7 SCOB [2016] HCD 134

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 520 of 2010

Mainuddin Ahammed
..... Petitioner

Versus

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

Mr. Mohammad Anwar Hossain with
Mr. Md. Nazir Ahmed Hossaini, Advocates
.....For the petitioner

Mr. Md. Aminul Haque with
Mr. S.M. Anamul Haque, Advocates
....For respondent nos. 3 & 8

Heard on 23.02.2015, 11.03.2015, 02.04.2015, 16.06.2015, 23.06.2015 and Judgment on 30.06.2015

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice Muhammad Khurshid Alam Sarkar.

State Acquisition and Tenancy Act, 1950
Section 144B:
During conducting the revisional survey under Section 144 of the SAT Act, till final record-of-rights are published, no suit lies in any civil Court challenging any action or Order of the Settlement Officer as provided in Section 144B of the SAT Act and, thus, the only option available for respondent no. 12 was to take recourse to the provision of Rule 42A of the Tenancy Rules. ... (Para-25)

Rule 42A of the Tenancy Rules
What to be fulfilled to direct excision of a fraudulent entry:
The following criteria are to be fulfilled to direct excision of a fraudulent entry. Firstly, there shall be an application or an official report alleging fraudulent entry in the record-of-rights; secondly, the application should be made or official report should be brought to the Revenue Officer who holds the status of a Settlement Officer; thirdly, the allegation should be brought or the official report should be made before publication of the final report; fourthly, Revenue Officer shall consult relevant records and also make necessary inquiry and, finally, upon hearing both the contending sides, shall pass the order of excision, if he is satisfied that the entry has been procured by fraud. Thus, in order to ascertain as to whether there has been a fraudulent entry, once the first four conditions are fulfilled, Revenue Officer shall be eligible to issue a notice for hearing. ... (Para-29)

Tenancy Rules
Rule 42A:
Under the provisions of Rule 42A of the Tenancy Rules, a Settlement Officer becomes legally obliged to issue a notice to the applicant, whenever the former receives an allegation of fraudulent entry in the record-of-rights before its final publication and, in discharging the said legal duty, it is incumbent upon the Settlement Officer to make a

proper assessment through hearing both the sides in an endeavour to find out as to whether the allegation is vague or the same is genuine having been substantiated by some specific evidence. Thereafter, following hearing the parties, if the Revenue Officer makes any correction in the record-of-rights, which goes against any party, in our view, only then the said aggrieved party may approach this Court, for, this action of the Settlement Officer is not appealable. ... (Para-31)

Tenancy Rules
Rule 42A:
When to invoke writ jurisdiction:
There is nothing to be aggrieved by the writ petitioner with the impugned notice at this stage inasmuch as he has the opportunity to explain his position by submitting papers and documents before the notice-issuing authority who is competent to deal with the petitioner's grievance and upon examining the papers regarding title and possession as well as record-of-rights, when the Settlement Officer would pass an order, or give a decision, exercising the power under Rule 42A of the Tenancy Rules, at that juncture, if the writ petitioner is unhappy with the said order or decision, he would be competent to invoke writ jurisdiction. ... (Para-46)

Judgment

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. By filing an application under Article 102 of the Constitution, the petitioner sought to question the legality and propriety of the notice dated 28.10.2009 (annexure-H) issued by respondent no. 8 (Deputy Assistant Settlement Officer, Sadar, Comilla) who has asked the petitioner to appear before him with all the papers relating to the Settlement Appeal nos. 8970 of 2003 & 11915 of 2008 of the Settlement Office of Comilla Sadar, Comilla.

2. Succinctly, the facts of the case, as stated in the writ petition, are that Maharaja of Tripura, Raja Birendra Kishore Manikya Bahadur, was owning and possessing 28.63 acres of land pertaining to CS Plot nos. 4384, 6396, 4397, 4099, 4101, 4102 and 4103. He settled the said entire lands perpetually in favour of Aftabuddin, Ahamuddin and Ali Mohammad, who are sons of late Juma Gazi of village Salmanpur within Police Station Kotwali of the then Tripura, by registered *kabuliyat* dated 13.08.1906. Thereafter, during the CS survey operation in the said area in the year 1915-1918, CS Khatian no. 88 of Mouza Lalmai Hill was recorded in the names of the aforesaid three persons in equal shares. Subsequently, the aforesaid three settlement holders voluntarily surrendered 15.65 acres of land to the Maharaja of Tripura in the year 1923 and, thus, the said three brothers kept 12.96 acres of land under their exclusive title and possession. Thereafter, the SA Khatian no. 64, which was prepared in the years from 1956 to 1962, was also recorded in the names of these three brothers. It is alleged that in the said SA Khatian no. 64 the names of some other persons, who did not have any title to the land, were inserted inadvertently. Among the said three brothers, Aftabuddin died leaving behind other two brothers Ahamuddin and Ali Mohammad and through an amicable arrangement Ahamuddin got 8.00 acres of land and Ali Mohammad 4.96 acres of land. Thereafter, Ali Mohammad died leaving behind his only son Md. Kala Miah who exchanged 4.96 acres of land with the writ petitioner vide exchange deed no. 2072 dated 25.04.1995 and Ahamuddin died leaving behind his two sons namely, Sujat Ali and Joynal Abedin and, later on, Sujat Ali died leaving behind his son Abul Hashem who exchanged 7.20 acres of land of Plot no. 4384 with the writ petitioner vide exchange deed no. 2024 dated 22.04.1995 and,

thereafter, Joynal Abedin also died leaving behind his only son Shaheb Ali who sold out 80 decimals of land under Plot no. 4384 to the writ petitioner vide Safkabala no. 3070 dated 06.07.1995 and, that is how, the writ petitioner claims to have been the owner of 12.80 acres of land. It is claimed that during field survey (Bujarat) of the BS operation, the property in question of the petitioner was enhanced upto 13.22 acres of land which was duly recorded in DP Khatian no. 2623.

