

5 SCOB [2015] HCD 67

**High Court Division
(Special Original Jurisdiction)**

Mr. Sukumar Biswas, A.A.G

Writ Petition No. 1657 of 2010

... for Respondents.

Shamsun Nahar Begum Shelly

Heard on the 13th, 16th, 19th April, 21st,
22nd June & 5th July, 2015.

... Petitioner.

&

Versus

Judgment on the 8th July, 2015.

Bangladesh & others.

... Respondents.

Mr. Khandaker Shahriar Shakir

... For the Petitioner.

Mr. Shahidul Islam, D.A.G. with

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Mahmudul Hoque

The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985

Section 5(1)(b)

And

Article 7 of P.O. 16 of 1972:

The Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance, 1985. Non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the “Kha” list of the Abandoned Buildings. It is also noted that there is nothing on record to show that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner. ... (Para 17)

Given this Court’s understanding of the essentials of enquiry as to the status of property under the relevant provisions of Ordinance as above explained, it is found that the claimant had duly discharged her onus of proving her case independently of the Government and that in doing so she had by a set of mutually reinforcing evidence produced generally established a continuous scenario of active ownership, occupation, supervision and management of the said property through her principal both before and after the promulgation of P.O. 16 of 1972. There was nothing on record that could have reasonably led the Court of Settlement to find otherwise. However, the Court of Settlement without following a judicial approach in determining the question of facts involved in this case unfortunately passed the Judgment without giving a judicial consideration of the whole dispute between the parties and decided the matter

erroneously. By that reason, and by confining this Court’s scrutiny to the objective of finding whether the impugned Judgment is perverse or not, this Court has inevitably arrived at the conclusion that the Court of Settlement’s Judgment and Order dated 22.2.2001 is indeed a highly perverse one being contrary to the facts and circumstances and evidences on record and by that reason we are inclined to interfere with the impugned Judgment of the Court of Settlement as prayed for. ... (Para 20)

Judgment

Mahmudul Hoque, J:

1. In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the decision dated 10.12.2009 passed by Respondent No.3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57 Khalishpur Housing Estate, Khulna, from Kha list of the Abandoned Buildings as published in the Bangladesh Gazette, dated 23.09.1986 at page No. 9764(36) against serial No. 615 (Mistakenly mentioned in the decision as published in the Bangladesh Gazette dated 28.04.1986 against Serial No. 634) (Annexure “L”) should not be declared to have been passed without lawful authority and is of no legal effect and as to why the Respondents should not be directed to exclude the house being No. T-57, Khalishpur Housing Estate, Khulna from the ‘Kha’ list of Abandoned Building as published in the Bangladesh Gazette dated 23.09.1986 as detailed hereinbefore and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this rule, in brief, are that the property in question being House No. T-57, Khalishpur Housing Estate, Khulna, measuring an area of 144 square yards was allotted by the Government to one S.G. Mustafa son of S.M.Yousuf by a registered deed of lease being No. 8753 dated 05.09.1963 and after getting allotment of the said property the lessee S.G.Mustafa had been possessing the same and constructed a two storied building thereon obtaining loan from House Building Finance Corporation (“HBFC”) by mortgaging the said property as security against loan. The said S.G.Mustafa while in possession and enjoyment of the property in question died in the year 1972 and he was buried in Khalishpur grave yard, Khulna. The said S.G. Mustafa died leaving son Abid Hossain who was in possession of the disputed property. Subsequently he decided to dispose of the property in question and accordingly he executed a registered deed of agreement for sale being No. 22877 dated 12.12.1980 in favour of one Abdur Rob Biswas, the husband of the present Petitioner at a consideration of Tk.80,000/- out of which he received Tk.40,000/- as earnest money and delivered possession of the property. On the same day he executed and registered a power of attorney appointing the Petitioner authorizing her to act on his behalf and to deal with the property in question in any manner including power of transfer of the same. After passing of a considerable time while Abdur Rob Biswas pressed the said Abid Hossain to execute and register the sale deed upon receipt of the rest money it was revealed that the property has been mortgaged to the HBFC and the original documents are lying with them. Thereafter the Petitioner after making necessary inquiry came to know that the original loan amount stood at Tk.43,778/- as on 7.12.1981. The Petitioner made payment of the entire loan amount to the HBFC by a payment receipt dated 7.12.1981 through Sonali Bank, Khulna Branch. After payment of the entire amount HBFC released the property from mortgage and since then, the petitioner is continuing in the possession of the disputed property without any

