

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

WRIT PETITION NO. 2102 of 2002

THE MATTER OF;

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

-And-

IN THE MATTER OF;

Sarwar Alam Chowdhury being dead his legal heirs:

1(ka) Fazilatun Nessa Mimi and others.

..... Petitioners.

-Versus-

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works & others.

..... Respondents.

Mr. Md. Afzal Hossain, Advocate

..... for the petitioners.

Mr. S. Rashed Jahangir, D.A.G

With

Mr. Titus Hillol Rema, A.A.G

.....for the Respondent No. 1.

Present:

Ms. Justice Zinat Ara

And

Mr. Justice J.N. Deb Choudhury.

Heard on: 06.05.2015, 07.05.2015, 17.05.2015,
19.05.2015 & 20.05.2015

and Judgment on: 27.05.2015.

J.N. Deb Choudhury, J :

On an application under article 102 of the Constitution of the People's Republic of Bangladesh made by the petitioners, this Court on 04.05.2002 was pleased to issue a Rule Nisi in the following terms:

“Let a Rule Nisi issue calling upon the respondents to show cause as to why the impugned judgment and order dated 31.07.2000 passed by the respondent No. 2 as contained in Annexure I to the writ petition should not be declared without lawful authority and of no legal effect and why the disputed Plot No. 13/A/A/1st Colony Mirpur, Dhaka should not be released from the “ka” list of the abandoned building as published in the Bangladesh Gazette Extra Ordinary on 23.09.1986 and pass such other or further order or orders as to this Court may seem fit and proper.”

Relevant facts necessary for disposal of this Rule, in brief, is that, the predecessor-in-interest of the vendor of the petitioners, Syed Abdus Sattar was allotted a house at the Mirpur Coloney, popularly known as Mirpur 1st Coloney vide agreement dated 24.07.1953 (Annexure-A to the writ petition). Thereafter, Syed Abdus Sattar while was in peaceful possession of the said property died on 25.03.1971 leaving behind his only nephew Md. Ehsanul Hoque as his heir and since then Md. Ehsanul Hoque was in peaceful possession of the property in question without any hindrance from any quarter. Thereafter, the petitioner’s vendor Md. Ehsanul Hoque sworn an affidavit before the Magistrate, 1st Class, Dhaka on 19.05.1979 to the effect that he is the only surviving heir of late Syed Abdus Sattar, the original allottee under the Muslim Personal Law and he also obtained a succession certificate on 14.04.1979 in Succession Certificate Case No. 241 of 1979 from the 3rd Court of Subordinate Judge, Dhaka for the purpose of recovering loan money left by Syed Abdus Sattar from one Mr.

Md. Nazrul Islam amounting to Tk. 925.00 (Annexure-B1 to the writ petition). The writ petitioners also stated that on 25.05.1979 they purchased the said property being House No. 13/A/A, Mirpur 1st Coloney under police Station Mirpur, Dhaka by two registered sale deeds from Md. Ehsanul Hoque and since the date of purchase the petitioners are paying all rent, taxes, bill etc. to the Revenue Office, WASA, DESA and City Corporation and their names were duly recorded in the Government Revenue Office and in the recent land survey conducted by the Government and thereby possessing the said property peacefully; but, the Government most illegally enlisted the property in question in the abandon property 'Ka' list, published in the official Gazette at page 976 (ka). It has further been stated that on 22.11.1983 the section officer of the Ministry of Public Works served a notice upon the petitioners for showing the original deeds and also served similar notice on 08.04.1984. While the writ petitioners submitted his documents and was advised to file an application before the Court of Settlement and accordingly, the petitioners filed case No. 125/96 (Ka-4, first Coloney, (Mirpur), Dhaka and the same was ultimately heard and dismissed on 31.07.2000, with the findings that the writ petitioners failed to prove the facts that his vendor was the heir of the original allottee and also found that the property was rightly enlisted as abandoned property.

Being aggrieved with the judgment and order of the Court of Settlement, the petitioners filed the writ petition and obtained the Rule Nisi.

Respondent No. 1 contested the Rule by filing an affidavit-in-opposition and supported the judgment and order dated 31.07.2000 passed

by the learned Judge of the 1st Court of Settlement, the respondent No. 2 on stating that the writ petitioners annexed some forged and manufactured papers in order to establish his alleged false ownership and the Government has legally and rightly enlisted the property as abandoned property and also stated that the writ petitioners failed to show the whereabouts of the original allottee, Syed Abdus Sattar after 28.02.1972.

During pendency of the Rule the petitioner Nos. 1 and 2 died and their heirs were duly substituted.

