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

In the matter of:

WRIT PETITION NO. 6377 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 :
Dipok Guho Roy and another
..…. Petitioners

Versus-

Government of Bangladesh and others
..... Respondents

Mr. M. I. Farooqui, Senior Advocate with
Mrs. Nazneen Nahar, Advocate(s)
……For the petitioners

Mr. A.M. Aminuddin, Attorney General with
Mr. Debashish Bhattacharya, Deputy Attorney General
……For the respondents

Heard on 13.10.2020, 03.12.2020, 10.12.2020 & Judgment on 10.02.2021

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Mohammad Ali

Md. Ashfaqul Islam, J:

This Rule under adjudication, issued on 17.08.2016, at the instance of the petitioners, was in the following terms:

"Let a Rule Nisi issue calling upon the respondents to show cause as to why the inaction of land measuring 10.20

decimals of land appertaining to District-Dhaka, Police Station- Kotwali, present Sutrapur, Mouza-Wari, under S.A. Khatian No. 3105, Plot No. 7636, corresponding to R.S. Khatian No. 2283, Plot No. 11355 in the 'Ka' list of the vested property published in the Bangladesh Gazette, Additional 6th May, 2012 (Annexure-'H') should not be declared to have been done without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this court may seem fit and proper."

The petitioners in this writ petition have challenged inclusion of land measuring 10.20 decimals in the 'Ka' list of the Vested Property, published in the Bangladesh Gazette, Additional, 6th May, 2012 (Annexure-'H').

The background leading to the Rule is that the land situated at present Sutrapur under S.A Khatian No. 3105, Plot No. 7636 corresponding to R.S. Khatian No. 2283, Plot No. 11355 along with other land originally belonged to one Chandra Kanto Ghosh and Lalit Mohon Ghosh. Chandra Kanto Ghosh died leaving behind three sons namely Provat Chandra Ghosh, Satish Chandra Ghosh and Girish Chandra Ghosh and their names have been correctly prepared in C.S. Record of Rights. Girish Chandra Ghosh died leaving behind two sons

namely Horpada Ghosh and Thakur Dhas Ghosh who sold their share to one Kusum Kumar Roy. Provat Chandra Ghosh made a gift of his share to his wife Labonnomoyee who instituted Title Suit No. 117 of 1932 in the Court of Second Sub-Judge, Dhaka for partition and in the final decree Satish Chandra Ghosh obtained saham of the case land. Staish Chandra Ghosh died leaving behind his wife Indu Prova Ghosh and three sons namely Sunil Kumar Ghosh, Anil Kumar Ghosh and Ronjit Kumar Ghosh. By an amicable partition Sunil Kumar Ghosh became owner and possessor of the case land. In S.A Khatian the name of Sunil Kumar appeared along with his brothers and mother. But they did not possess the case land (Annexure-'A').

On 20.03.1974 Sunil Chandra Ghosh gifted the case land to his sister Niva Rani Guho Roy by a registered Deed No. 5807 and her name was correctly prepared in R.S. Khatian No. 2283 (Annexure-'B'). Since the case land was declared as abandoned property as such Niva Rani Guho Roy filed Title Suit No. 520(A) of 1978 in the Court of First Sub-ordinate Judge, Dhaka for declaration of title. Said Suit was decreed exparte on 05.05.1981 (Annexure-'C').

Niva Rani Guho Roy filed Case No. 35 of 1989 in the First Court of Settlement or exclusion of case land from the list of abandoned Buildings. On 11.12.1993 said Court allowed the case by a Judgment

declaring that the case property be excluded from the list of Abandoned Buildings (Anneuxre-‘D’). Niva Rani Guho Roy died leaving behind two sons namely Sujos Chandra Guho Roy and dipok Guho Roy. On 07.06.2001 Sujos Chandra Guho Roy died leaving behind his wife Susmita Guho Roy and daughter Debolila Guho Roy.