objection from any quarter. By this time the Petitioner as possessor of the disputed property did not receive any notice either under Article 7 of the President's Order No. 16 of 1972 or under Section 5(1)(b) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. 54 of 1985) from the Government. Subsequently the Petitioner came to know that the disputed property has been enlisted as Abandoned Property at serial No. 615 in the "Kha" list vide S.R.O. 364-L/86-1985 published in the Gazette (Extraordinary) on 23.9.1986. Then the Petitioner filed a Case under Section 7(1) of the Ordinance 54 of 1985 in the Second Court of Settlement being Case No. 221 of 1992, Dhaka annexing all the relevant documents in support of her claim by a Firisti. But the Second Court of Settlement after hearing dismissed the Case by the impugned Judgment and Order dated 10.12.2009. At this stage the Petitioner moved this Court by filing this application and obtained the present Rule and Order of Stay.

3. The Respondent-Government contested the Rule by filing Affidavit-in-Opposition and Supplementary Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the property in question was leased out by the Government to one S.G. Mustafa for 99 years by a lease deed dated 4.9.1963. During the War of independence said S.G. Mustafa left the case property uncared for and taking such advantage the present Petitioner entered into possession and created some false documents to grab the case property. It is also stated that the claimant could not produce any document to show that the original owner was in possession of the case property at the material time from 26.3.1971 to 28.2.1972 and as such the case property has been rightly included in the 'Kha' List of the abandoned buildings under the provision of Article 2(1) of P.O. 16 of 1972 upon compliance of all the legal formalities. Further case of the Respondents-Government is that the claimant Petitioner while deposed before the Court of Settlement admitted in her cross-examination that she entered into the case property as an abandoned property, the Petitioner could not prove the death of S.G. Mustafa in Bangladesh and Abid Hossain is the son of said S.G. Mustafa and also failed to prove the right, title and interest in the case house and as such the Rule is liable to be discharged.

4. Mr. Khandaker Shariar Shakir, the learned Advocate appearing for the Petitioner submits that admittedly the Petitioner as constituted attorney of Abid Hossain son of S.G. Mustafa has been possessing the case property since 1982 and before that Abid Hossain was in possession. In this situation the Respondent-Government ought to have served a notice under Article 7 of P.O. 16 of 1972 upon the owner or the occupier asking them to surrender the possession of the property to the Deputy Commissioner but in the present case no such notice was issued and subsequently when the Ordinance No. 54 of 1985 came into force before enlistment of the property as abandoned property in the "Kha" list, the Government ought to have served a notice upon the owner or occupier of the property under Section 5(1)(b) of the Ordinance 54 of 1985 asking the owner or possessor to surrender the property or to explain on what basis they are occupying the disputed property but in the instant case no such notice was issued and served upon the Petitioner or upon her principal Abid Hossain, as such inclusion of the property in question in the "Kha" list of the Abandoned Buildings is palpably illegal and without lawful authority. Mr. Shakir referring an inquiry report dated 30.9.1996 [Annexure J(1)] furnished by the Officer-in-Charge, Abandoned Property Division, Khulna, submits that in the said report it has been clearly stated that there is no paper in the office to show on what basis the house in question included in the 'Kha' list of the abandoned buildings.

