

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

Writ Petition No. 4031 of 2010.

In the matter of :

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

And

In the matter of:

Jodge Miah and others

..... petitioners.

-Versus –

Bangladesh and others

..... respondents

Mr. Zakir Hossain

.....for the petitioner.

Mr. Md. Salauddin Talukder

..... for respondent Nos.7-9.

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Md. Khasruzzaman

Judgment on 09.11.2017.

Md. Khasruzzaman, J:

The Rule under adjudication was issued on 12.07.2010 in the
following terms:

*“Let a Rule Nisi be issued calling upon the respondents to
show cause as to why the order dated 18.11.2009 passed by
Appeal Officer, Zonal Settlement Office, Comilla, in Appeal No.
8667 of 2008 canceling Khatian No. 731 and affirming the
Khatian No. 627 by setting aside the order dated 14.05.2009
passed by Appeal Officer allowing the prayer of the petitioner
which was passed against the order dated 24.11.2008 rejecting
the appeal of the petitioner under section 31 of the East Bengal
Tenancy Act, 1955 should not be declared to have been passed*

without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Facts as stated in the petition, briefly, are as follows:

The property in dispute measuring 44 decimals situated at Mouza: Satbarga, Police Station: Sadar, District: Brahmanbaria, under C.S. Khatian No. 54 originally belonged to one Tamizuddin and Ramizuddin whose names were duly recorded in the C.S. Khatian; they died leaving behind their three brothers namely Karamuddin, Safeytullah and Tajimuddin who became the owners of the said land including other land. Karamuddin died leaving behind his three sons namely Ismail, Israil and Ibrahim; Safayetallah died leaving behind his only son Motiur Rahman; Tajimzuddin died leaving behind his only son Nur Miah. However, R.S. Khatian No.60 was published in the names of the heirs of Karamuddin, Safayetullah and Tajimuddin. Subsequently, Ismail died leaving behind his only son Kawsar; Israil died leaving behind his 5 (five) sons and 3 (three) daughters; Ibrahim died leaving behind one son and three daughters and that all of them have been enjoying the property by constructing houses and planting different kinds of trees.

Respondent No.9, one Shamsul Haque, managed to procure a field *porcha* in his name for which the petitioners filed Appeal Case No. 8667 of 2007 under Rule 31 of the Tenancy Rules, 1955 before the concerned Settlement Officer. The respondent No.9 contested the said

appeal by filing written statement. Upon hearing the respective contending parties, the Appeal Officer dismissed the appeal vide order dated 19.11.2008 holding that the facts as to the ownership of the appellants were not proved from C.S. record by way of inheritance. Being aggrieved, the petitioners filed an application before the Zonal Settlement Officer with a prayer for re-hearing of the appeal. The Zonal Settlement Officer, having found substance thereto, ordered for re-hearing and sent the matter to the Assistant Settlement Officer, Hazigonj to that effect. After hearing both the parties, the Assistant Settlement Officer, Hazigonj allowed the claim of the petitioners vide order dated 14.05.2009 and ordered for correction of record in the name of the petitioners. Accordingly, Khatian No. 731, corresponding to Plot No. 938 was prepared in their names.

After passing of the order in Appeal Case No. 8667 of 2007 dated 14.5.2009, the alleged vendee of respondent No. 9 instituted Title Suit No. 24 of 2009 before the learned Joint District Judge, 1st Court, Brahmanbaria impleading the petitioners as defendants and prayed for declaration of title in the land in question. During pendency of Title Suit No. 24 of 2009, one Sukanto Roy, on behalf of respondent No. 9, filed an application under Rule 44 of the Tenancy Rules before the Director (Land Record) Directorate of Record of Land and Survey, Dhaka who sent it to the Zonal Settlement Officer, Comilla and thereafter it was placed before the Assistant Settlement Officer, Chandina for hearing. The Assistant Settlement Officer, Chandina

fixed on 18.11.2009 for re-hearing of the appeal. On the said date, the petitioners duly appeared and filed application for adjournment of hearing, but the Appeal Officer rejected the said prayer and fixed 1:30 p.m. for hearing. At 1:30 p.m., he took up the matter for *ex-parte* hearing and passed the impugned order dated 18.11.2009 cancelling Khatian No. 731, thereby affirming the Khatian No.627.

Being aggrieved by and dissatisfied with the said order, the petitioners filed the instant writ petition before this Court and obtained the present Rule Nisi.

