

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

WRIT PETITION NO. 6068 OF 2016

IN THE MATTER OF:

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

AND

IN THE MATTER OF:

1. A.M.K. Hasan son of late A.K. Mohammad Ali of
Cha-32, Mohakhali, Police Station-Gulshan,
District-Dhaka and others.

.....**Petitioner.**

-V E R S U S-

Bangladesh, represented by the Secretary, Ministry of
Land, Government of the People's Republic of
Bangladesh

.....**Respondents.**

Mr. A.J Mohammad Ali with

Mr. M. G. Mahamud (Shaheen), Advocates

.....for the Petitioners

Mahbubey Alam, Attorney General

..... for the Respondent No.1

Mr. Md. Mokhleshur Rahman, DAG

..... for the Respondents

Mr. Md. Imam Hossain, Advocate

..... for the Respondent No. 10

Heard on: 29.11.2017 and 05.12.2017

Judgment on: 04.01.2018

Present:

Ms. Justice Naima Haider

And

Mr. Justice Zafar Ahmed

Naima Haider, J:

In this application under Article 102 of the Constitution of People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why a direction upon the respondent Nos.1-8 should not be passed to establish Land Survey Appellate Tribunal as per the provisions of Section 145B of the State Acquisition and Tenancy Act, 1950 and to show cause as to why Judgment and decree dated 5.5.2016 (decree signed on 9.5.2016) passed in Land Survey Tribunal Suit No. 3018 of 2009 by the Land Survey Tribunal, Dhaka Mohanagar, Dhaka, i.e. the respondent No. 9 (Annexure – C & C-1) should not be declared to have been passed without lawful authority and are of no legal effect and to show cause as to why the operation of the Judgment and decree dated 5.5.2016 (decree signed on 9.5.2016) passed in Land Survey Tribunal Suit No. 3018 of 2009 by the Land Survey Tribunal, Dhaka, Mohanagar, i.e. the respondent No. 9 (Annexure – C & C-1) should not be stayed till establishment of Land Survey Appellate Tribunal and/or pass such other or further order or orders as to this Court may seem fit and proper.

The facts leading to the issuance of the Rule, in brief, are that the petitioners' father Abul Khaer Mohammad Ali and Abul Kalam Azad, both are brothers, purchased 67 decimals of land covered by C.S. Plot Nos. 366 & 367 of C.S. Khatian No. 40 from one Munsur Ali vide a registered Kabala No. 5567 dated 17.05.1956. Since Abul Khaer Mohammad Ali brought up Abul Kalam Azad, he purchased half of the land in question in the benami of his brother and whole land was possessed by Abul Khaer Mohammad Ali alone. The said Abul Kalam Azad has executed an unregistered 'নাদারী পত্র' on 04.04.1966 in respect of his share, i.e.

33.5 decimals of land, in favour of petitioners' father. Accordingly, petitioners inherited the land from their father including the portion of Abul Kalam Azad and Dhaka Mahanagar Survey Khatian correctly recorded in their names. Though 'bv`vex cĪ' has been executed in 1966 but in R.S. record of Rights both of the names, i.e. Abul Khaer Mohammad Ali and Abul Kalam Azad were appeared.

On the other hand, respondent No. 10 contended Abul Kalam Azad is the owner and possessor of 33.5 decimals land. He died on 05.05.2007 leaving his wife, five sons and two daughters. Thereafter, the successors of interests inherited the said 33.5 decimals of land from their father, Abul Kalam Azad. Accordingly, they mutated their names vide Mutation Case No. 15388 of 2007 on 03.09.2007 which is evident from the D.C.R of the said Mutation Case. Being in the possession of earlier mentioned land they transferred 25.25 decimals of land to Respondent No. 10, M.M. Builders and Engineers by a registered deed No. 7231 dated 03.09.2008. Subsequently, Respondent No. 10 mutated its name vide Mutation Case No. 15392 of 2008-09 which is evident from the D.C.R and Mutation Khatian No. 2452. And, it has also paid land holding tax for the period of 2010-15. However, in Mahanagar Survey, Dhaka Mahanagar Survey Khatian No. 2242 (Annexure - X-6 series) only the name of the petitioners, descendants of Abul Khaer Mohammad Ali, appear leaving the name of the heirs of Abul Kalam Azad. As the matter arises out of final publication of last revised record of rights prepared under section 144 of State Acquisition and Tenancy Act 1950, the Respondent No. 10, as a Plaintiff, filed Land Survey Tribunal Suit No. 3018 of 2009 for the correction of Dhaka Mahanagar Survey Khatian No. 2242 before Land Survey Tribunal, Dhaka.