That is the genealogy of the case. However, the petitioners mutated their names in the Khatian and have possessed the case land by paying rents. Since the case was not recorded in the City Survey petitioners filed Land Survey Tribunal Case No. 536 of 2008 in Land Survey Tribunal, Dhaka. Said Case was decreed exparte on 03.01.2011 (Annexure-‘G’).

In paragraph 10 of the petition the petitioner stated that recently they came to know that the above land has been wrongly included in ‘Ka’ list of the Vested Property published in the Bangladesh Gazette, Additional, 6 May, 2012 in serial No. 903 in the name of Anil Kumar Ghosh and others (Annexure-‘H’) which is the impugned order.

Mr. M.I. Farooqui, the learned Senior Advocate appearing with Mrs. Nazneen Nahar, the learned Advocate for the petitioners after placing the petition and other materials on record have pressed into service several arguments. He mainly submits that the inclusion of the property in question as per section 2 of the Arpita Shampatti Prattarpan

Ain, 2001 (hereinafter referred to as Ain, 2001) is illegal and absolutely in violation of Section 6(Ka) of the Ain, 2001. In elaborating his submissions the learned Senior Advocate clearly submits that it is a shut and close case. He clarifies that the property in question has been enlisted in Arpita Shampatti Talika 2012 without any lawful authority in that a decree has been passed by a proper Court of law in respect of the said property declaring the same being not a vested property. Therefore, it squarely comes within the meaning of section 6(ka) of the Ain, 2001.

Next he submits that neither the petitioners nor their predecessors have ever migrated to India and the property in question has been recorded in the names of the predecessor of the petitioners as correctly published in C.S, S.A and R.S record of rights. Title suit for declaration of title was decreed in favour of the petitioners and the court of Settlement allowed the case and ordered to exclude the property from the list of Abandoned Property and accordingly thereafter the land Survey Tribunal by Judgment ordered to record the property in the name of the petitioners who mutated their names in the Khatian and have been paying rents regularly to the government and as such the chain of title being well established, the petitioners are ‘মালিক’ under Section 2(da) of the Ain, 2001. That is the sum and substance of the submissions of the learned Senior Advocate Mr. M.I Farooqui.

By filing affidavit-in-opposition on behalf of the respondent No. 2, the Deputy Commissioner, Dhaka the Rule has been vehemently opposed by the Government. The learned Deputy Attorney General Mr. Debashish Bhattacharya argued the case at length and he has also submitted a written submissions covering the total aspect of the case. In that written submissions he has highlighted the following things:-

"Neither the decree as obtained by the petitioner does contain a declaration to the effect that the property in question is not a vested property nor the petitioner after promulgation of the Ain, 2001 approached Arpita Shampatti Prattarpan Tribunal for release of his property from the list of vested property.

Inclusion of the property in the list of vested property by way of gazette notification is the conclusive proof of the fact that property in question falls within the description of the vested property. Such presumption can only be discarded by way of adducing evidence. In an application for certiorari this Division cannot assume the power of Court of Appeal and thereby discusses the evidence.

More pertinently a declaration of title by and under mandate of Section 42 of the Specific Relief Act, 1877 does not change the vested character of the property. Vested character of the property will remain

unharmed despite that of the exparte judgment and decree of title as obtained by the petitioner."

We have heard the learned Senior Advocate Mr. M.I. Farooqui, the learned Attorney General, the learned Deputy Attorney General and the Assistant Attorney General at length and considered their submissions carefully.

Let us first digress what is the scheme of ''অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ ও অর্পিত সম্পত্তি অবমুক্তি বিধিমালা, ২০১২''.