Respondent Nos. 7-9 contested the Rule by filing a joint affidavit-in-opposition contending, *inter-alia*, that the petitioners have no right to file the instant writ petition challenging the order passed by the Assistant Settlement Officer, Chandina which is a special forum. In this regard, it has also been stated that the procedure, as embodied in the Tenancy Rules, 1955 provides for challenging the order of the Settlement Officer is an alternative forum which has not been exhausted by the petitioners and as such, the present writ petition is not maintainable. They further stated that Tamizuddin and Ramizudding were admittedly the owners of C.S. Khatian No. 54 as their names were recorded in the respective Khatian. Moreover, Ramizuddin had no issue and his interest devolved upon his brother Tamizuddin; on his death, the entire property devolved upon his only daughter Karam Chand Nesa; said Karam Chand Nesa, while possessing the same, sold out the same to Hazi Altaf Ali by a registered Kabala dated 17.7.1952,

who subsequently sold it to respondent no. 9, Shamsul Haque on 21.11.1974 with possession thereof. Respondent No. 9 mutated his name by opening a mutation Khatian and also paid rents. Thereafter Shamsul Haque sold it to respondent nos.7 and 8 who are enjoying possession of the same by paying rents and upon mutating their names in the mutation khatian.

It has also been stated that the petitioners have no right, title and interest and possession for the last 60 years and that the opening of the Khatian by the Assistant Settlement Officer, Hazigonj is illegal and unlawful; that the Assistant Settlement Officer, Chandina has exercised his jurisdiction judicially and properly by re-hearing the appeal and such order cannot be challenged or called in question under the writ jurisdiction., Thus the Rule is liable to be discharged.

Mr. Md. Zakir Hossain, the learned Advocate appearing for the petitioner, submitted that amongst the C.S. recorded owners Tamizuddin and Ramizuddin died without any issue so there was no existence of any daughter named Karam Chand Nessa. As such, Shamsul Haque did not acquire any interest through such fictitious person. He further submitted that respondent No.9 is not in possession of the land in question and in Title Suit No. 24 of 2009, he categorically admitted this fact stating, *inter-alia*, that the petitioners had dispossessed him and the petitioners are in possession from their predecessor for a long time.

Mr. Hossain further submitted that the application for re-hearing of the appeal under Rule 44 or 42A of the Tenancy Rules, 1955 was not maintainable and the Appeal Officer passed the impugned judgment and order cancelling the khatian of the petitioners in excess of his jurisdiction and therefore, the same should be declared to have been passed without lawful authority and to be of no legal effect.

Conversely, Mr. Md. Shalauddin Talukder, the learned Advocate appearing for respondent Nos.7-9, submitted that there is no bar for filing an application under Rule 44 or 42A of the Tenancy Rules, 1955 wherein fraud has been committed in the respective record-of-rights and the Settlement Officer has the power to correct it before its final publication.

We have heard the learned Advocates of both sides and have perused the instant writ petition and the affidavit-in-opposition along with the annexures annexed thereto.

It appears from Annexure-II of the supplementary affidavit filed on behalf of respondent Nos. 7-9 that an application was filed on behalf of respondent No.9 before the Director (Land Record), Directorate of Record of Land and Survey, Dhaka for correction of record under Rule 44 of the Tenancy Rules, 1955 on the ground of fraudulent entry in the record. If the applicant could make out a case that fraud was committed in the record-of-rights, then the Revenue Officer/Settlement Officer, before final publication, can correct the

entry after giving the parties concerned a hearing under Rule 42A of the Tenancy Rules, 1955.

One Sukanto Roy, on behalf of respondent No. 9, filed an application before the Director (Land record), Directorate of Land Records and Surveys, Dhaka is quoted below:

“বরাবর,
পরিচালক (ভূমি রেকর্ড)
ভূমি রেকর্ড ও জরিপ অধিদপ্তর,
তেজগাঁও, ঢাকা-১২০৮।

বিষয়ঃ- তঞ্চকতার মাধ্যমে প্রদত্ত পুনঃশুনানীর রায় বাতিল এবং দায়ী ব্যক্তিদের বি।দ্বৈ ব্যবস্থা গ্রহন প্রসঙ্গে।

