

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

Present

Madam Justice Kashefa Hussain

And

Madam Justice Kazi Zinat Hoque

Writ Petition No. 1820 of 2016

In the matter of:

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

-And-

In the matter of:

Jubair Ahmmed B.Sc

..... Petitioner.

Vs.

Government of the People's
Republic of Bangladesh and
others.

.....Respondents.

Mr. Sherder Abul Hossain, Advocate
with Mr. Md. Ashraful Islam, Advocate
with Mr. Tanjil Mahmud, Advocate

.....for the petitioner

Mr. Noor Us Sadik Chowdhury, D.A.G
with Mr. Prahlad Debnath A.A.G
with Mr. Md. Hafizur Rahman A.A.G
with Ms. Farida Parvin Flora, A.A.G

... for the respondents Nos. 1-7

Mr. Md. Musharraf Hossain Mozumder, Advocate

.... for the respondent No. 9

Heard on: 01.08.2022, 08.08.2022, 25.08.2022

and judgment on: 28.08.2022.

Kashefa Hussain, J:

Supplementary affidavit do form part of the main petition.

Rule nisi was issued calling upon the respondents to show
cause as to why the impugned latter vide Memo No. Shakha-9/IM-

26/2008/38 dated 21.01.2016 issued by the respondent No. 3 denied to permit the petitioner to transfer the Plot No. 50 , Block-A, Measuring an area of 5 Khathas of Mouza Jhilingjha Upazila-Cox's Bazar, Cox's Bazar Sea Beach Area (Annexure-H) should not be declared to have been made without any lawful authority and is of no legal effect and as to why the respondents Nos. 1-7 should not be directed to permit the petitioner to transfer the plot No. 50, Block-A, Measuring an area of 5 Khathas of Mouza Jhilingjha Upazila-Cox's Bazar, Cox's Bazar Sea Beach Area and/or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioner Jubair Ahammed B.Sc, son of late Moulavi Mir Ahamed and late Zobaida Khanam, of Village- West Pukuria, Badar Khali, Post Office- Badarkhali, Police Station- Chakaria, District-Cox's Bazar is the citizen of Bangladesh. The respondent No. 1 is the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Shahbag, Dhaka-1000, the respondent No. 2 is the Additional Secretary (Development-2) Ministry of Housing and Public Works, Bangladesh Secretariat, Shahbag, Dhaka-1000, the respondent No. 3 is the Joint Secretary (Development-2) Ministry of Housing and Public Works, Bangladesh Secretariat, Shahbag, Dhaka-1000, the respondent No. 4 is the Chief Engineer, Directorate of the Housing and Public Works, Purta Bhaban, Segun Bagicha, Dhaka, the respondent No. 5 is the Senior Assistant Secretary (Development-2) Ministry of Housing and Public Works, Bangladesh Secretariat, Shahbag, Dhaka-1000, the respondent No. 6 is the Executive

Engineer, Public Works Division, Cox's Bazar, the respondent No. 7 is the Sub-Divisional Engineer, Public Works Sub-Division-1, Cox's Bazar, the respondent No. 8, Md. Mamun Islam, son of late Al-haj Zahirul Islam, of Tekpara, Burmese School Road, Police Station and District-Cox's Bazar is the citizen of Bangladesh and the respondent No. 9, Md. Moinuddin son of late Abdur Rashid of the village West Para Shaplapur, Post Office- Shaplapur-4700, P.S- Moheshkhali, District-Cox's Bazar is the citizen of Bangladesh.

The petitioners' case inter alia is that Member Secretary and Superintendent Engineer of the Allotment Committee Chittagong Public Works Circle =1, allotted the plot No. 50, Block-A, Measuring an area of 5 Kathas, of Mouza- Jhlongjha, Upazila- Cox's Bazar, Cox's Bazar Sea Beach Area to the petitioner vide Memo No. 1109 dated 08.06.1979. That subsequently the respondent No. 6 Executive Engineer, Public Works Division, Cox's Bazar executed and registered Lease Deed No. 7524 dated 20.01.1980 for 99 years in favour of the petitioner Jubaur Ahammed B.Sc and handed over possession to him. That the petitioner appointed Mr. Zahibur Islam, son of late Abdur Rahim Sikder, of Burmese Primary School road, Cox's Bazar as power of Attorney vide registered deed No. 472 dated 22.02.1995 for developing the land but the predecessor of the respondent No. 8 failed to develop the schedule land. That the appointed power of attorney holder had failed to develop the schedule land and failed to construct a six storied residential building in the last 12 years and in the meantime the lessee Mr. Zahirul Islam died in