In the preamble of the Ain it has been clearly mentioned:-

> *"অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়নকল্পে প্রণীত আইন।"*

Section 2 contains some definitions which are very important to note:

> *২। বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে,-*
>
> *(ক) ''অর্পিত সম্পত্তি'' অর্থ অর্পিত সম্পত্তি আইনের অধীনে সরকারে ন্যস্ত সম্পত্তি;*
>
> *(খ) ''অর্পিত সম্পত্তি আইন'' অর্থ-*
>
> *(অ) Defence of Pakistan Ordinance, 1965 (Ord. No. XXIII of 1965) (যাহা ১৬/০২/১৯৬৯ ইং তারিখ পর্যন্ত কার্যকর ছিল);*

(আ) উক্ত Ordinance No. XXIII of 1965 এর অধীনে প্রণীত Defence of Pakistan Rules, 1965 এবং উক্ত Rules এর অধীন প্রদত্ত আদেশের যতটুকু দফা (উ) তে উল্লেখিত Act বলে হেফাজতকৃত;

(ই) Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ord. No. I of 1969) (যাহা Act XLV of 1974 দ্বারা রহিত);

(ঈ) Bangladesh (Vesting of Property and Assets) Order, 1972 (P. O. No. 29 of 1972) এর যতটুকু উপ-দফা (অ), (আ) এবং (ই)- েত উল্লিখিত Ordinance এবং Rules এর ক্ষেত্রে প্রযোজ্য হয়;

(উ) Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (XLV of 1974); এবং

(ঊ) Vested and Non-resident Property (Administration) Act, 1974 (XLVI of 1974) (যাহা Ord. No. XCII of 1976 দ্বারা রহিত)এর যতটুকু উপ-দফা (অ),(আ)এবং (ই)-তে উল্লিখিত Ordinance এবং Rules এর ক্ষেত্রে প্রযোজ্য হয়;

……

(ঞ) ''প্রত্যর্পণযোগ্য সম্পত্তি'' অর্থ অর্পিত সম্পত্তি আইনের অধীনে তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত করা হইয়াছে এইরূপ সম্পত্তির মধ্যে-

(অ) যাহা এই আইন প্রবর্তনের অব্যবহিত পূর্বে সরকারের দখলে বা নিয়ন্ত্রণে ছিল; বা

(আ) যাহা ''প্রত্যর্পণযোগ্য জনহিতকর সম্পত্তি'' অর্থাত্ দেবোত্তর সম্পত্তি, মঠ, শ্মশান, সমাধিক্ষেত্র বা ধর্মীয় প্রতিষ্ঠানের বা দাতব্য প্রতিষ্ঠানের সম্পত্তি বা

জনকল্যাণের উদ্দেশ্য ব্যক্তি উদ্যোগে সৃষ্ট ট্রাস্ট সম্পত্তি এবং যাহা এই আইন প্রবর্তনের অব্যবহিত পূর্বে সরকারের দখলে বা নিয়ন্ত্রণে ছিল;

ব্যাখ্যা।- ধারা ৬ এর দফা (ক) হইতে (চ) তে উল্লিখিত কোন সম্পত্তি উক্তরূপ প্রত্যর্পণযোগ্য সম্পত্তি বা প্রত্যর্পণযোগ্য জনহিতকর সম্পত্তি হিসাবে গণ্য হইবে না-তবে উক্ত ধারার দফা (চ) এর শর্তাংশে উল্লিখিত ক্ষতিপূরণের অর্থ প্রত্যর্পণযোগ্য সম্পত্তি বলিয়া গণ্য হইবে;

……….

(ড) '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;]

Section 4 of the Ain enjoins the limited scope of application of Code of Civil Procedure in the manner:

৪। এই আইনের অধীন কোন কার্যধারায় দেওয়ানী কার্যবিধির নিম্নবর্ণিত বিধানাবলী ব্যতীত অন্য কোন বিধান প্রযোজ্য হইবে না, যথা:-

(ক) এই আইনে বা বিধিতে কোন বিষয়ে দেওয়ানী কার্যবিধির কোন বিধান যতটুকু প্রযোজ্য মর্মে বিধান করা হয় ততটুকু; এবং

(খ) উক্ত কার্যবিধির ১১ ধারা।

Section 6 of the Ain, 2001 reveals that:

৬। [প্রত্যর্পণযোগ্য সম্পত্তির তালিকায়] নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না, যথা:-

(ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি;

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এরূপ কোন সম্পত্তি;

In addition to the above Section 7 of the Ain, 2001 further reveals that:

৭। (১) এই আইন প্রবর্তনের পর কোন ব্যক্তি কোন সম্পত্তি [প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় অন্তর্ভুক্তিযোগ্য নহে মর্মে বা উক্ত তালিকায় অন্তর্ভুক্ত কোন সম্পত্তি প্রত্যর্পণযোগ্য] সম্পত্তি নহে মর্মে কোন আদালতে মামলা দায়ের করিতে বা এইরূপ সম্পত্তি অবমুক্তির জন্য তত্ত্বাবধায়কের নিকট কোন দাবী উত্থাপন করিতে বা উহার ব্যাপারে নাম জারীর জন্য কোন রাজস্ব কর্মকর্তার নিকট কোন আবেদন করিতে পারিবেন না।

(২) এইরূপ মামলা দায়ের বা দাবী উত্থাপন বা আবেদন করা হইলে আদালত বা ক্ষেত্রমত তত্ত্বাবধায়ক উক্ত দাবী বা রাজস্ব কর্মকর্তা উক্ত আবেদন সরাসরি নাকচ করিবেন।

Further Section 10(1) and 1(ka) of the Ain, 2001 made following provisions:

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।

(১ক) উপ-ধারা (১) এর অধীন আবেদন দায়ের করার সময়সীমা অতিক্রান্ত হওয়া সত্ত্বেও এই আইন কার্যকর হইবার পর [৩১ ডিসেম্বর] ২০১৩ খ্রিস্টাব্দ তারিখ পর্যন্ত ট্রাইব্যুনালে আবেদন দায়ের করা যাইবে।

Be it mentioned that in this case at the very outset the learned Attorney General Mr. A.M. Aminuddin appeared and rebutted the first argument of Mr. Farooqui contending that the argument is erroneous in that the decree as it appears in Annexure-'C' to the petition relates to a suit for declaration of title and not a decree declaring the property not being a vested property. There is a certified copy of the original suit which is before us fortifies his submissions that the suit was for declaration of title. Therefore, the learned Attorney General submits that by no stretch of imagination the said decree would operate within the meaning of Section 6(ka) of the Ain, 2001. The argument as it has been advanced by the learned Attorney General have force. And the submissions of the learned Deputy Attorney General has also aided to that when he submitted that the mandate of section 42 of the specific relief Act, 1877 does not change the vested character of the property. Vested Character of the property will remain unharmed despite that of the exparte Judgment and decree as obtained by the petitioners. From that point of view the argument on this score by the Senior Counsel Mr. M.I Farooqui seems to be a fallacious one.

Next comes the question that even if the facts and circumstances of the present case have been admitted to be true in its entirety, whether this Division in exercise of its jurisdiction under Article 102 of the Constitution in the nature of writ certiorari would interfere with the same. To appreciate let us referred a decision of ours in the case of Abdur Rahman and others vs. District Judge, Arpita Shampatti Prattarpan Tribunal, Brahmanbari and others 72 DLR 735 in which while considering propriety of the decision of the Arpita Shampatti Appellate Tribunal, Barahmanbaria we observed:

> *"Now the question comes how far sitting in writ certiorari we can deal with all these aspects though we have discussed everything in minute details. It is well settled that in writ certiorari this Division would be loath to interfere with a decision of a Tribunal in specific, if the same is not a perverse one or a gross miscarriage of justice has been done. A lucid observations of the Hon'ble Appellate Division in the case of Shahidul Haque vs. Court of settlement 69 DLR AD 241 in this context has been quoted below: (Paragraph 44 and 45)*
>
> *"A writ of certiorari is maintainable only if it can be shown that the tribunal erroneously held that the property was*

illegally declared as abandoned property without admitting legal evidence or it has misconstructed the law. In other words, a writ of certiorari does not lie for an erroneous decision in respect of a matter which is within the jurisdiction of the inferior tribunal. Unless such erroneous decision relates to anything collateral, an erroneous decision upon which might affect jurisdiction and the statute does not confer upon the tribunal final jurisdiction to decide such question. A writ of certiorari is maintainable only in a case where erroneous decision within it jurisdiction. Even if there is mere error of law that will not confer any power on the High Court Division to issue a writ of certiorari except where there is an error apparent on the face of the record, that means, the error must be something more than a mere error. The High Court Division can issue writ of certiorari only if it can be shown that the judgment has been obtained by fraud, collusion or corruption or where the tribunal has acted contrary to the principles of natural justice or where there is an error apparent on the face of the record or where the tribunal's conclusion is

based on no evidence whatsoever or where the decision is vitiated by malafide.