5. He also submits that from the said report it is evident that the property in question was never declared abandoned or any notice to that effect was issued or served upon the owner or occupier of the disputed property. Mr. Shakir also argued that to substantiate the claim of the Petitioner, she deposed before the Court of Settlement and exhibited relevant documents in support of her claim such as the original lease deed, mortgage deed executed in favour of HBFC, death certificate of S.G.Mustafa, nationality certificate of Abid Hossain, Affidavit sworn by Abid Hossain before the Magistrate, First Class, utility bills, succession certificate, registered power of attorney, payment receipt showing payment of loan money to HBFC by the Petitioner but the Court of Settlement totally failed to consider those documents in its true perspective and upon misconstruction of the said documents most illegally dismissed the case holding that the property has been rightly declared abandoned and included in the “Kha” list of the Abandoned Buildings. He further argued that the record of Khalishpur Housing Estate placed before the Court of Settlement shows that wife of S.G.Mustafa, namely, Hosneara Begum filed an application on 13.12.1972 before the Housing Authority, Khulna praying for allotting the said quarter in her favour stating that the property was leased out to her husband S.G.Mustafa in the year 1963 and subsequently her husband S.G.Mustafa constructed a two storied building on the property obtaining loan from HBFC who was killed on 10.3.1972. It is also argued that the Government file shows that said S.G. Mustafa died in Bangladesh in 1972 and several notices were issued by the Housing authority demanding outstanding installments from said S.G.Mustafa. Therefore, it is established that the original owner of the property was present in Bangladesh at the relevant time and he never left this country leaving the property uncared for but he died in this country and after his death his heirs had been in possession of the disputed property till 1980 and thereafter Abdur Rob Biswas and then the Petitioner as attorney of Abid Hossain has been possessing the disputed property.

6. For the above reason the property in question cannot be declared abandoned and as such the listing of the property in the “Kha” list of the Abandoned Buildings is illegal and without lawful authority. In support of his submission he has referred to the cases of *Jebon Nahar and Others Vs. Bangladesh* reported in 49 DLR (HCD) 108, *Bangladesh Vs. Chand Sultana* reported in 1 MLR (HCD) 310 and 51 DLR (AD) 24.

7. Mr. Md. Shahidul Islam, the learned Deputy Attorney General with Mr. Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent Government submit that the Petitioner is not the owner of the property and as such she cannot file application before the Court of Settlement for release of the property from the ‘Kha’ list of the Abandoned Buildings. It is also argued that the Petitioner having failed to prove the case, the Court of Settlement has rightly dismissed the case. Mr. Islam further submits that the burden of proof squarely lies on the Petitioner to prove that S.G.Mustafa or his heirs occupied, managed and supervised the case property on the relevant date i.e. on 28.2.1982 to establish that the said property is not an abandoned property. But the Petitioner having failed to prove the same the inclusion of the Building in the “Kha” list is proof of its being an abandoned property and the Government has nothing to prove or deny.

8. In the present case the Petitioner could not show that S.G. Mustafa was present in Bangladesh on material dates or that he occupied, managed or supervised the case property when P.O. 16 of 1972 came into operation, as such the listing of the property in the “Kha” list as abandoned property is lawful and conclusive proof of facts. It is also argued that the papers and documents submitted on behalf of the Petitioner to prove her case showing payment of utility bills are after 1980 onwards as such it cannot be said that the Petitioner or

her principal was in active control and possession of the property in question. He further argued that the Court of Settlement rightly observed that though the Petitioner submitted some documents but those have not been proved by evidence. Mr. Islam also argued that the Petitioner is not the owner of the property and she cannot be a claimant of the property as per law. It is also argued that this Court cannot sit as a Court of appeal sitting in writ jurisdiction. This Court only can interfere if it is found that the Court of Settlement acted malafide and in violation of principle of natural justice. But in the present case no such allegation has been brought on behalf of the Petitioner. In support of his submissions he referred to the cases of Bangladesh and others Vs. Md. Jalil and others reported in 48 DLR(AD) 10 , Secretary Ministry of Works Vs. Rowshan Ara Begum reported in 57 DLR (AD) 167 and Bangladesh Vs. A.T.M. Mannan & others reported in 1 BLC (AD) 8 and an unreported judgment dated 29.10.2009 passed in the case of Md. Feroj Mia and another Vs. Bangladesh in Writ Petition No. 4971 of 2001.