2006 and thereafter his successors could not reach in a decision with the petitioner to settle the matter. Though the petitioner tried to sit with them in Cox's Bazar Bar Association in several times but in vain. That the petitioner finding no other way cancelled the Irrevocable Power of Attorney on 11.09.2009 vide registered deed No. 25.12.2007. That the petitioner filed Mutation Case No. 1205 of 2006 and mutated his name in the B.S khatian No. 4706 and the petitioner has been paying rents to the concerned authority regularly. That the petitioner filed an application to the respondents for permission to sell the allotted plot, against the said application to the Ministry of Housing and Public Works and the ministry issued a letter to the Executive Engineer, Cox's Bazar vide Memo No. sha-9/1-M-26/2008/302 dated 07.05.2008 to send elaborate report regarding the ownership of the land. That the respondent No. 6 enquired the matter and submitted his report on 21.08.2008 to the respondent No. 4 Chief Engineer, Directorate of the Housing and Public Works, Purta Bhaban, Segun Bagicha, Dhaka vide Memo. 341/3(2) dated 21.08.2008.

That on 14.01.2015 the petitioner filed an application to the respondent No.2 Additional Secretary (Development 2) praying for permission to sell the scheduled property but the respondents did not pay any heed against the said application. That thereafter the petitioner filed another application for sale of the schedule property on 06.01.2016 to the respondent No.3 Joint Secretary but the respondents did not pay any heed. That on 20.01.2016 the petitioner sent a Notice

Demanding Justice through registered post with acknowledgement document and by special messenger to the respondents No.1-3 and prayed that the respondents permit the petitioner to sell the schedule property. That the respondent No. 3 issued a letter vide memo No. Shakha-9/1M-26/2008/38 dated 21.01.2016 to the petitioner denying to permit to transfer the schedule land with a malafide and arbitrary intention. That the said letter is impugned herein. Hence the writ petition.

Learned Advocate Mr. Mr. Sherder Abul Hossain, Advocate with Mr. Md. Ashraful Islam, Advocate with Mr. Tanjil Mahmud, Advocate appeared for the petitioner while learned D.A.G Mr. Noor Us Sadik Chowdhury along with Mr. Prahlad Debnath A.A.G along with Mr. Md. Hafizur Rahman, A.A.G along with Ms. Farida Parvin Flora, A.A.G appeared for the respondent Nos. 1-7 and learned Advocate Mr. Md. Musharraf Hossain Mozumder appeared for the respondent No.9 .

Learned Advocate for the petitioner submits that the final refusal in not allowing him to transfer the property vide memo no. Shakha -9/1 M -26/2008/38, dated 21.01.2016 which is Annexure –H issued by the respondent No. 3 is without lawful authority and not sustainable. He agitates that the respondent No. 3 by his order dated 21.01.2016 refusing to allow the petitioner to transfer the property is arbitrary and is a slip shod order. He draws attention to Annexurer H and submits that the respondent No. 3 did not anywhere mention in his order their reason for not allowing the petitioner to transfer his

property. He contends that admittedly the petitioner is still a lessee having being allotted the land in 1980 and has been continuing as a lawful lessee since over a period of 40 years. Upon a query from the bench regarding the respondent's contention as to some pending suits between the instant petitioner and some other individuals (persons), the learned Advocate for the petitioner agitated that whatever suit/case may be pending between the petitioner and some other individual/person do not concern the respondent nos. 1-7 at all. He argues that such pending suit involve issues which are disputed matter of fact to be decided in the concerned civil court. He agitates that so far the respondents are concerned admittedly the petitioner still a lessee and the land is duly mutated in his name upon payment of rent, taxes, D.C.R etc and which is clear from Annexure E of the writ petition. He draws attention to Annexure E which is an enquiry conducted by the respondents. He contends that nowhere in the enquiry report is there any negative indication or remark on any malafide nor any latches on the part of the petitioner. He continues that from the enquiry report it is clear that the property pursuant to allotment was duly mutated in the petitioners name followed by payment of rent, taxes, D.C.R etc in the name of petitioner who is the lawful and admitted lessee.

Upon another query from this bench regarding the respondent's contention that clauses 19 and 17 of the Lease Deed dated 27.12.1980 was not complied with, he argues that nowhere in the enquiry report nor by way of any other evidences could it shown be that clauses 19 and 17 was not complied with.