Mr. Md. Afzal Hossain, the learned advocate for the petitioners takes us through the Writ Petition as well as the annexures thereto, the materials on record and submits that the original allottee Syed Abdus Sattar died on 25.03.1971 leaving behind his only nephew Md. Ehsanul Hoque as his only heir and accordingly, the said Md. Ehsanul Hoque while in possession of the property in question sworn an affidavit before the Magistrate, 1st Class, Dhaka on 19.05.1979 declaring that he was the sole heir of Syed Abdus Sattar (Annexure-B to the writ petition) and also referred the succession certificate dated 14.04.1979 (Annexure-B1 to the writ petition) showing that Md. Ehsanul Hoque obtained the succession certificate from the Subordinate Judge, 3rd Court, Dhaka for the purpose of recovering a loan of Tk. 925.00 as heir of the original allottee Syed Abdus Sattar and while Md. Ehsanul Hoque was in possession sold the land in question to the writ petitioners by two registered sale deeds dated 25.05.1979; but, the Government most illegally enlisted the property in question in the abandon property 'Ka' list, published in the official Gazette at page 976 (ka). He also submits that the inclusion of the disputed property in the 'ka' list has

been without any lawful authority as the petitioners were in possession, till illegally dispossessed by the lessees of the Government. He also submits that after purchase the writ petitioners paid taxes to the Dhaka Municipality Corporation and the bills of gas connection. He further submits that the Government by Memo dated 08.04.1984 (Annexure-F to the writ petition) admitted the vendor of original writ petitioner as owner of the land in question; but, the Court of Settlement without considering those documents most illegally dismissed the case by the impugned judgment and order dated 31.07.2000, which is liable to be set-aside and the disputed Plot No. 13/A/A, 1st Coloney, Mirpur, Dhaka is liable to be released from the 'ka' list of the abandoned building as published in the Bangladesh Gazettee Extra Ordinary, on 23.09.1986. Mr. Hossain further submits that, in view of petitioners' possession in the disputed property the same cannot be enlisted in "ka" schedule of the abandoned property. The learned advocate for the petitioners by citing two decisions reported in 53 DLR (AD) 55 and 54 DLR (AD) 100 and submits that notice as contemplated under sections 5 & 7 of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (hereinafter referred as the Ordinance) was not issued upon the petitioner and as such the inclusion of the disputed property in the list of abandoned property is without lawful authority. Mr. Hossain, the learned advocate also referred a decision reported in 45 DLR 416 and submits, it is a condition precedent that the physical possession of a building must have to be taken over by the Government before enlisting any property in 'ka' list of the abandoned property. On referring those decision and facts as

stated above the learned advocate for the petitioners prays for making the Rule absolute.

On the other hand, Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing for the respondent No. 1 takes us through the affidavit-in-opposition and annexures thereto and submits that the petitioners failed to prove before the Court of Settlement that the original allottee or his legal heirs if any, were present in Bangladesh on or after 28.02.1972 and also submits that the writ petitioners in order to grab the land in question created some false and forged documents and the Court of Settlement rightly disbelieve the documents filed by the writ petitioners. The learned Deputy Attorney General also placed before us the relevant article 2(1) and 6 of the President Order 16 of 1972 and section 5(2) of the Ordinance and also cited some decisions reported in 48 DLR (AD) 10, 3 BLC (AD) 42, 61 DLR (AD) 15, 49 DLR (AD) 161 and 59 DLR (AD) 165 and submits that in view of these decisions of our Apex Court, Government has no obligation to prove the property as abandoned property and it is only the writ petitioners who have to prove that the property is not abandoned property and also submits that, it is immaterial whether the abandoned property listed in 'Ka' or 'Kha' list of the abandoned property list as published and as such, he prays for discharging the Rule.

We have heard the learned advocate for the petitioners as well as the learned Deputy Attorney General for the respondent No. 1 and perused the writ petition, affidavit-in-opposition and annexures thereto.

It appears from the order sheet of this Court that by order dated 20.01.2009 this Court directed the respondent No. 2 to transmit the case

record of Case No. 125 of 1996 (ka-4) regarding the House No. 13/A/A of 1st Coloney, Mirpur, Dhaka and accordingly, the record has been transmitted to this Court.

We have carefully examined the record of the Court of Settlement, and found that the writ petitioners examined 2(two) witnesses in order to prove their case before the Court of Settlement, amongst them P.W. 1 is Mohammad Nazrul Islam, who is a witness of the sale deeds dated 25.05.1979 and P.W. 2 Mohammad Siraj-Ud- Dowla also a witness of the sale deeds dated 25.05.1979 and they were examined only in order to prove the execution of the registered sale deeds dated 25.05.1979 and also filed the affidavit dated 19.05.1979 and the succession certificate dated 14.04.1979 in order to prove that Md. Ehsanul Hoque was the only heir of Syed Abdus Sattar the original allottee along with some other papers.