9. Heard the learned Advocates for the parties, perused the Application, Supplementary Affidavits, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and Affidavit-in-Reply, along with the annexures annexed thereto.

10. In the instant Rule the moot question to be looked into whether the property in question has been legally declared as abandoned property and whether the property is at all come within the per view of the definition “abandoned.” Before going through the merit of the case the provisions of law in this regard may be looked into.

11. The purpose of P.O. 16 of 1972 is to make provisions for the control , management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property or who are enemy aliens.

12. It appears that the purpose of P.O. 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. In the present case the Government submitted the concerned record before the Court of Settlement. This Court finds that there are some papers which show that the Housing Authority on different dates wrote letters to the lessee after 1972 onwards demanding payment of outstanding instalments. It is also found that wife of original lessee S.G. Mustafa has filed an application on 13.12. 1972 praying for allotment of the house in her name since her husband has been killed on 10.3.1972. Apart from this the petitioner in her application categorically asserted that the original owner of the case property died in Bangladesh in the year 1972. Subsequently, while his son Abid Hossain was in active control, supervision and management of the case property, he, by a registered power of attorney, authorized the Petitioner to manage, supervise and control the property on his behalf. The Government though claim that the property was rightly declared abandoned and enlisted in the “Kha” list as abandoned property, but could not produce any document in support of enlistment and declaration of the property as abandoned or even a notice to surrender under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance 54 of 1985. Furthermore, the Government could not show any paper in respect of treating the property as abandoned except a Gazette notification. The record of the Housing Settlement shows that the original owner of the case property S.G. Mustafa was present in Bangladesh at the relevant time i.e. on 28.2.1972 when P.O. 16 of 1972 came into force, as such the claim regarding whereabouts of the original allottee was not known to the Government was not correct. The Petitioner in support of her claim

submitted all the original documents before the Court of Settlement including Deed of Lease, Mortgage Deed executed in favour of HBFC, Receipt showing payment of loan to HBFC, payment of utility bills and other connected documents. The Court of settlement though discussed about the documents but upon a misconstruction raised question about the genuineness of those documents.

13. It is true that there are some anomalies in the papers of the Petitioner submitted before the Court of Settlement as well as before this Court but those anomalies in this court's view contributes a little in the merit of the case.

14. Furthermore, it is always to be borne in mind that in any case as this it must be accepted as a truism that the act of abandonment implies two fundamental factors:

- (i) Desertion of the property; and
- (ii) Giving up one's right to the property.

15. The word "abandonment" connotes in this sense the idea of the owner not merely temporarily vacating but deserting the property with the intention of never returning to it. Such absolute desertion must be concomitant with the positive intention to give up the right vested in the property. It follows, therefore, that mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. These two determinants of the notion of "abandonment" appear not to have been established in this case. It is true that the petitioner before us is not the owner of the property she represents the heirs of S.G. Mustafa namely, Abid Hossain and in other words she has some interest and she produced the power of attorney, Receipt showing payment of loan money to the HBFC and possessing the disputed house, as such the case property does not in any way answer to the description of the abandoned property as mentioned above and defined particularly under Article 2 of the P.O. 16 of 1972 as there was no desertion of the property accompanied by a giving up the right to the property by the owner.

16. A perusal of the Government file pertaining to the case property at page 113 it is found that the Officer-in-Charge of the Abandoned Property, Khulna submitted a report on 30.09.1996, the relevant portion of the said report is reproduced below for ready reference.