মহাত্মন,

যথাযথ সম্মান পূর্বক বিনীত নিবেদন এই যে, আমরা কুমিল্লা জোনাল সেটেলমেন্ট অফিসের অধীন ব্রাহ্মনবাড়ীয়া জেলার সদর থানার সাতবর্গ মৌজার অধিবাসী। আমার নামে বিগত ০৮-০৩-৮৯ সালে মাঠ পর্যায়ে ৪৪.০০ শতাংশ জমি রেকর্ড হয়। তসদিক, আপত্তি ও আপীল স্তরে বহাল থাকে। কিন্তু দীর্ঘ দিন পর ২০০৯ সালে পুনঃশুনানীর মাধ্যমে কোনরূপ সরেজমিন তদন্ত না করে শুধুমাত্র মিথ্যা স্বাক্ষী দ্বারা তঞ্চকতা করে সহকারী সেটেলমেন্ট অফিসার জনাব মোঃ শাহজাহান আমাদের নামে রেকর্ডকৃত জমি কর্তন করেন। যা সম্পূর্ণ বে-আইনী ও ভিত্তিহীন। মামলায় উপস্থিত স্বাক্ষীগণকে সাতবর্গের অধিবাসী হিসেবে বলা হলেও আসলে তারা সেখানকার অধিবাসী নয়। এ ছাড়া আমরা সরেজমিন তদন্তের দাবী জানালেও তিনি তা প্রত্যাখান করেন। ভূয়া স্বাক্ষীর প্রেক্ষিতে তঞ্চকতার মাধ্যমে প্রদত্ত রায় বাতিল এবং দায়ী ব্যক্তিদের বিরুদ্ধে ব্যবস্থা গ্রহন করা না হলে আমরা ক্ষতিগ্রস্ত হবো। উক্ত জায়গায় আমরা দীর্ঘদিন যাবৎ ঘর-বাড়ী তৈরী করে বসবাস করছি এবং ভাড়া দিয়ে আসছি। নিম্নে ভূয়া স্বাক্ষীগণের ভোটার লিষ্ট এবং আমাদের ভাড়াটিয়াদের সহিত সম্পাদিত চুক্তিপত্র উপস্থাপন করলাম।

এমতাবস্থায়, সূষ্ঠ রেকর্ড প্রণয়ন এবং ন্যায় বিচার প্রতিষ্ঠার লক্ষ্যে তঞ্চকতা পূর্বক/রায় বাতিল এবং দায়ী সহকারী সেটেলমেন্ট অফিসার হাজীগঞ্জ থানা জনাব শাহজাহান এর বিরুদ্ধে ব্যবস্থা গ্রহণের জন্য আপনার নিকট আবেদন জানাচ্ছি।

বিনীত নিবেদক,
সামসুল হক এর পক্ষে
স্বাক্ষর সুকান্ত রায় (ঐ তা)”

In the present case, the petitioners, as appellants, filed Appeal Case No.8667 of 2007 under Rule 31 of the Tenancy Rules, 1955, which was dismissed by the Appeal Officer on 19.11.2008. Subsequently, they filed an application (which has not been annexed) before the Zonal Settlement Officer, Comilla for re-hearing of the appeal. Said application was allowed on 03.03.2009 by the Zonal Settlement Officer, Comilla and the appeal was sent to the Assistant Settlement Officer, Hazigonj for re-hearing. After hearing the respective contending parties, the said appeal was allowed on 14.05.2009 by the Assistant Settlement Officer, Hazigonj setting aside the order dated 19.11.2008 passed by the Appeal Officer. Thereafter, on an application under Rule 44 of the Tenancy Rules, 1955, filed by one Sukanto Roy on behalf of respondent No. 9, the impugned order dated 18.11.2009 was passed, setting aside the order dated 14.5.2009 passed in Appeal Case No. 8667 of 2007.

The land under adjudication is the subject matter in both the title suit pending before the civil court and also in the instant writ petition but some of the parties in both title suit and in writ petition are different which has made the writ petition in hand a segregated one and as such there is no bar to invoke writ jurisdiction.

We have considered the case of *Zahirul Islam and others Vs. Government of Bangladesh and others*, reported in *65 DLR 168* wherein a Division Bench of this Court observed *inter-alia*, that no review or other application lies when the appeal has been disposed of on contest under Rule 31 of the Tenancy Rules and the Settlement Officer has got no jurisdiction to reopen the same. He is duty bound to send it for final publication under Rule 32 of the Rules. Once an order has been passed under Rule 31 of the Rules, Rule 42 does not allow the Settlement Officer to sit and act as an appellate authority.