The petitioners though stated in the writ petition that the original allottee had died on 25.03.1971 leaving behind his only nephew (sister's son) Md. Ehsanul Hoque as his heir and in order to prove the said fact filed two documents, one is an affidavit which was sworn before the Court of Magistrate, 1st Class, Dhaka on 19.05.1979 (annexure-B to the writ petition) and the other is a succession certificate dated 14.04.1979 (annexure-B1 to the writ petition). From those documents it appears that Md. Ehsanul Hoque on 19.05.1979 sworn an affidavit before the Court of Magistrate, 1st Class, Dhaka declaring himself as the sole heir of Syed Abdus Sattar and it appears from the succession certificate dated 14.04.1979, the same was obtained for recovering a loan of Tk. 925.00 only, while said Md. Ehsanul Hoque transferred the case land in question

by two registered sale deeds dated 25.05.1979. So, it appears to us that only for the purpose of creating sale deeds dated 25.05.1979, showing Md. Ehsanul Hoque as the heir of Syed Abdus Sattar, the succession certificate dated 14.04.1979 and affidavit dated 19.05.1979 were obtained. Moreover, the writ petitioners failed to produce any documentary or oral evidences before the Court of Settlement to prove the fact that the original owner Syed Abdus Sattar or his legal heir was present in Bangladesh and occupied, managed or supervised the disputed property when President's Order 16 of 1972 came into operation.

Now let us consider the decisions placed before us by the respective parties. The learned advocate for the petitioners relied upon the case of Bangladesh Vs. Amela Khatoon and others, reported in 53 DLR (AD) 55, wherein our Hon'ble Appellate Division held that,

“High Court Division further found that according to clause (b) of sub-section (1) of section 5 of the Abandoned Buildings (Supplementary Provisions) Ordinance 1985 an abandoned property in possession of a person can only be included in the “kha” list of abandoned buildings in respect of which notice for surrendering or taking possession has been issued. Though the learned Deputy Attorney General referred to notices dated 06.11.1976, 07.06.1977 and 06.03.1986 mentioned in the judgment of the Court of Settlement he could not satisfy us that the said notices were issued to surrender possession of the disputed property treating the same as abandoned property. On going through the judgment of the

Court of Settlement we find that those notices were issued on the respondent Nos. 1-6 to produce their vendor Bibi Homaira when they had applied for mutating their names after their purchase from Bibi Homaira. Thus it appears that the Government petitioner did neither treat the disputed property as abandoned property nor took any step to take over possession of the same till publication of Gazette notification in question. Since no notice as contemplated under section 5(1)(b) of the said Ordinance was issued to the respondent Nos. 1-6 or any other person inclusion of the disputed property in the “kha” list of the abandoned buildings is without lawful authority. In that view of the matter we do not find any merit in this petition to interfere with the impugned judgment.”

And in the case of Government of Bangladesh and others Vs. Bibi Marium and other, reported in 54 DLR (AD) 100 wherein their Lordships held that,

“It is now settled principle of law on interpretation of section 5(1)(b) of the Abandoned Buildings (supplementary provision) Ordinance, 1985 in the case of Bangladesh vs Amela Khatun and other 53 DLR (AD) 55 that since no notice as contemplated under section 5(1)(b) of the Ordinance was issued to the respondent or any other person inclusion of disputed property in the kha’ list of the abandoned building is without lawful authority. In the facts and circumstances of the

case as detailed above and found by the High Court Division and that the judgment of the Court of Settlement is coram non judice, the illegal inclusion of the building in the 'kha' list of the abandoned building and that no notice having been served to the petitioner or other predecessor, the said inclusion is without any lawful authority."

And in the case of Iqbal Ahmed Quraishi Vs. Bangladesh represented by the Secretary, Ministry of Works, Government of the People's Republic of Bangladesh, Dhaka, reported in 45 DLR 416, wherein a Division Bench of the High Court Division held that,

"Therefore, it is a condition precedent that the physical possession of building must have been taken over by the Government before it could be listed as an abandoned property under Clause (a) of sub-section (1) of section 5 of the Ordinance i.e. published in the official Gazette."

On the other hand, it appears from the decisions cited by the learned Deputy Attorney General in the case of Government of Bangladesh Vs. Md. Jalil and others, reported in 48 DLR (AD)10, that their Lordships held that,

"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."