The crux of the matter is whether the disputed property is abandoned property within the meaning of Abandoned Property (Control, Management and Disposal) Order, 1972 and that the whereabouts of the owners were not in this country on 28th February, 1972. On both counts the Court of Settlement found in affirmative. The first groups of appellants are claiming the property by way of alienation after 28the February, 1972. In Government Vs. Orex Network Ltd.,10 ADC 1, the claimant claimed the property on the basis of oral gift followed by an affidavit acknowledging the gift on taking prior permission from the Ministry of Works for transfer, and the Ministry on accepting transfer fees muted the name of the claimant. Three of us (CJ, Md. Abdul Wahhab Mia and Syed Mahmud Hossain, JJ.) were members of the Bench in which it was held that "Admittedly the disputed property was published in the 'Kha' list of the abandoned buildings by Gazette Notification dated 23.09.1986. Therefore, all the

permissions accorded by the Ministry or works and from 23.09.1986 allowing mutation and transfer were void and those orders were obtained by collusion and fraud'. So, in this case also all the deeds and transfers were collusively made after PO 16 of 1972 came into force and these transfers are hit by article 6 of PO 16 of 1972. Similarly, Abdus Sobhan failed to substantiate his clean title and possession. He being a citizen of this country ought to have given explanation why he was not in possession in 1972 has he been really inherited the same."

Unequivocally, we are in respectful agreement with the said decision of the Appellate Division and hold that the judgment passed by the Lower Appellate Tribunal was a proper judgment which cannot be at all interfered under Article 102 of the Constitution that is to say under the writ certiorari. Therefore, in all fairness this Rule should be discharged."

To sum up the same we reiterate that in writ certiorari this Division would be reluctant to interfere sitting as a court of appeal in deciding the issue before it. However, we do not want to embark upon the merit of the case. The petitioners, if so advised, still can approach the

Arpita Shampatti Prattarpan Tribunal with this case. In a recent decision of Abdul Hye vs. Bangladesh 70 DLR 313, where the Ain, 2001 was under challenge, His Lordships Mr. Justice Obaidul Hassan after exhaustive and elaborate discussion in para 140 gave the following directions:

> *"a. All the government officials are hereby directed not to take any attempt in future to enlist any property in the official gazette as the vested property;*
>
> *b. Government may set up an exclusive Tribunal having no other jurisdiction, under section 10 of the Act No. 16 of 2001 in each District and where huge number of petitions are pending more than one Tribunal may be set up;*
>
> *c. The Tribunals already set up under the Act No. 16 of 2001 are directed to dispose of the applications maintaining the time frame strictly as provided in the Act No. 16 of 2001;*
>
> *d. The Limitation Act should be made applicable in filing application under Section 10(1) of the Act;"*

Notably, in paragraph 37 of the said decision their Lordships highlighted the submissions of the learned Attorney General which is quoted below :

> *"The learned Attorney General added that in filing application for claims to the Tribunal, provision of section 5 of the Limitation Act may be made applicable."*

The law of limitation under section 10(1) and 1(ka) of the Ain, 2001 has already been quoted above. Considering the overall aspect, in the 70 DLR's case their Lordships gave a clear directive (d) that the limitation Act should be made applicable in filing application under Section 10(1) of the Ain, 2001.

Therefore, the petitioners if so advised, may seek remedy in terms of the decision as stated above. On the context we refrain from making any deliberations on the point of merit of the case.

With these observations and direction this Rule is discharged, however, without any order as to cost.

Communicate at once.

Mohammad Ali, J:

I agree.