3. It is stated that after being transferred the aforesaid quantum of lands in favour of the petitioner, the same were mutated in the name of the petitioner vide the order passed in the Separation Case no. 611 of 1995-1996 and the Separation Case no. 85 of 1999-2000 by the office of the Assistant Commissioner (Land) Sadar, Comilla and since then the petitioner has been paying Land Development Tax to the Government by receiving rent receipts. It is stated that during Bangladesh Survey Operation the property in question along with other property of the petitioner situated at Mouza Lalmai Pahar was recorded in the field survey (Bujarat) Khatian nos. 2636, 2637 and 2822 upon observing the relevant legal formalities as laid down in Rules 26-28 of the Tenancy Rules, 1955 (hereinafter referred to as the Tenancy Rules) and the DP Khatian no. 2623 was published by amalgamating and merging Bujarat Khatian nos. 2636, 2637 and 2822 and, then, by dealing with the objections raised by respondent nos. 7-12 under Rule 30 of the Tenancy Rules, DP Khatian no. 2623 was framed towards final publication of the record-of-rights with respect to the property of the writ petitioner.

4. It is stated that at this juncture respondent nos. 7-12 in collaboration with each other have filed the Settlement Appeal no. 8970 of 2003 under Rule 31 of the Tenancy Rules against the writ petitioner in an attempt to scrap the DP Khatian no. 2623 and, upon contested hearing, the said Settlement Appeal no. 8970 of 2003 was dismissed on 25.08.2003 by the Appeal Officer, Sadar, Comilla. After five years of the disposal of the said Settlement Appeal no. 8970 of 2003, respondent nos. 6-11 filed another Settlement Appeal no.11915 of 2008 challenging the DP Khatian no. 2623 of the petitioner, which was also dismissed on 22.02.2009 by the Appeal Officer. Thereafter, on 30.03.2009 respondent nos. 7-12 filed an application before respondent no. 3 with a prayer for reopening and rehearing of the aforesaid Settlement Appeal case nos. 8970 of 2003 and 11915 of 2008 and, pursuant to the said application, respondent no. 3 asked the Assistant Settlement Officer, Chowddagram, Comilla to hear and dispose of the said Settlement Appeals and, then, on 28.10.2009 respondent no. 8 issued notice fixing 04.11.2009 asking the petitioner to appear and hear the said appeals. On 06.12.2009 the petitioner's attorney submitted an application before respondent no. 3 with a request to cancel the order of rehearing and reopening of the said Settlement Appeal case taking the ground that previously the matter had been dealt with and disposed of twice on 25.08.25003 and 20.03.2009, but respondent nos. 3, 5 and 6 proceeded with the hearing of the case. Under the circumstances, the writ petitioner served a notice demanding justice on 03.01.2010 upon the respondents asking them to cancel the proceedings in question and finding non-compliance of the same, the petitioner approached this Court. Hence, this Rule.

5. On behalf of respondent nos. 9-14 although the Vokalatnama dated 05.04.2010 was filed, but no affidavit was submitted before this Court on their behalf to contest the Rule.

6. However, respondent nos. 3 and 8, namely, the Zonal Settlement Officer of Comilla Zone and the Deputy Assistant Settlement Officer, Comilla Sadar respectively, contested the Rule by filing an affidavit-in-compliance to the order passed by this Court on 15.04.2015. It is stated that during Bangladesh Survey Operation the property was recorded in the name of the petitioner situated at Mouza Lalmai Pahar along with other properties in the Bujarat

Khatian nos. 2636, 2637, 2822 and also in the DP Khatian no. 2623 by amalgamating the said Bujarat Khatians. The Settlement Appeal no. 8970 of 2003 was filed by respondent nos. 9 and 10, whereas the Settlement Appeal no. 11915 of 2008 was preferred by respondent nos. 11 to 13. The subsequent Settlement Appeal no. 11915 of 2008 was dismissed in absence of the appellants and on 20.08.2009 respondent no. 12 submitted an application to respondent no. 3 with a complaint of fraudulent entry in the case property upon stating the fact of his absence at the time of disposal of the said Settlement Appeal no. 11915 of 2008. Pursuant thereto, respondent no. 3 directed respondent no. 5 to submit a report upon carrying out a preliminary investigation under Rule 42A of the Tenancy Rules. Having been, thus, asked by a superior authority respondent no. 5 conducted an inquiry into the allegation of committing fraud and submitted an elaborate report to respondent no. 3. Through the said investigation, it was revealed that the opponent of the Settlement Appeal no. 8970 of 2003 and the Settlement Appeal no. 11915 of 2009 (Mainuddin Ahmed) do not have any physical possession in the property and, thus, the said investigation hinted at the existence of *prima-facie* elements of fraud.