The learned tribunal after considering all the evidences submitted and placed before it by both the parties has decreed the suit on contest in favour of the Respondent No. 10, for making the necessary correction in Dhaka Mahanagar Survey Khatian No. 2242.

Being aggrieved by and dissatisfied with the decree passed by the tribunal and as Land Survey Appellate Tribunal has not yet been established by the Government in accordance with Section 145B of State Acquisition and Tenancy Act 1950, to hear the appeals arising out of the judgment, decree or order of the Land Survey Tribunals, the petitioner did not have any alternative efficacious remedy except to seek remedy under Article 102 of the Constitution of People's Republic of Bangladesh by filing the instant writ petition and moved the same before this Court and obtained the instant Rule Nisi.

Mr. A.J Mohammad Ali along with Mr. M. G. Mahamud (Shaheen), learned Advocates appearing on behalf of the petitioners submit that the tribunal acted malafide and without jurisdiction in determining the question of title and validity of the deed no. 7231 dated 03.09.2008 executed in between Respondent No. 10 and successors of Abul Kalam Azad which is forged one. Mr. Ali further submits that the Tribunal misconstrued the law of 'benami transaction' the Nadabi deed dated 04.04.1966 and decreed the suit holding wrongly that the benami transactions are prohibited by the Land Reforms Ordinance, 1984 which came into force on 26.01.1984. Whereas the deed in question is dated 17.05.1956, which cannot come within the purview of Land Reforms Ordinance, 1984 and as such the impugned judgment and decree is liable to be declared to have been passed without lawful authority and is of no legal effect. It is also argued that the suit filed before the

Land Survey Tribunal, being Land Survey Tribunal Suit No. 3018 of 2009, was barred by limitation according to the provision of the State Acquisition and Tenancy Act 1950.

Mr. Mahbubey Alam, learned Attorney General appearing on behalf of Respondent No. 1 submits that in establishing Land Survey Appellate Tribunal all over the country by the Government as per the provisions of Section 145B of the State Acquisition and Tenancy Act, 1950 will take much time after completing all the procedures. He further made submissions in support of the impugned judgment delivered by the Land Survey Tribunal that on coming into force of the Land Reforms Ordinance on 26th January, 1984 no one is allowed to set upon his claim on the basis of benami transaction. It is also argued that the plea of benami transaction cannot be decided by the tribunal which is established for a particular purpose and as such the petitioners ought to have obtained a decree from competent court declaring their title Deed in the absence of such decree no title can be claimed by the petitioners in the suit land.

Mr. Md. Imam Hossain, learned Advocate appearing on behalf of the Respondent No. 10 submits that the tribunal did not act without jurisdiction in considering the documentary evidence submitted by the petitioners and Respondent No. 10 in support of their title and possession over the suit land and consideration of the registered deed No. 7231 dated 03.09.2008 executed between the Respondent No. 10 and vendors, heirs of R.S. recorded owner Abul Kalam Azad, transferring the suit land by the Tribunal is valid in law. Tribunal held that benami transaction is void after 1984 and the said 'নাদাবী পত্র' dated 04.04.1966 is an unregistered one and by the said 'নাদাবী পত্র' no title passed to Abul Khaer