We have also taken into consideration the case of *Romisa Khanam Vs. Secretary, Ministry of Land, Government of People's Republic of Bangladesh and others*, reported in *61 DLR 18* wherein it has been observed that the Settlement Officer is empowered under Rule 42A, upon an application or receipt of an official report, to correct any entry that has been procured by fraud in the record-of-rights before final publication and, after consulting the relevant records and making such other enquiries as he deems necessary, to direct excision of the fraudulent entry and his act in doing so shall not be open to an appeal. However, none of such powers under Rule 42 or 42A of the Tenancy Rules, 1955 appears to empower such Settlement Officer to sit and/or act as an appellate authority over an appellate order passed under Rule 31 and set aside the appellate order or direct

the Appellate Officer to hear an appeal afresh in respect of a particular holding.

We are in agreement with the observations of the said two decisions.

Accordingly, we are of the view that where fraudulent entry has been detected to have been procured in the record-of-rights, Rule 42A of the Tenancy Rules, 1955 comes into play, as being an independent Rule. Where the question relates to fraud, it has no nexus with Rule 30 or Rule 31 of the Tenancy Rules, 1955. Rule 42A is attracted where an entry has been procured by fraud in the record-of-rights, but before final publication under Rule 32 of the Tenancy Rules, 1955. In such event, after taking necessary steps, the Settlement Officer may direct excision of the fraudulent entry and such act shall not be open to appeal. In other words, where fraud been detected, exhaustion of Rules 30 and 31 shall not act as a bar in invoking the provision of Rule 42A of the Tenancy Rules.

Facts of the present case and facts of the cited decisions are quite distinguishable because on an application filed by a party or on an official report for correction of entry which has been procured by practising fraud in the record-of-rights, before final publication, the Revenue Officer/Settlement Officer, after hearing the parties, shall correct the entry. It is not necessary to exhaust Rules 30 and 31 of the

Tenancy Rules, 1955 before invoking the Rule 42A of the Tenancy Rules, 1955 as the same is not an appellate/revisional authority.

The petitioners, as appellants, filed Appeal No. 8667 of 2007 before the Appeal Officer under Rule 31 of the Tenancy Rules and the appeal was dismissed on 19.11.2008 on contest. Thereafter, the petitioners filed an application under Rule 42A of the Tenancy Rules before the Zonal Settlement Officer, which was allowed and the matter was sent to the Assistant Settlement Officer, Hazigong for rehearing of the appeal and upon rehearing, the appeal was allowed on 14.05.2009. However, the said decision has not been challenged by the respondents before the High Court Division.

On the other hand, One Sukanto Roy on behalf of respondent No. 9, filed an application under Rule 44 of the Tenancy Rules, 1955 before the Director (Land Record), Directorate of Record of Land and Survey, Dhaka, who sent it to the Zonal Settlement Officer, Comilla and the same was set aside by the order dated 14.05.2009 and the record was sent to the Assistant Settlement Officer, Chandina for rehearing of the appeal. Upon rehearing on 18.11.2009, the appeal was allowed by the Appeal Office which has been challenged before this Court. As per the provisions of law, the petitioners have to wait for final publication under Rule 32 of the Tenancy Rules and then they can institute suit under section 145A of the State Acquisition and Tenancy Act, 1950 before the Land Survey Tribunal to ventilate their grievances. Since at the time of issuance of the Rule, no Tribunal was

constituted, the petitioners have no other alternative forum, but to invoke the provision of Article 102 of the Constitution.

In the present case, One Sukanto Roy on behalf of respondent No. 9, Shamsul Haque, filed an application before the Director (Land Record) Directorate of Record of Land and Survey, Dhaka alleging fraudulent entry in the record-of-rights after exhausting Rule 31 of the Tenancy Rules. However, mere filing of an application for correction of fraudulent entry in the record is not sufficient, after invoking Rules 30 and 31 of the Tenancy Rules, 1995 between the same contesting parties in respect of the same land.

Considering the facts of the case as discussed above, we find merit in the Rule.

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

The order dated 18.11.2009, passed by Appeal Officer, Zonal Settlement Office, Comilla, in Appeal No. 8667 of 2008 is hereby set aside.

The order of stay, granted at the time of issuance of the Rule, is hereby re-called and vacated.

Communicate the order.

Zubayer Rahman Chowdhury, J:

I agree.