7. Mr. Md. Anwar Hossain, the learned Advocate appearing for the petitioner, takes us through the various documents annexed to the petition in a bid to make us familiar with the claim of title of the petitioner and submits that from the annexed papers and documents it is clear that the land in question has been owned and possessed by the petitioner and, accordingly, during the Bangladesh Survey Operation, the petitioner's name was recorded in the DP Khatian no. 2623. He submits that in view of the fact that previously two appeals were preferred challenging the said DP Khatians and on both the occasions the appeal officers dismissed the appeal, respondent nos. 3 and 5, thus, have committed illegality by issuing the impugned notice for reopening and rehearing the said disposed of case. He next submits that there is no provision of appeal after an order is passed under Rule 31 of the Tenancy Rules and, hence, no appeal lies against the decision of Revenue Officer passed under Rule 31 of the Tenancy Rules and further once the appeal has been disposed of on contest under Rule 31 of the Tenancy Rules, no review application under any of the provisions of the Tenancy Rules lies and the Settlement Authority does not have any authority of reopening and rehearing the said disposed of case. By placing the provisions of Rule 32 of the Tenancy Rules, he submits that after exhausting the stage of Rule 31 of the Tenancy Rules, the Settlement Officer's only duty is to send the DP (Draft Publication) Khatian to the settlement press for its final publication. He, in an endeavour to make persuasive submission on this point, argues that when all the objections under Rule 30 of the Tenancy Rules have been dealt with and thereafter all the appeals under Rule 31 of the Tenancy Rules have been disposed of and, thereafter, the draft record-of-rights has been created in accordance with the original & appellate orders, the Revenue Officers have no other option but to proceed towards framing the final record-of-rights under Rule 32 of the Tenancy Rules and, thus, it is his submission that issuance of a notice for hearing appeals for 2nd time or 3rd time is beyond the scheme of the Tenancy Rules. He next submits that if the petitioner has any grievance against the decision or order passed in the proceedings under Rule 31 of the Tenancy Rules, the petitioner has only option to institute a civil suit in any civil Court. He places the application dated 30.03.2009 filed by respondent no. 12 before respondent no. 3 for rehearing of the appeals and submits that the allegations of fraud, as alleged by the said respondent in the application, is unspecific, vague and, thus, he argues that, as per the *ratio* laid down in the case of Jabed Ali Sarker Vs Dr. Sultan Ahmed & another 27 DLR (AD) 78, there is no reason for the Settlement Authority to entertain the said application containing unspecific and vague allegations and thereby reopen a matter which has previously been disposed of. In support of his submissions on the provisions of Rules 30,

31, 32, 33 & 42A of the Tenancy Rules, the learned Advocate for the petitioner refers to the following cases; Bhawal Raj Court of Wards Estate Vs Rasheda Begum & others 15 BLC(AD) 115, Zahirul Islam & others Vs Government of Bangladesh & others 65 DLR 168, Romisa Khanam Vs Secretary, Ministry of Land & others 61 DLR 18, Aftab Ali Sheikh (Md.) Vs Director, Land Records & others 58 DLR 397 and an unreported judgment of the High Court Division passed in writ petition no. 2175 of 2002.

8. By making the above submissions the learned Advocate for the petitioner prays for making the Rule absolute.

9. Per contra, Mr. Md. Aminul Haque, the learned Advocate appearing on behalf of respondent nos. 3 and 8, places Rule 42A of the Tenancy Rules and submits that it is the statutory obligation of a Revenue Officer/Settlement Officer to issue a notice whenever he receives an application from an aggrieved party or he is informed by a Tahashilder as to commission of fraud with regard to an entry in any record-of-rights. In an endeavour to elaborate his submission on this point, he reads out the contents of all the three applications filed by the different applicants on 3 (three) occasions in 2003, 2008 & in 2009 and submits that it is evident that the first application in the form of Appeal was filed by respondent nos. 9 & 10 in 2003 with regard to the dispute pertaining to a quantum of land of .33 acres arising out of Objection Case no. 3051 and, thereafter, the 2nd application/appeal was filed in the year 2008 by respondent nos. 11, 12 & 13 against the order passed in Objection Case no. 3523 but the same was dismissed without hearing these respondents and, thus, it is his submission that the parties of the Settlement Appeal no. 8970 of 2003 and the parties of the Settlement Appeal no. 11915 of 2008 are not the same. By placing the order sheets of the Settlement Appeal no. 11915 of 2008, he submits that since it is evident from the report of surveyors and respondent no. 5 that there are elements of fraud, the Settlement Authority has rightly issued the notice as they are statutorily bound to do so upon receipt of an application under Rule 42A of the Tenancy Rules. He submits that if the writ petitioner has any grievance against issuance of notice, he has every opportunity to explain his position by submitting papers and documents and also by making oral submissions before the said authority. By referring to the cases of Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260 and ACC Vs Sheikh Hasina 60 DLR (AD) 172 (relevant Para-41), he submits that mere issuance of a notice does not create any right for anyone to challenge the same without first appearing before the authority who issues the notice and only when a disfavourable order is made pursuant to hearing the parties, then, there may be an occasion to be aggrieved by the order of the authority.

10. By making the aforesaid submissions, the learned Advocate for respondent nos. 3 and 8 prays for discharging the Rule.

11. For an effective adjudication upon the case, when no affidavit was filed by the concerned State-functionaries after issuance of the Rule, we directed the said Settlement Authorities to assist this Court by furnishing their explanations as to why they have issued the impugned notice for re-opening and re-hearing a disposed-of case, which they complied with and, then, we have accommodated the learned Advocates for the petitioner and the respondents to make their respective submissions as lengthy as they wished. Side-by-side, we have perused the writ petition, affidavit-in-compliance filed by the Settlement Authorities and the annexures appended thereto. We have also read through very carefully the relevant laws and decisions placed before us.