Regarding the issue of power of attorney granted by the petitioner to some other person subsequent to allotment, the learned Advocate for the petitioner strenuously argued that Power of Attorney is a legal right and which does not require any permission from the respondents. He submits that subsequent to any allotment of property power of attorney can be lawfully granted to any person for sake of convenience whatsoever for purpose of construction of building or any other reason. He reiterates that since after 40 years of the original allotment admittedly the petitioner is still a lawful lessee therefore the respondents have no legal right in not allowing him to transfer the property moreover without assigning any valid reason. He further submits that the allotment has not been cancelled and which is contemplated in clause 22 of the lease deed in the event of any default by the petitioner. He continues that therefore it is evident that the petitioner pursuant to the allotment by granting another person power by way of power of attorney to construct building on his behalf whatsoever, however did not deviate or otherwise depart from the terms of the deed. He submits that since the allotment has not been terminated therefore it is to be presumed that clauses 19 and 20 and also 22 of the lease deed was complied with. He argued that therefore it is the lawful right of the petitioner to obtain permission from the Respondents. He agitates that the respondent no. 3 without assigning any reason by way of slip shod order arbitrarily and whimsically refused the petitioner. He concludes his submission upon assertion that the Rule bears merit ought to be made absolute for ends of justice.

On the other hand learned A.A.G Mr. Prahlad Devnath appearing for the respondent No. 1-7 by way of filing affidavit in opposition opposes the Rule. From the affidavit in opposition he however mainly submits on some factual matters pertaining to some suits pending between the petitioner and some other individuals/ persons. He submits that since some suits are pending between the petitioner and some others therefore pending the suit the respondents are not in a position to transfer the land. He further submits that the petitioners did not comply with some relevant clauses of the lease deed which stipulate a time of 2(two) years from the date of allotment to construct on the leased land and therefore the petitioner may not be allowed to lawfully transfer the property. He further submits that the petitioner did not act lawfully since he granted power of attorney to some other person after allotment of the property and further there are some pending suits between the petitioner and some other persons in the lower court. He made some other factual submissions regarding the reason of the respondents refusal not to allow the petitioner to transfer the land. Upon a query from this bench as to whether the respondents still acknowledge the petitioner as their lessee? the learned Assistant Attorney General however concedes and admits that the petitioner is still a lessee of the government(Respondents). He concludes his submission upon assertion that however the Rule bears no merits ought to be discharged for ends of justice.

The learned Advocate for the respondent No. 9 who is the purchaser of the property from the petitioner substantively support the

contention of the learned Advocate for the Respondents and concludes his submission upon assertion that the Rule bears no merit and ought to be made Absolute for ends of justice.

We have heard the learned Advocates for all sides, perused the application and materials on records. It is an admitted fact by both the parties that whatever the reason of refusal to transfer may be however the petitioner is still a lessee of the government since 1980.

For purpose of proper disposal of the Rule we have examined the lease deed which has been annexed as Annexure-A and which is dated 20.10.1980. For our purpose we have examined Clauses 3, 19, 20 and 22 of the lease deed. Clauses 3, 19, 20 and 22 of the lease deed reproduced hereunder:

“(3) That the constructions to be made on the demised property shall not cover more than two-thirds of the demised property and within two years from the date of commencement of the lease or within such further time as the Lessor may allow in his discretion, the tenant shall complete the building on the demised property of a house with all necessary outhouses, boundary marks , drains and appurtenance for the purpose of a residence including a septic tank of a pattern approved by the Chief Engineer, Public Works Department.”

“(19) That the tenant shall not sell, charge, mortgage, exchange, gift away otherwise assign, sublet, encumber or in any way part with or dispose of the demise property or any part

thereof before the construction of the buildings, outhouses and appurtenances hereby covenanted to be erected. ”

“(20) That subject to the provision of clause 19, the tenant shall be at liberty to transfer or sublet subject to the conditions of these presents the whole of the demised property subject to the obligation that the transfer shall be registered in the office of such authority as may be appointed by the lessor, and unless this is done the lessor will not be bound to recognise or accept any person as tenant of the demised property in place of the transferor.”

Clause 3 of the lease deed contemplate that the property pursuant to being allotted to the lessee the lessee must construct on at least 2/3rd within a period of 2(two) years. Clause 19 and 20 of the lease deed also consist of similar provision. Clause 19 of the lease deed contemplate that in the absence of constructing house in the property the petitioner shall not have any right to transfer the property. Clause 20 of the lease deed however contemplate that subject to construction by way of building etc. in the land the lessee (tenant) shall be at liberty to transfer or sublet the property in whole or in part thereof whatsoever and in the case of transfer, the property shall be duly registered. It also contemplates that in the absence of registration the lessor shall not be bound to acknowledge the new transferee or new lessee whatsoever.