Mohammad Ali as claimed by the petitioners. Moreover, Section 5(3) of Land Reforms Ordinance, 1984 provides that where consideration is paid by another person to transfer the property to the transferee it will be presumed that such another person intended to pay or provide such consideration for the benefit of that transferee. And this presumption is irrebuttable since no evidence either oral or documentary is admissible before any court or authority by virtue of the said provision of the Ordinance, 1984. More importantly by the provision of section 5 of the said Ordinance, 1984 all kinds of benami transactions in relation to immovable property are prohibited and there is no room left to limit its application by interpreting it otherwise or inserting any term in this provision. In support of his argument he has referred to the case of *S.N. Kabir vs Mrs. Fatema Begum*, reported in **12 ADC (2015) 73**.

Mr. Hossain further submits that petitioners could not produce any document to prove their possession over the suit land. On the other hand, it has been proved that both Abul Kalam Azad and Abul Khaer Mohammad Ali were in possession in respect of their shares over the total (33.5+33.5 = 67 decimals) land which is evident from R.S. Khatian, against which no objection whatsoever was raised by any of them. Later, successors of Abul Kalam Azad have completed mutation over the portion of their father's share after inheriting it. Thereafter, the subsequent purchaser, Respondent No. 10, has also got its name mutated in the Khatian and has been paying land tax regularly. Petitioners did not raise objections against such mutations completed by Respondent No. 10 and successors of Abul Kalam Azad which proves that they were not ever in the possession of the said land.

Mr. Hossain further submits that the suit is not barred by limitation under any provision of law in particular as the suit was filed within the next year under section 145A(7) of State Acquisition and Tenancy Act, 1950.

Heard the learned Advocates for the parties, perused the writ petition, its annexures, affidavit in opposition filed by the respondent No. 10 and other materials on record placed before us.

According to the Section 145A(4) of State Acquisition and Tenancy Act, 1950 suits arising out of final publication of the last revised record of rights prepared under Section 144 shall lie in the Land Survey Tribunal. As it is evident from the judgment dated 05.05.2016 of the Tribunal that relevant gazette notification of the suit land has been published on 21.08.2008 about the final publication of the recent revised record-of-rights, i.e. Dhaka Mahanagar Survey Khatian, therefore, filing of the suit challenging the correctness of the last revised record-of-rights where petitioners' names were recorded is just and proper. In ***Romisa Khanam VS. Bangladesh*** case reported in **61 DLR (2009) 18 HCD** it has been held that;

“(...) under section 145A of the State Acquisition and Tenancy Act, 1950, when the Government would establish the Land Survey Tribunal only after final publication of last revised record-of-rights prepared under section 144 and after establishment of such Tribunals, any suit challenging correctness of the last revised record-of-rights shall lie in such Tribunal.” [58]

After considering the relevant laws contained in the State Acquisition and Tenancy Act, 1950 it appears that any person aggrieved by the final publication of the last revised record-of-rights under Section 144 of State Acquisition and

Tenancy Act 1950 may file a suit before Land Survey Tribunal within one year from the date of such publication or from the date of the establishment of the Land Survey Tribunal, whichever is later. Additionally, such period may extend one more year after the expiry of the period mentioned earlier if the Land Survey Tribunal is satisfied with the reasons for delay shown by the plaintiff. Relevant provisions of State Acquisition and Tenancy Act, 1950 are as follows—

Section 145A (6) –

“Any person aggrieved by the final publication of the last revised record-of-rights prepared under section 144 may, within one year from the date of such publication or from the date of the establishment of the Land Survey Tribunal, whichever is later, file a suit in such Tribunal.”

Section 145A(7)–

“A suit may be admitted within next one year after the expiry of the period specified in sub-section (6), if the Land Survey Tribunal is satisfied with the reasons for delay shown by the plaintiff.”