12. Since the question of maintainability of this writ petition has been raised by the learned Advocate for respondent nos. 3 & 8 on the ground that the writ petitioner is not competent to invoke jurisdiction under Article 102 of the Constitution without first appearing before the notice issuing authority, as per the practice and convention of handing down of a judgment, this Court is required to deal with the said preliminary point at first, before embarking upon examination of the legality and propriety of the issuance of the impugned notice. However, for the reasons to be known hereinafter, first we would take up the substantial issue, namely the action of the Settlement Authority in asking the petitioner to attend a hearing on a matter, which is claimed by the petitioner to have already been disposed of by the said authority. Thus, it appears that for a proper adjudication upon the substantial issue, we should see whether the matter is a disposed of matter or not.

13. It is an admitted position that previously the Settlement Appeal no. 8970 of 2003 was filed by respondent nos. 9 and 10 namely, Md. Nurul Islam and Md. Taleb Khan with a prayer for correction of the record-of-rights with regard to a quantum of land of only .33 acres and the same was dismissed by the appeal officer on 25.08.2003 and it is also admitted that the Settlement Appeal no. 11915 of 2008 was filed by respondent nos. 11 to 13 namely, Abul Kashem, Nazmul Islam and Abdul Majid and, thus, it is evident that these appellants are completely different groups of people who have challenged the record-of-rights for a different quantum of land under the different Khatians. It is further evident that while the Settlement Appeal no. 8970 of 2003 was preferred before the Appellate Authority against the order passed in Objection Case no. 3051, the Settlement Appeal no. 11915 of 2008 originated from the Objection Case no. 3523. Though the Settlement Appeal no. 8970 of 2003 was dismissed on a contested hearing on 25.08.2003, the Settlement Appeal no.11915 of 2008 was dismissed in absence of the appellants on 22.02.2009 and this *exparte* disposal of the Settlement Appeal no. 11915 of 2008 prompted respondent no. 12 (Nazmul Islam) to approach the concerned Settlement Authority, namely Zonal Settlement Officer, Comilla (respondent no. 3), to raise the allegations of practicing fraud in obtaining a favourable order and, thereby, prayed for re-hearing of the previous appeals.

14. The above factual examination produces two results. One outcome is that the Settlement Appeal no.11915 of 2008 is not the repetition of the appeal filed in the year 2003 and the other one is that the subject matter in question has already been dealt with by the Appeal Officer in the Settlement Appeal no. 11915 of 2008.

15. The preceding upshot triggers the following two pertinent questions for our consideration; (*K*) Did the appeal officer commit an error by pronouncing an *exparte* order? (*L*) Was any other option available or open for the applicants (defendant no. 12 &other 2) other than filing the application before the respondent no. 3? The foregoing scenario leads us to look at the relevant provisions of the Tenancy Rules and to get engaged in the scrutiny as to whether duties of the concerned Settlement Officers were carried out as per the provisions of the Tenancy Rules in dealing with the petitioner's matter.

16. As per the provisions of Section 144 of the SAT Act, the Government, when finds it appropriate, may undertake the task of preparation or revision of the record-of-rights in respect of any district, part of a district or local area by a Revenue-Officer in accordance with the relevant Government Rules and Chapter VII of the Tenancy Rules, 1955 incorporates the provisions as to the procedure to be adopted by the Revenue Officer for revision of record-of-rights under Section 144 of the SAT Act.

17. While Rule 26 of the Tenancy Rules contains the provision about the particulars to be recorded, Rule 27 states that ten phases are to be completed in preparation of the revision of record-of-rights with the discretion of the concerned Revenue Officer that all the first six stages or any of it may be omitted with the approval of the Director of the Land Records and Survey as per the circumstance of an area. Out of the above ten steps, the sixth to tenth stages deal with attestation, publication of draft record, disposal of objections, filing of appeals and disposal thereof and preparation and publication of final record-of-rights.

18. Rule 28 outlines the modus operandi of the work up to attestation by observing The Technical Rules and Instructions of the Settlement Department, which was published for the last time in 1957. Rule 29 enumerates that after completion of attestation, the Revenue Officer shall publish the draft record-of-rights by placing it for public inspection for a period of not less than one month at such convenient place as he may determine informing the local inhabitants about the last date of filing objections under Rule 30. Rule 30 spells out the procedure for filing objection against draft publication of record-of-rights and Rule 31 provides the forum for preferring appeal against the order passed under Rule 30. Before passing the final order on such an appeal the contending parties shall be afforded the opportunity to present their part of the case.

19. In other words, on completion of attestation the Revenue Officer's first-phase duty is to provide an opportunity for raising objection, if any, regarding the ownership or possession of land or of any interest in the land and, in disposing of the objection, the Revenue Officer shall record his brief decision. Then, comes the stage of appeal where the Revenue Officer shall pass an order in writing stating the grounds for allowing or rejecting the appeal upon affording the opportunity for hearing.

20. Following disposal of objections under Rule 30 and appeals under Rule 31, the Revenue Officer must proceed towards final publication of the record-of-rights, as provided in Rule 32, keeping conformity with previously published draft record and, then, according to the direction given by the Government, by general or special order, the final record shall be published. Under Rule 33 the Revenue Officer shall publish the final record-of-rights within 30 (thirty) days from the date of receipt of the general or special order of the Government. When a record-of-rights is finally published under Rule 33, the publication shall be conclusive evidence that the record has been duly revised under Section 144 of the SAT Act. Rule 34 prescribes the procedure for issuance of certificate containing the fact of such final publication. The Government is empowered by Rule 34(2) to declare by notification in the official Gazette that the record-of-rights has been finally published with regard to a specific area for every village and such notification shall be conclusive proof of such publication. Rule 35 heralds that the presumption of the published records-of-right in the above manner is to be taken as correct until it is rebutted on taking evidence before the appropriate civil Court.