And in the case of Hazerullah and another Vs. Chairman, 1st Court of settlement and another, reported in 3 BLC (AD) 42, their Lordships held that,

*“This contention will stand only when the claimant can prove that the disputed building was not an abandoned property. **In case before the Court of settlement, main question is, whether the disputed house answers the description of “abandoned property” as defined in article 2 (1) of Bangladesh Abandoned property (Control, management and Disposal) Order, 1972(PO No. 16 of 1972), briefly, “the Order”. Under clause (1) of Article 2 of the Order ‘abandoned Property, inter alia, 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.***

Section 5(2) of the Ordinance provides that a list of the buildings published under sub-section (1) thereof, shall be conclusive evidence that the buildings included therein are abandoned property and have vested in the Government as such.

.....

Before the Court of Settlement the petitioner could not produce any evidence that the said Abdur Rahim or his alleged heirs had been present in Bangladesh during after the war of liberation and that their whereabouts were known to the

*respondent Government or that the said Abdur Rahim had been occupying supervising and managing the disputed property as on 28-2-72. **The said court on consideration of the materials on record held that the original lessee Abdur Rahim and his heirs at the relevant time were not traceable in Bangladesh and that the appellants had unauthorisedly been occupying the property in question since 28-03-72. As such, it is immaterial, as far as the appellants are concerned whether the disputed property was published in the ‘Ka’ or ‘Kha’ list.***

(Bold, emphasis given)

And in the case of Golam Rabbani Vs. Chairman, Court of Settlement and others, reported in 61 DLR (AD) 15, their Lordships decided as under:

“In the case of Hazerullah vs Chairman, 1st Court of Settlement reported in 3 BLC (AD) 42 it was held that it is immaterial whether the disputed property was listed in the ‘ka’ or ‘kha’ list, it is the abandoned character of the property which is the main criteria for determining the whole matter.”

And in the case of Government of Bangladesh Vs. Ashraf Ali @ Ashraf Ali and another, reported in 49 DLR (AD) 161, wherein their Lordships held that,

“It has been held by this Division in various decisions that the enlistment of a building under section 5(1) of the Ordinance 54 of 1985 raises a presumption in law that the property is an

abandoned property under section 5(2) of the Ordinance. This presumption is, of course, a rebuttable presumption but respondent No. 1 failed to rebut this presumption. No rebuttable evidence could be adduced to show that original owner Yahiya was present in Bangladesh and he occupied, managed or supervised the disputed building when President's Order 16 of 1972 came into operation. Hence, the listing of the property as an abandoned property in the Supplementary Provisions Ordinance, 1985 was lawful as it was an abandoned property by operation of law."

And lastly in the case of Rowshan Ara Begum Vs. Secretary, Ministry of Works and Urban Development, Government of Bangladesh and others, reported in 59 DLR (AD) 165, wherein their Lordships 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 28.02.1972 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

there upon the claim of title made by the petitioner in the property in question is not legally sustainable”

On considering the facts and circumstances of the case we are of the view that the writ petitioners failed to prove that Syed Abdus Sattar or his legal heir ever occupied, managed or supervised in person the land in question on or after 28.02.1972. Only 2(two) witnesses were examined by the writ petitioners before the Court of Settlement to prove the execution of the alleged sale deeds of 1979 and no other oral or documentary evidences were produced before the Court of Settlement to prove the petitioner’s case. Moreover, the enlistment of the disputed property under the Ordinance raises a presumption in law that the property is an abandoned property under section 5(2) of the Ordinance. This presumption is, of course, a rebuttable presumption but the petitioners failed to rebut this presumption. No rebuttable evidence could be adduced to show that original owner Syed Abdus Sattar or his legal heir was present in Bangladesh and had occupied, managed or supervised the disputed building when President’s Order 16 of 1972 came into operation. Hence, the listing of the property as an abandoned property was lawful as it was an abandoned property by operation of law. Further, the petitioners having not been able to establish before the Court of Settlement that their vendor Syed Abdus Sattar was present in Bangladesh on or after 28.02.1972 and consequent thereupon the property having assumed the character of abandoned property, the listing of the property in question, even if without service of notice as per provision of Ordinance, is not material as the property because due to non-service of notice for listing the property in the

list of abandoned property would not change the fact that the property is an abandoned property and consequent, there upon the claim of title made by the petitioners in the property in question is not legally sustainable. 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 petitioners. It is immaterial whether the disputed property was listed in the 'ka' or 'kha' list, it is the abandoned character of the property which is the main criteria for determining the whole matter.