Therefore, filing of the suit before the tribunal for the necessary correction in Dhaka Mohanagar Survey Khatian is proper and the findings of the tribunal that an aggrieved party may come to the tribunal within next one year, is also lawful and proper. Moreover, from the further discussions of the tribunal it transpires that tribunal allowed the suit within the next year with its satisfaction. Land Survey Tribunal, held that –

“এম.এম. বিল্ডার্স এন্ড ইঞ্জিনিয়ারিং লিঃ এর পক্ষে ব্যবস্থাপনা পরিচালক মোঃ মহিউদ্দিন (মর্দন) ১৯৫০ সালের রাষ্ট্রীয় অধীগ্রহণ প্রজাস্বত্ব আইনের ১৪৫(১) ধারার বিধান মতে অত্র মোকদ্দমা আনয়ন করেছেন। উক্ত ধারার

৩ উপধারার বক্তব্য হল, চূড়ান্তভাবে গেজেট প্রকাশের এক বছরের মধ্যে অথবা ল্যান্ড সার্ভে ট্রাইব্যুনাল প্রতিষ্ঠার এক বছরের মধ্যে রেকর্ড সংশোধনের জন্য ক্ষতিগ্রস্ত ব্যক্তি মোকদ্দমা করতে পারে। তদুপরি উক্ত এক বছরের মধ্যে মোকদ্দমা আনয়নে কোন কারণে ব্যর্থ হলে সংশ্লিষ্ট পক্ষ পরবর্তী এক বছরের মধ্যে মোকদ্দমা আনয়ন করতে পারেন। (...)

যুক্তিতর্ক শুনানীকালে বিবাদী পক্ষের বিজ্ঞ কৌশলী উল্লেখিত ১৬/০১/০৬ইং তারিখের গেজেটের প্রতি আদালতের দৃষ্টি আকর্ষণ করেন। উক্ত গেজেট পর্যালোচনায় দেখা যায় যে, উক্ত গেজেটটি আদালতের বিচারকের এখতিয়ার বিষয়ক। মূলতঃ নালিশী সম্পত্তি সংক্রান্ত এবং মহাখালী মৌজার কতিপয় খতিয়ানের গেজেট ২১/০৮/০৮ইং তারিখে চূড়ান্ত প্রকাশিত হয়। উক্ত তারিখের পর যথাযথ সময়ে তথা ২১/১০/০৯ইং তারিখে বাদী অত্র মোকদ্দমা আনয়ন করেন। ফলে আইনের দৃষ্টিতে সঠিক সময়ে মোকদ্দমা আনয়ন করেছেন। নথি পর্যালোচনায় দেখা যায়, বাদী অত্র মোকদ্দমা আইনের নির্দিষ্ট সময়ের মধ্যে আনয়ন করেছেন।”

Hence, the suit was not barred by limitation.

Since, the suit land has been transferred by the successors who inherited the land from the R.S. recorded owner, i.e. Abul Kalam Azad, but, not recording the name of the transferee or its vendors or Abul Kalam Azad in Dhaka Mahanagar Survey Khatian, Tribunal has acted within its jurisdiction in considering the registered documents submitted by respondent No. 10 in support of the transfers of the suit land and present possession of the Respondent No. 10. In the case of **Romisa Khanam vs. Bangladesh** reported in **61 DLR (HCD) (2009) 18** it has been held that

“In revision of a record-of-rights under section 144 of the State Acquisition and Tenancy Act, 1950 the particulars to be included,

amongst others, are enumerated in Rule 26 of the Rules, 1955. Such particulars relate to the present state of things and not to the things which existed in 1922. Moreover, it is neither possible nor expected for such a recording officer to transfer title since 1922. Practically, such record-of-rights is to be prepared on the basis of present possession duly backed by documents of title only. It must be remembered that such record-of-rights does not confer any title though it is a very good evidence of possessory rights. The Appellate Officer definitely failed in the discharge of his duty in not considering the registered documents in support of transfers of the lands in question since 1929. Which carries statutory presumption of correctness and also the statutory presumption under section 144A of the State Acquisition and Tenancy Act, 1950 attaching to the finally published SA record-of-rights and RS record-of-rights in the names of the petitioners.” [44]