21. Then, Chapter VIII of the Rules, 1955 seeks to outline the power of the Settlement Officers in revising record-of-rights under Section 144 of the SAT Act. Rule 36 speaks about a Revenue Officer's power, who is appointed with or without additional designation of the Settlement Officer or Assistant Settlement Officer for Revision of a record-of-rights under Chapter XVII of the Act within any district, part of a district or local area, of taking evidence upon following the procedure as laid down in the Code of Civil Procedure, 1908 for the trial of suit and also of his power to enter upon any land included within the area in respect of which an order under Section 144 of the Act has been made to survey, demarcate and prepare a map of the same. Rule 40 empowers the Settlement Officer to make over certain

matters, including proceedings relating to objections under Rule 30 and appeals under Rule 31, for disposal by any Assistant Settlement Officer subordinate to him. Rule 41 empowers the Settlement Officer to withdraw cases from the file of any Assistant Settlement Officer or Revenue Officer subordinate to him relating to any of the proceedings under Chapter VII and to dispose of the same by himself or by transfer them to any other Assistant Settlement Officer or Revenue Officer Subordinate to him for disposal. Rule 42 provides special power to the Revenue Officer appointed with the additional designation of the Settlement Officer who may at any time before publication of the final record-of-rights direct that any portion of proceedings referred to in Rules 28 to 32 in respect of any district, part of a district or local area shall be cancelled and to take up the proceeding afresh from such stage as he may direct. Rule 42 provides that pursuant to a complaint or on receipt of an official report the Revenue Officer with the additional designation of Settlement Officer has jurisdiction to correct a fraudulent entry in the record-of-rights upon consulting the relevant records and making other inquiries as he may deem necessary and direct excision of the fraudulent entry upon giving opportunities of personal hearing to the contending parties. Rule 42B authorises the Revenue Officer to make correction of obvious errors i.e. arithmetical or clerical before final publication of the record-of-rights. Rule 44 empowers the Director of Land Records and Surveys to discharge all the aforesaid functions of a Revenue Officer.

22. It appears that among the powers vested in the Revenue Officers in Chapter VIII (Rules 36 to 44), while Rules 36 to 41 and 43 to 44 are administrative power, the powers vested in them vide Rules 42, 42A & 42B are extraordinary power, albeit with the limitation that those may be exercised only before final publication of the record-of-rights, for, Rule 42 vests special power in the Revenue Officer to cancel any portion of the proceeding referred to in Rules 28 to 32 in respect of any district, any part of a district or local area and thereby direct the proceedings to be taken up afresh from such stage as he may direct, Rule 42A vests power in the Revenue Officer with the additional designation of the Settlement Officer to hear and dispose of any application filed alleging fraud and Rule 42B empowers the Revenue Officer to correct any clerical errors.

23. It transpires from the facts of this case that following making order under Section 144(1) of the SAT Act, revision of record-of-rights for Comilla District was commenced and, thereafter, upon completing the required works namely (i) Traverse Survey, (ii) Cadastral Survey, (iii) Erection of boundary marks, (iv) Preliminary record-writing (Khanapuri), (v) Local Inspection (Bujharat) and (vi) Attestation, when draft record-of-rights was published by the concerned Settlement Officer under Rule 29 of the Tenancy Rules, respondent no. 12 together with other two persons made objection to the concerned Settlement Officer under Rule 30 of the Tenancy Rules and the same was registered as Objection Case no. 3523. However, from the papers submitted before this Court, it is not clear as to when the Government had kicked off the work of the revision in question in the District of Comilla and also when the first six stages were carried out or those were not required to be carried out. Also, the date of publication of the draft record-of-rights, the date of filing the Objection Form/Application and the date of disposal of the Objection Case no. 3523 were not made available for our consideration. Although the petitioner in his supplementary affidavit has sought to allege that appeal no. 11915 of 2008 was preferred after five years, but no clue of delay in preferring the appeal within 30 (thirty) days, as stipulated in rule 31 of the Tenancy Rules, is traceable from the order dated 22.02.2009 passed by the Appeal Officer in Settlement Appeal no. 11915 of 2008, for, there is no date of disposal of the Objection Case no. 3523 in the order sheet. However, the Appeal Officer in the above order goes on to say

that appeal has been filed within time without bothering to mention about the date of the disposal of the said Objection case no. 3523.

24. Be that as it may, we find that the Settlement Appeal no. 11915 of 2008 has been dealt with by the concerned officer in a cavalier fashion. It is evident from the order sheets of the said appeal that while the applicants were present before the Appellate Officer on every occasion from the date of filing the appeal up to the next consecutive 6 (six) dates and the petitioner was seeking time on each occasion, on the 7th date of hearing when the appellants were found absent, the Appeal Officer in their absence dismissed the appeal on a ground that since the appeal was dealt with previously, appellants should not be allowed to re-open it. Had the matter been heard in the presence of the appellants, this matter would not have been dragged up to this Court, for, they could have placed the fact before the Appeal Officer that the present appeal had arisen out of a different Objection Case relating to a different land. It was incumbent upon the Appeal Officer to properly vet the order passed by the Objection Officer to find out as to whether any evidence regarding ownership or title was taken by the Objection Officer and whether the ground taken by the said Objection Officer for turning down the Objection Case was rational, but these vital aspects were not recorded by the Appeal Officer in dismissing the Settlement Appeal no. 11915 of 2008.