We have particularly perused clause 22 of the lease deed which contemplates that in case of failure to construct building within the stipulated time of 2(two) years, if any lessee fails to perform his part within that time the respondents shall be at liberty to terminate the lease and following such termination shall proceed accordingly with the relevant laws.

Now as mentioned above in this case the petitioner admittedly is still a lessee and which is conceded and admitted by the respondent government. In our considered opinion since the petitioner is admittedly still a lessee since 1980 and since his allotment has not yet been cancelled therefore it may be presumed and concluded that the petitioner did not deviate from the prescribed clause. We may safely presume that the petitioner followed the conditions in clause Nos. 3, 4, 19, 20 and other relevant clauses of the lease deed. It is only reasonable and logical to hold that if the petitioner was not in compliance with the conditions and terms of the lease deed, the lease deed would have been terminated by dint of clause 4 of the lease deed. But however the petitioner in this case is till date a lawful and legal lessee as admitted by the respondents.

Truly enough permission is required in accordance with the lease deed and under the other relevant laws. Before transferring any property the lessee is required to obtain permission from the concerned authority. However it must be borne in mind that refusing to allow transfer a property cannot be done arbitrarily and particularly

in this case the petitioner has been an allottee since 1980 and a lawful lessee. While his refusing to be allowed permission to transfer his property the respondents must assign a cogent reason. In this case it is clear by way of Annexure- H dated 21.01.2016 that the respondents did not assign any reason. The order dated 21.01.2016 which is annexure- H denying the petitioner to allow him to transfer is a slipshod order with no explanation at all. Further we have examined the enquiry report (Annexure E). Upon careful examination of the findings of the enquiry report dated 21.08.2008 we do not find any negative comment against the present petitioner. It appears that the enquiry report expressly stated that pursuant to the allotment the lessee (petitioner here) have been paying taxes, DCR etc.

As to the power of Attorney being granted to some other person it is common knowledge that a power of attorney is a common factor and is often granted by the owner to some other person to construct/ sell or otherwise supervise the property for sake of convenience. We do not find anywhere anything in any other law which may indicate that permission is required from the respondents/authorities to grant power of attorney. Apparently the enquiry report found that there is a construction building also thereupon in the demised land. Therefore it may be safely concluded that the petitioner complied with the conditions/terms of the lease deed. Since the lease is still continuing and has not been cancelled

therefore it is evident that the petitioners complied with the rules and conditions.

The learned A.A.G on behalf of the respondents agitated that there are some pending suits between the petitioner and some other person and for that reason transfer of the property to any other person is not possible.

It is a settled principle of law that property may be transferred by any person/lessee/owner whatsoever to some other person even pending a suit. However it is also a settled principle of law that if there are any pending cases involved in that event the purchaser shall purchase or otherwise obtain the property from the transferor with all its rights and liabilities attached to such property whatsoever. Therefore the transferor may purchase the property and shall be transposed in the possession of the original lessee and he shall purchase the property pending any suit and the fate of the original suit shall decide the fate of the subsequent transferee of the property. Therefore the purchaser shall purchase the property bearing in mind that the fate of the property shall be decided depending on the fate of the suit.

From the foregoing discussions made above and under the facts and circumstances we are of the considered view that we do not see any legal bar nor any other bar as to why the petitioner cannot transfer the property to any other person. The respondent No. 3 by his slip

shod order dated 21.01.2016 which is annexed as annexure- H in the writ petition committed illegality in not allowing the petitioner to transfer the Plot No.50, Block-A, measuring an area of 5 Khathas of Mouza Jhilingjha, Upazila-Cox's Bazar, Cox's Bazar Sea Beach Area. He gave a slip shod and non speaking order. We find merit in this Rule.

In the result, the Rule is made absolute with direction and relying on the observations made above. The impugned letter vide Memo No. Shakha-9/IM-26/2008/38 dated 21.01.2016 issued by the respondent No. 3 which is marked as Annexure-H in the writ petition is hereby declared without lawful authority and if of no legal effect. The respondent Nos. 1-7 are hereby directed to permit the petitioner to transfer the Plot No. 50 , Block-A, Measuring an area of 5 Khathas of Mouza Jhilingjha Upazila-Cox's Bazar, Cox's Bazar Sea Beach Area within a period of 90(ninety) days from the date of receiving of this judgment.

Communicate this judgment at once.

Kashefa Hussain, J:

I agree.

Kazi Zinat Hoque, J:

Arif(B.O)