Petitioners claim on the suit land is solely based on the unregistered ‘नादाबी पत्र’ dated 04.04.1966 by which no title passed in favour of the predecessor of the petitioners Abul Khaer. Though the Tribunal improperly held that the benami transaction are prohibited by the Land Reforms Ordinance, 1984, but to establish a claim of benami, the claimant ought to have proved that the original title deed lying with him, he paid the government taxes, uninterrupted possession and the consideration paid by him. But in the present case the petitioners could not produce any material evidences whatsoever claiming their title to the portion of land which was previously and originally owned by the R.S. recorded owner Abul Kalam Azad and later by the successors among which 25.25 decimals have been sold out to the Respondent No. 10.

Nadabipatra is not a document of title and by the said deed the petitioners’ father did not acquire any title in the said land and it does not *ipso facto* prove that

the property in question was purchased by Abul Khaer Mohammad Ali in the benami of Abul Kalam Azad. Moreover the petitioners or their predecessor got no decree declaring that Abul Kalam Azad is his benamder from any competent court.

On the other hand, Respondent No. 10 to prove his title over suit land produced a registered deed no. 7231 dated 03.09.2008 and unlike petitioners to prove his possession it has submitted R.S. Khatian where its predecessor's name appeared, Mutation Khatian No. 2452 which is recorded in its name, D.C.R and receipts showing payment of tax. But the said deed has been claimed to be forged by the petitioners stating in their written statement submitted before tribunal in the Land Survey Suit No. 3018 of 2009 wherein they could not produce any single evidence to prove their contention before the Land Survey Tribunal to show that the deed is forged or did not file any suit challenging the said deed. Therefore, the finding of the tribunal in weighing the evidentiary value of the said deed has not committed any wrong. Relevant finding of the Tribunal is quoted below;

“অপর পক্ষে আর.এস ১০২ নং খতিয়ানের মালিক আবুল কালাম আজাদ এর ওয়ারিশদের নিকট থেকে বাদী ০৩.০৯.২০০৮ তারিখের ৭২৩১নং দলিল মূলে নালিশী জমি ক্রয় করেছেন মর্মে দেখা যায়। উক্ত দলিলটি অদ্যাবধি কোন আদালত কর্তৃক জাল মর্মে বাতিল হয়নি। ফলে উক্ত দলিল দ্বারা নালিশী সম্পত্তিতে বাদীর উত্তম স্বত্ব রয়েছে মর্মে প্রতিষ্ঠিত হয়। এমনকি উক্ত দলিল দ্বারা জমি ক্রয় পূর্বক বাদী নালিশী সম্পত্তি নিজ নাম খারিজ এবং খারিজ প্রদান করেছেন মর্মে দেখা যায়। ফলে বাদী অত্র মোকদ্দমায় ডিক্রী পেতে হকদার।”

Since the petitioners could not submit any piece of evidence except said unregistered ‘নাদারী পত্র’ to prove their title and to show their possession, the claim of benami cannot sustain in law. Additionally, since R.S. Khatian have never been challenged by the Abul Khaer Mohammad Ali or by the petitioners and since Petitioners have never taken any step to mutate their names or after making objection against mutation proceedings completed by Respondent No.10 or its

predecessor, the Land Survey Tribunal took the correct approach in order to infer the current state of things in relation to the suit land after R.S. record-of-rights has been finally published by considering the title deed of transfer and said unregistered 'বাদাবী পত্র' to decide whether it is necessary to bring the correction in Dhaka Mahanagar Survey Khatian No. 2242 or not. Hence, the learned Judge did not act beyond its jurisdiction in decreeing the suit for making necessary corrections in Dhaka Mahanagar Survey Khatian No. 2242 and to insert Respondent No. 10's name in the place of owner in lieu of the name of petitioners after weighing and considering all the material documents presented to the Tribunal from both parties to prove their respective case.

From the discussion made hereinbefore, we find no merit in this Rule.

Accordingly, the Rule is discharged.

Zafar Ahmed, J;

I agree