25. It follows that the Appeal Officer committed a serious error in disposing of the Settlement Appeal no. 11915 of 2008 and the question posed hereinbefore as question no (*K*) is, thus, answered in affirmative. The next question formulated in question no. (*L*) is liable to be answered in the negative, given that during conducting the revisional survey under Section 144 of the SAT Act, till final record-of-rights are published, no suit lies in any civil Court challenging any action or Order of the Settlement Officer as provided in Section 144B of the SAT Act and, thus, the only option available for respondent no. 12 was to take recourse to the provision of Rule 42A of the Tenancy Rules.

26. Now, we are to see whether respondent no. 8, under the instructions of respondent no. 3, was competent to treat the said application to be a proper application under Rule 42A of the Tenancy Rules and, thereby, to issue the impugned notice dated 28.10.2019.

27. It is evident from the text of the application filed by respondent no. 12 that he has brought the allegation of forging the papers and documents against the petitioner in the following words: *"gvgjvØ‡qi weev`xMb A‰ea I ZÂKZvc¥Rvj KvMRcÎ mÿRb K‡i A‰ea fv‡e Avgv‡`i ˆcwÎK `Ljxq fwg Zvnv‡`i bv‡g †iKW mÿRb Kwiqv †KŠk‡j †iKW mwó K‡i, A_P bwjkx fwgi GK BwÂI weev`xi `L‡j bvB, †Kvb w`bB wQj bv Ges fweI¨‡ZI weev`x `Lj Kwi‡Z cwi‡e bv"*. Respondent no. 3 considered the said allegations to be within the purview of Rule 42A of the Tenancy Rules and directed the Tahashilder and Surveyors to conduct an enquiry as to the said allegations.

28. Does the above style of representation authorise respondent no. 3 to treat the same as an allegation under the provisions of Section 42A of the Tenancy Rules? For having a better understanding of the provisions of Rule 42A of the Tenancy Rules, it is reproduced hereunder-

> **42A. Correction of fraudulent entry before final publication of record-of-rights-**The Revenue-officer, with the additional designation of 'Settlement Officer' shall, on receipt of an application or on receipt of an official report for the correction of an entry that has been procured by fraud in record-of-rights before final publication thereof, after consulting relevant records and making such other enquiries as he deems necessary, direct excision of the fraudulent

> entry and his act in doing so shall not be open to appeal. At the same time, the Revenue-officer shall make the correct entry after giving the parties concerned a hearing and recording his finding in a formal proceeding for the purpose of future reference.

29. From a plain reading of the above provisions, it appears that the following criteria are to be fulfilled to direct excision of a fraudulent entry. Firstly, there shall be an application or an official report alleging fraudulent entry in the record-of-rights; secondly, the application should be made or official report should be brought to the Revenue Officer who holds the status of a Settlement Officer; thirdly, the allegation should be brought or the official report should be made before publication of the final report; fourthly, Revenue Officer shall consult relevant records and also make necessary inquiry and, finally, upon hearing both the contending sides, shall pass the order of excision, if he is satisfied that the entry has been procured by fraud. Thus, in order to ascertain as to whether there has been a fraudulent entry, once the first four conditions are fulfilled, Revenue Officer shall be eligible to issue a notice for hearing.

30. Here, in the case at hand, it is apparent that the final record-of-rights for the case lands are yet to be published and, at this stage, an application with an allegation of fraud was lodged with a Revenue Officer who holds the status of Settlement Officer and he, upon consulting the records, directed respondent no. 5 (the Assistant Settlement Officer, Chowddagram, Comilla) to do the needful. Then, respondent no. 5 sent two surveyors to the case lands to find out the names of the persons who are holding physical possession over the case lands. The surveyors' report reveals that the petitioner is not in possession of the case land and, that is how, upon fulfilling the four pre-conditions of issuance a notice under Rule 42A of the Tenancy Rules, the Settlement Authority became legally obliged to issue the impugned notice asking the petitioner to explain his position as to whether there are irregularities in recording the names in the record-of-rights. The purpose of asking the parties to attend the hearing is to assess the authenticity of the allegation brought against the petitioner by respondent no. 12 as well as to see the veracity of the surveyors report, for, the Settlement Authority cannot remove the petitioner's name from the record-of-rights on a vague and unspecific allegation, as propounded in the case of Jabed Ali Sarker Vs Dr Sultan Ahmed & another, 27 DLR (AD) 78 and, thus, only when the allegation would be substantiated by some evidence or, at least, it would appear to be a plausible allegation to the concerned Settlement Officer, then, he would be competent to direct excision of the present entry.

31. In other words, under the provisions of Rule 42A of the Tenancy Rules, a Settlement Officer becomes legally obliged to issue a notice to the applicant, whenever the former receives an allegation of fraudulent entry in the record-of-rights before its final publication and, in discharging the said legal duty, it is incumbent upon the Settlement Officer to make a proper assessment through hearing both the sides in an endeavour to find out as to whether the allegation is vague or the same is genuine having been substantiated by some specific evidence. Thereafter, following hearing the parties, if the Revenue Officer makes any correction in the record-of-rights, which goes against any party, in our view, only then the said aggrieved party may approach this Court, for, this action of the Settlement Officer is not appealable.