“এ বাড়ী সংক্রান্তে অত্র কার্যালয় হতে 'M' তালিকার ৬৩৪ নং ক্রমিকে গেজেটে প্রকাশের জন্য ২২/০৪/৮৬ তারিখে প্রেরণ করা হয়। সে মতে ১৯৮৬ সালে ২৮ শে এপ্রিল মাসের গেজেটে ৬৩৪ নং ক্রমিকে পরিত্যক্ত বাড়ী হিসেবে ঘোষিত হয়েছে। কিসের বুনিয়াদে বা কোন প্রতিবেদনের উপর পরিত্যক্ত বলে এ বাড়ী ঘোষিত হবে তার কোন তথ্য অত্র দপ্তরে বর্তমানে খুঁজে পাওয়া যায় না বা এ সংক্রান্ত কোন নথি নেই। খোলা হয়েছে কিনা তাও পরিদৃষ্ট হচ্ছে না।

উপরোক্ত তথ্য প্রমান হতে বাড়ীটি পরিত্যক্ত সম্পত্তির পরিচয় হতে অবমুক্তির যোগ্য বলে প্রতীয়মান”

17. The above mentioned observation of the concerned Officer of the Abandoned Property Division, Khulna, establishes that the Government never declared the property as abandoned. In the present case the ownership of the property is not a paramount consideration for this Court. The main question is whether the property in question has been rightly included in the "Kha" list of the Abandoned Building in accordance with law. This court also finds that the Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance, 1985. Non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on record to show

that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner.

18. In the case of Syeda Chand Sultana & others. Vs. Bangladesh reported in 1 MLR (HC) 310 which was affirmed by the Appellate Division and reported in 51 DLR(AD) 24, it has been held that,

“Where the owners as Bangladeshi nationals having lawful title have been in possession of the property although and never having ceased to manage or supervise the same and not having left the country and when there was no proper service of notice upon the petitioners as required under Article 7 of the P.O. no. 16 of 1972, the inclusion of the said building in the “Kha list” of abandoned properties being violative of the fundamental rights as contained in article 42 of the Constitution is illegal, without jurisdiction and of no legal effect and as such the petitioners are entitled to invoke the writ jurisdiction for enforcement of fundamental rights.

19. In the present facts and circumstances, this Court finds itself wholly subscribing to that *ratio decidendi* in the Syeda Chand Sultana Case.

20. Given this Court’s understanding of the essentials of enquiry as to the status of property under the relevant provisions of Ordinance as above explained, it is found that the claimant had duly discharged her onus of proving her case independently of the Government and that in doing so she had by a set of mutually reinforcing evidence produced generally established a continuous scenario of active ownership, occupation, supervision and management of the said property through her principal both before and after the promulgation of P.O. 16 of 1972. There was nothing on record that could have reasonably led the Court of Settlement to find otherwise. However, the Court of Settlement without following a judicial approach in determining the question of facts involved in this case unfortunately passed the Judgment without giving a judicial consideration of the whole dispute between the parties and decided the matter erroneously. By that reason, and by confining this Court’s scrutiny to the objective of finding whether the impugned Judgment is perverse or not, this Court has inevitably arrived at the conclusion that the Court of Settlement’s Judgment and Order dated 22.2.2001 is indeed a highly perverse one being contrary to the facts and circumstances and evidences on record and by that reason we are inclined to interfere with the impugned Judgment of the Court of Settlement as prayed for.

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

22. It is hereby declared that the Judgment and Order dated 10.12.2009 passed by the Respondent No. 3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57, Khalishpur Housing Estate, Khulna from the “Kha” list of abandoned buildings, published in the Bangladesh Gazette on 23.9.1986 at page No. 9764(36) against serial No. 615 (mistakenly mentioned in the decision as published in the Bangladesh Gazette, dated 28.4.1986 against serial No. 634) is without lawful authority and is of no legal effect and the Respondents are hereby directed to exclude the same from the “Kha” list of the Abandoned Buildings within 60 (sixty) days from the date of receipt of this Judgment and Order.

23. The order of stay granted at the time of issuance of this Rule is stand vacated.

24. Communicate a copy of this Judgment and Order to the Court of Settlement concerned at once.