We as such, find that the writ petitioners failed to prove their case that their vendor Md. Ehsanul Hoque was the heir of the original allottee Syed Abdus Sattar and that Syed Abdus Sattar or his legal heir had occupied, managed or supervised the property in question on or after 28.02.1972 and the same was rightly listed as abandoned property. Therefore, the Court of Settlement rightly found that,

“প্রার্থী পক্ষের দাখিলী কাগজাদি এবং সরকার পক্ষের দাখিলী সরকারী নথি পর্যালোচনা করিলাম। নালিশী সম্পত্তি সরকার জনৈক মোহাজের (Refugee) আবদুস সাত্তারের অনুকূলে কিছু শর্ত সম্বলিত অরেজিস্ট্রিকৃত লিজ এগ্রিমেন্ট মূলে বিগত ২৪-৭-৫৩ ইং তারিখে বরাদ্দ প্রদান করেন, ইহা সর্বস্বীকৃত। প্রার্থীগনের দাবী হইল লীজ গ্রহীতা আবদুস সাত্তার নিঃসন্তান অবস্থায় বোনের ছেলেকে একমাত্র ওয়ারিশ রাখিয়া মারা গেলে এহসানুল হক লীজ গ্রহীতার উত্তরাধিকার সূত্রে মালিক হিসাবে নালিশী সম্পত্তি বিগত ২৫-২-৭৯ ইং তারিখে প্রার্থীগনের অনুকূলে বিক্রয় করে এবং খরিদা সূত্রে প্রার্থীগন বর্তমানে নালিশী সম্পত্তি ভোগ দখল করিতেছে। সরকার পক্ষ প্রার্থী পক্ষের এই দাবী অস্বীকার করিয়া উল্লেখ করেন যে, লীজ গ্রহীতা স্বাধীনতা যুদ্ধের সময়ে স্বপরিবারে এদেশ ত্যাগ করে এবং স্বাধীনতার পর হইতে এ যাবত তাহার অবস্থান অজ্ঞাত নিঃসন্তান অবস্থায় এদেশে তাহার মৃত্যু এবং এহসানুল হক

তাহার বোনের ছেলে ইহা প্রার্থীপক্ষের কাল্পনিক গল্পই বটে। তৎমর্মে কোন প্রকার স্বীকৃত কাগজাদি প্রার্থী পক্ষ দাখিল করে নাই। প্রার্থী পক্ষের ১ নং স্বাক্ষরী জনাব নুরুল ইসলাম জেরাতে বলেন তিনি প্রার্থীগণের খরিদা দলিলে স্বাক্ষরী আছেন। কিন্তু এই স্বাক্ষরী দলিলে কি লিখা আছে বা কত টাকা লেনদেন হইয়াছে তৎমর্মে কিছুই বলিতে পারেন না। এই স্বাক্ষরী ১৯৭৬ সাল হইতে ১৯৭৯ ইং সাল পর্যন্ত এই বাড়িতে এহসানুল হকের ভাড়াটিয়া ছিল বলিলেও এহসানুল হক কি সূত্রে বাড়ির মালিক ছিল কিছুই বলিতে পারেন না। এই স্বাক্ষরী আরও স্বীকার করেন যে, ১৯৭৬ সালের পূর্বে নালিশী সম্পত্তি পরিত্যক্ত অবস্থায় ছিল। ২ নং স্বাক্ষরী জনাব সিরাজউদ্দৌলা জেরাতে এহসানুল হক কিভাবে নালিশী সম্পত্তির মালিক হইয়াছেন সেই সম্পর্কে কিছুই বলিতে পারেন নাই। এই ক্ষেত্রে নালিশী সম্পত্তির লীজ গ্রহীতার একমাত্র ওয়ারিশ সূত্রে এহসানুল হক নালিশী সম্পত্তির মালিক বা দখলকার ছিলেন ইহা প্রমান করিতে পারেন নাই। মূল মালিকের মৃত্যু ও তাহার ওয়ারিশ সম্পর্কে স্বীকৃত প্রমান প্রার্থীপক্ষ যেহেতু দাখিল করিতে ব্যর্থ হইয়াছেন, সেইহেতু প্রার্থীপক্ষ তাহাদের মোকদ্দমার প্রার্থীত প্রতিকার পাইতে পারেন না। সেইহেতু তাহাদের মোকদ্দমা খারিজযোগ্য।’

Accordingly, we do not find substance in the arguments of the learned advocate for the petitioners and find substance in the arguments of the learned Deputy Attorney General for the respondent No. 1.

In the result, the Rule is discharged without any order as to costs.

Send down the record of the Court of Settlement.

Communicate the judgment to respondent No. 1 at once.

Zinat Ara, J :

I agree.

Murshedul Hasan
Bench Officer.