32. Upon carrying out the above analysis on the contents of the application under Rule 42A of the Tenancy Rules in tandem with the circumstances which led respondent no. 12 to

make such an approach to respondent no. 3, we are satisfied that respondent no. 8 issued the impugned notice within his lawful authority and, thus, we hold that no illegality was committed by respondent nos. 3 & 8 to issue the notice dated 28.10.2009 (annexure-H).

33. With the above resolutions on the substantial issue of this case, we may comfortably discharge the instant Rule without delving into the question of maintainability of this writ petition. However, since the said issue has been raised by the learned Advocate for respondent nos. 3 & 8 that without first appearing before them by responding to the impugned notice, invocation of writ jurisdiction was improper, we feel it appropriate to briefly dwell on the maintainability issue by dealing with the cases referred to by the learned Advocates, for the sake of completeness of this judgment, particularly, in the backdrop of presentation of its counter-arguments before us by the learned Advocate for the petitioner.

34. The case of Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC (AD) 115, was referred to by the petitioner in a bid to buttress up his argument that after disposal of appeal under Rule 31, the Settlement Authority was incompetent to issue the impugned notice. Since the plea of lacking competency was taken by the petitioner with reference to the aforesaid case laws, it would be a prudent exercise if we discuss the fact of the cited case law in an endeavour to apply the *ratio* of the same.

35. In the said case, an order passed by the Settlement Authority directing the excision of an entry in the record-of-rights was challenged, but in the case at hand a mere notice has been challenged. More so, in the said case, after preparation of the SA Record and BS Record in the names of the writ petitioners of the said case, they were in exclusive possession continually for decades together in the property by constructing multistoried buildings thereon. The High Court Division and Appellate Division found that while the writ petitioners of the said case were owning and possessing their land for decades and, particularly, when their names were published finally in the Gazette Notification after preparation of the SA Record and the BS Record, the Settlement Authority was not competent to correct the records inasmuch as after final publication, an aggrieved party can take recourse to the jurisdiction of the civil Court. Therefore, the facts of the afore-cited case being completely different, the *ratio* laid down therein is not applicable in the said case.

36. The learned Advocate Mr. Md. Anwar Hossain has also sought to rely on the cases of Zahirul Islam Vs Bangladesh 65 DLR 168, Romisa Khanam Vs Secretary, Ministry of Land, Government of People's Republic of Bangladesh & others 61 DLR 18, Aftab Ali Sheikh (Md.) Vs. Director, Land Records & others 58 DLR 397 and an unreported judgment of the High Court Division passed in writ petition no. 2175 of 2002.

37. In the case of Zahirul Islam Vs Bangladesh 65 DLR 168, eight notices were challenged and a Division Bench of this Court made the Rule absolute on the basis of the *ratio* laid down in the afore-cited 15-BLC case of Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115. But in the said case the differential factors of the cited 15-BLC case and the said case were not discussed. Therefore, we are of the view that this Court is not bound to follow the decision of this case as the same renders to be *per incuriam.*

38. We have taken into judicial notice that, in these days, the learned members of the Bar tend to refer to their chosen case-laws without minutely looking at the facts of the said referred cases so as to tally the facts of the case under adjudication with that of the referred

cases, rather by simply skimming through the Head Notes at a glance, they try to fit their cases into the referred cases. The learned Advocates are the officers of the Court and their efforts should be directed towards properly assisting the Court by placing the true position of a *ratio* laid down in a case-law, as opposed to their endeavour of achieving a favourable application of the referred case-law by bringing to the notice of the Court only the part which seems to be relevant and, thereby, abstain from placing the other part of the referred case-law which does not match with the case at hand. The 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115] is a milestone judgment on the application of the Tenancy Rules, particularly of the provision of Rules 27 to 42A of the same. But due to non-placement of the fact of the 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115], the Division Bench considered that the *ratio* of the 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115] is applicable. The background fact of the said mile-stone case is that the writ petition was filed against an order of direction of the Settlement Authority who had removed the names of the present recorded tenants, whereas the case of 65 DLR 168 is merely with regard to challenging the legality of the notices for appearing before the concerned Settlement Authority; non-disclosure of the preceding differential features of the above-mentioned two cases led the Division Bench to hold a view that the *ratio* of the mile-stone ease is squarely applicable.

39. The decision of the case of Romisa Khanam 61 DLR 20 does not require discussion as the case having been appealed by the writ-respondent-Bhawal Raj in the Appellate Division was upheld and was reported in the above 15-BLC (AD) 115 case.

40. In the case of Aftab Ali Sheikh (Md.) Vs. Director, Land Records & others 58 DLR 397, when the Director of Land records and Survey being the highest Settlement Authority ordered excision of an entry, the aggrieved party's move before this Court was not questioned. In the case at hand as well, if the petitioner moves before this Court after passing an order by the Settlement Authority, availing writ jurisdiction would be the proper course of action, as there is no appellate forum against such order. Moreover, in the said case the High Court Division having not found any element of fraud, it rightly held that correction done by the said highest Settlement Authority in the record-of-rights exercising his power under Rule 42A was improper.

41. In the cited unreported case (Writ Petition no. 2175 of 2002), when the petitioner was asked to attend hearing of appeal for the third-time on a matter which was previously twice dealt with and disposed of by the Appeal Officers, this Court found the issuance of the impugned notice to be beyond of competency of the Appeal Officer. The differentiating features of the above case are that in the said case there was no allegation of fraud and the notice was not issued aiming at exercising power under Rule 42A of the Tenancy Rules and, secondly, there cannot be a second appeal on the same matter among the same parties.

