্বই এবং পয়সা বাইশ) মাত্র এর সমুদয় দুই কিস্তিতে পরিশোধ করিয়াছেন এবং পরিশোধ সাপেক্ষে ময়মনসিংহ সোনালী ব্যাংক ইং ২৭-৬-৮৪ তারিখ বি-৭২ নং চালান যোগে এবং ইং ২৯-৭-৮৪ তারিখ বি-৯২ নং চালান যোগে সরকারী হিসাবের অধীন প্রধান “৮৮-বিভাগীয় ও বিচার বিভাগীয় জমা ব্যক্তিগত জমা” খাতে জমা দিয়াছেন।”

(Underlines given)

4.8 It appears from the very above averments in the sale deed that paragraph-1 of the same recognizes the vesting of the property in the government by operation of law, in particular Section 3 of the Act No. XLV of 1974, namely the Enemy Property

(Continuance of Emergency Provisions) (Repeal) Act, 1974. Paragraph-2 of the deed further recognizes the subsequent amendment of Section 3 of the said Repealing Act vide Ordinance No. XCIII of 1976 and paragraph-3 of the same finally admits the payment of consideration money by the predecessor-in-interest of the petitioner.

4.9 In this regard, we have examined Section 2 of the aforesaid Ordinance No. XCIII of 1976 by which Section 3 of the Act No. XLV of 1974 has been amended. It appears from the said amended provision that by this amendment, the property vested in the government shall be administered, controlled, managed and disposed of by transfer, or otherwise, by the government or by such officer or authority as the government may direct. Therefore, this amending Act has clearly empowered the government not only to control and manage the vested property, but also to dispose of the same by way of transfer. Paragraph-2 in the sale deed quoted above further reveals that the person

executing the deed was the collector of the district Mymensingh and he was the representative, being authorized, to execute the said deed. It is true that the said deed does not give any information as to by what memo or circular he was so authorized. But it cannot be denied that the deed in question is a registered deed of more than 30 years old and it has presumption of due execution in its favour as provided by Section 90 of the Evidence Act. However, such presumption is rebuttable presumption and such rebut can only be done by adducing effective evidence. In this regard, we have examined carefully the affidavit-in-opposition filed by the respondent No. 02, but has not found a single piece of evidence which can lawfully rebut such presumption of law. Therefore, we are of the view that as against this registered sale deed, in particular the presumption enjoyed with it, the respondent-government, or respondent No. 02, does not have any case before this Court.

4.10 It is apparent from materials on record that the property in question was decided to be sold in favour of the petitioner in 1983 by the said District Committee, as authorized under the law, to dispose of such property and, accordingly, the said property was transferred in favour of the predecessor in interest of the petitioners in the year 1984 by executing registered sale deed. It further appears that after such transfer, the predecessor-in-interest of the petitioners got the said property mutated in his favour vide Mutation Case No. 1059/1984 & 85, and has been enjoying the possession of the same since then as owner of the said property. Therefore, we have no option but to hold that the government committed gross illegality in enlisting the said property in the impugned correction notification as well as gazette dated 10.12.2012 (Annexure-H) under Serial No. 6, Page No. 198267 as the same is clearly prohibited by Section 6 (Ga) of the said Ain. Therefore, this Court is of the view that government should immediately correct the said mistake and publish a fresh correction gazette upon

deleting the said property from the said impugned correction gazette. In view of above, we find merit in the Rule and as the same should be made absolute.

4.11 In the result, The Rule is made absolute. Accordingly, the impugned Correction Notification No. 31.00.0000.045.53.005.2012-2782 dated 29.11.2012 and publication of the same in the Bangladesh Gazette (Extraordinary issue) on 10.12.2012 (Annexure-H) under Serial No. 6, Page No. 198267, under Mouza-Mymensingh Town, Police Station-Mymensingh Sadar, District-Mymensingh in respect of petitioner's said land, are declared to be without lawful authority. Government (respondent Nos. 1 and 2) are directed to take effective steps for deleting the said property from the impugned notification dated 09.11.2012 issued by the government and correction gazette notification dated 10.12.2012 (Annexure-H) upon deleting the property mentioned at Serial No. 6, Page No. 198267, under Mouza-Mymensingh

Town, Police Station-Mymensingh Sadar, District-Mymensingh within a period of 30 (thirty) days from the receipt of the copy of this order.

Communicate this.

.....
(Sheikh Hassan Arif, J)

I agree.

.....
(Md. Bazlur Rahman, J)