42. On the other hand, the following cases have been referred to by Mr. Md. Aminul Haque, the learned Advocate for respondent nos. 3 and 8; (i) Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, (ii) Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260 and (iii) ACC Vs Sheikh Hasina 60 DLR (AD) 172 (relevant Para-41).

43. The facts of the first two cases [(i) Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, (ii) Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260] are with regard to challenging a notice issued by Bangladesh Bank whereupon the writ petitioner

of the said writ petition was asked to furnish some documents within 30 days with an explanation as to whether he was a loan defaulter and thereby was competent to hold the position as a director of the Bank. When the writ petitioner, without appearing before the notice-issuing authority, challenged the said notice, the High Court Division summarily rejected the writ petition which was affirmed by the Appellate Division having held that the writ petitioner does not have anything to be aggrieved with a notice which has not been apparently issued without any jurisdiction or lawful authority.

44. In the afore-referred case no. iii [ACC Vs Sheikh Hasina 60 DLR (AD) 172], when the ACC issued a notice upon the writ petitioner, she challenged the notice and it was observed at Para-41, albeit impliedly, that issuance of a mere notice does not amount to any accusation so as to placing the notice-receiver in the position of an aggrieved person.

45. The above discussions on the referred case-laws amply demonstrate that while the cases referred to by the learned Advocate for the petitioner do not help him to directly invoke writ jurisdiction, on the contrary, the *ratio* of the case-laws referred to by the learned Advocate for respondent nos. 3 & 8 do fit in the case at hand.

46. Accordingly, the Rule is liable to be discharged on the maintainability ground as well, for, we find that there is nothing to be aggrieved by the writ petitioner with the impugned notice at this stage inasmuch as he has the opportunity to explain his position by submitting papers and documents before the notice-issuing authority who is competent to deal with the petitioner's grievance and upon examining the papers regarding title and possession as well as record-of-rights, when the Settlement Officer would pass an order, or give a decision, exercising the power under Rule 42A of the Tenancy Rules, at that juncture, if the writ petitioner is unhappy with the said order or decision, he would be competent to invoke writ jurisdiction.

47. Before parting with this judgment, we feel it pertinent to observe that there should be a fixed time-frame for the concerned Revenue/Settlement Officers, who are performing functions upon exercising their powers under Rule 42A of the Tenancy Rules, 1955 in entertaining applications from the applicants or in *suo motu* undertaking any step by them and also a time-frame for disposal of the matters pending before them on top of providing a limitation of filing an application or time-limit of *suo motu* taking up a matter under the authority of the said Rule 42A after exhausting the stage of Rule 31. More importantly, there must be some instructions or guidelines on exercising powers by the Settlement Officers under Rule 42A of the Tenancy Rules stating as to what type of allegation by an applicant or a report from a Tahshilder would constitute a fraudulent entry. The Settlement Department should not be allowed to delay in publishing the final record, otherwise the procedures laid down in the Rules would turn to be an endless process causing persistent harassment to the people of Bangladesh and thereby frustrating the scheme of the SAT Act. Also, there should be a clear-cut guide-line for exercising power by the Settlement Officers under Rule 42 outlining under what circumstances an already-completed work can be cancelled.

48. It is our considered view that since in the SAT Act there is a provision of getting a fraudulent-entry corrected through challenging the same in the Tribunal, vesting power in the Settlement Officers under Rule 42A appears to be an excessive provision in the SAT Act, for, it creates an opportunity for the ill-motivated litigants to harass the original land owners. The rationale behind taking the above view is that in course of dealing with the cases under Rule 42A of the Tenancy Rules, 1955, this Court has taken in its judicial notice that in the pretext

of exercising power under Rule 42A of the Tenancy Rules, the concerned authorities are always procrastinating the final publication of the record-of-rights despite completing all the stages under Rules 26-32 of the Tenancy Rules. In this case as well, although the stages under Rules 26-32 have been completed, each time a new Settlement Officer upon taking over his charge is re-opening the file instead of finally publishing the records-of-rights of the petitioner. Furthermore, the other point of the balance of convenience is that apparently the provision of Rule 42A has been inserted for removing the fraudulent entry, therefore, even if the fraudulent entry is traced after the final publication, the affected person is not left without any remedy, as we find that if there is any fraudulent entry or there remains any other fault in the process of completing the tasks starting from Rules 26 to 35, the same can be corrected by invoking the jurisdiction of the Tribunal under Section 145A of the SAT Act.

49. In the result, the Rule is discharged, however, there shall be no order as to costs. The order of stay granted at the time of issuance of the Rule is hereby vacated.

50. The writ petitioner shall be at liberty to appear before the notice issuing Settlement Authority, namely respondent no. 5, within 30 (thirty) days from the date of receipt of this judgment and order.

51. Office is directed to send an advance copy of this judgment and order to respondent nos. 3 and 8. If the writ petitioner appears before respondent no. 5 within 30 (thirty) days from the date of receipt of this judgment following this judgment and order, the latter shall dispose of the matter under the impugned notice dated 28.10.2009 within 7 (seven) days from the date of the writ petitioner's appearance before him.

52. Office is further directed to send a copy to (i) the Bangladesh Law Commission, (ii) Secretary, Ministry of the Land and (iii) the Director General of the Settlement Department to let them peruse and consider the observations made hereinbefore concerning deletion of the provisions of Rule 42A of the Tenancy Rules, 1955 or, in the alternative, incorporation of the appropriate provisions in Rule 42A of the Tenancy Rules, 1955 to prevent its colourable exercise.