14 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 10519 of 2018
With
WRIT PETITION NO. 10520 of 2018

Abdur Rahman and others
..... Petitioners
(In writ petition No. 10519 of 2018)

-Versus-

Judge (District Judge) Arpita Shampparrti Prattarpan Appellate Tribunal, Brahmanbaria and others
..... Respondents
(In writ petition No. 10519 of 2018)

Farid Ahammed
..... Petitioner
(In writ petition No. 10520 of 2018)

-Versus-

Judge (District Judge) Arpita Shamppatti Prattarpan Appellate Tribunal, Brahmanbaria and others
..... Respondents
(In writ petition No. 10520 of 2018)

Dr. Kazi Akter Hamid, Senior Advocate with
Mr. A.Q.M Sohel Rana, Advocate(s)
……For the petitioners
(In both the writ petitions)

Mr. Md. Oziullah, with
Mr. Md. Kamal Hossain and
Mrs. Afroza Sultana, Advocate(s)
….. For the respondent No. 4 & 5
(In both the writ petitions)

Heard on 02.01.2019, 23.10.2019, 21.11.2019 & Judgment on 05.12.2019

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

Writ of Certionary: Maintainability;
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 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. ... (Para 34)

JUDGMENT

Md. Ashfaqul Islam, J:

1. Both the writ petitions are taken up together and heard and disposed of by this single judgment as there involved a common question of fact and law.

2. The Petitioners in writ petition No. 10519 of 2018 Abdur Rahman and others as plaintiffs filed Arpita Shamppatti Prattarpan Suit No. 163 of 2012 before Arpita Shamppatti Prattarpan Tribunal, Brahmanbaria (hereinafter referred to as Tribunal), where writ respondent No. 5, Mihir Dutta contested as added defendant No. 4.

3. The Petitioner of writ petition No. 10520 of 2018 Farid Ahammed (who was plaintiff No. 4 in Suit No. 163 of 2012) featured as added defendant No. 3 in Suit No. 390 of 2012 filed by Mihir Dutta as plaintiff who is the added defendant No. 4 in Suit No. 163 of 2012.

4. Both the Suits were contested by the respective parties before the Tribunal wherein Arpita Case No. 163 of 2012 was decreed and Arpita Shamppatti Suit No. 390 of 2012 was dismissed by the Tribunal on 27.03.2017.

5. Three appeals were filed before the Arpita Shamppatti Appellate Tribunal, Brahmanbaria. Appeal No. 32 of 2017 was filed by Mihir Dutta against the Judgment and Decree passed in Arpita Shamppatti Suit No. 390 of 2012. Mihir Dutta filed another appeal No. 33 of 2017 as appellant as added opposite party against the decision of the Tribunal in Arpita Suit No. 163 of 2012 in which Suit was decreed. The Government also filed Appeal No. 34 of 2017 against the Judgment and Decree passed in Arpita Shamppatti Suit No. 163 of 2012.

6. The Appellate Tribunal after hearing the parties by the impugned Judgment and Decree dated 05.07.2018 allowed appeal No. 32 of 2017 and 33 of 2017 in favour of Mihir Dutta by setting aside the Judgment and Decree passed by the Tribunal in Arpita Shamppatti Suit No. 163 of 2012 and Suit No. 390 of 2012 respectively. Government Appeal No. 34 of 2017 was also dismissed and the Judgment and Decree of Arpita Shamppatti Suit No. 163 of 2012 was set aside.

7. For better understanding of the case the facts are detailed below in a nutshell:
Writ petitioners Abdur Rahman and others filed writ petition No. 10519 of 2018. Their case is that they filed the Suit before the Arpita Shamppatti Tribunal under অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ (hereinafter referred to as Ain) being Arptia suit no. 163 of 2012 (hereinafter referred to as Arpita case) before the Tribunal stating inter alia, that during preparation of revisional Khatian C.S Plot No. 131 was converted into S.A Plot No. 356. S.A Khatian No. 133 in respect of total 103 decimals of land including 46 decimals of land of Plot No. 356 was prepared in the name of Harendra Kishore Dutta, Norendra Kishore Dutta, son of Surendra Kishore Dutta and Surendra Kishore Dutta son of Prassanno Kishore Dutta. Harendra Kishore Dutta was enjoying the suit land on amicable settlement along with other tenants and died leaving behind Birendra Kishore Dutta as only legal heir. Birendra Kishore Dutta died leaving behind Samir Kishore Dutta as his only legal heir. Accordingly, Samir Kishore Dutta transferred the suit land to Malai Miah, son of late Siraj Miah vide an Ewaznama Deed being No. 5322 which was executed on 03.09.1982 and registered on 11.09.1982. Malai Miah was enjoying the suit land through tenants by erecting dwelling house and by digging pond therein.

8. The Government as plaintiff instituted a Title suit being No. 96 of 1985 for declaring the aforesaid Ewaznama deed as illegal and inoperative. The Suit was decreed in favour of the Government. Malai Miah preferred an appeal being No. 15 of 1993 before the District Judge, Brahmanbaria against the judgment and decree of the title suit No. 96 of 1985. On 09.10.2000 the aforesaid appeal was allowed and thereby set aside the judgment and decree dated 01.12.1992 and 02.01.1993 respectively passed in title suit No. 96 of 1985. Thereafter, the Government preferred a Civil Revision being No. 1225 of 2000 before this Division which was rejected for default vide order dated 24.03.2202. Malai Miah while in possession of the suit land transferred the same to the petitioners/their predecessors vide different sale deeds. The petitioners have been possessing and enjoying the suit land. The opposite parties have no right, title and possession over the suit land. After disposal of the Civil Revision case Additional Deputy Commissioner (Revenue), sought for legal opinion from the vested property lawyer and Government Pleader (GP) for correction of record of the suit land. On 11.03.2008 they rendered their legal opinion that Government has no right, title over the suit land of plot No. 356 and there is no legal bar to mutate the names of the petitioners in respect of the suit land. The suit land of plot No. 356 (41 decimals out of 46 decimals) was enlisted in the 'Ka' schedule as vested property vide Gazette notification dated 26.04.2012. Earlier the petitioners had no knowledge about the enlistment of the property in the 'Ka' schedule (Annexure-'B').

9. Added opposite party No. 4, Mihir Dutta who is respondent No. 5, in the instant writ petition contested the suit by filing a written statement wherein he denied the material allegations and stated inter alia, that S.A Khatian No. 133 corresponding to B.S Khatian No. 1576 in respect of C.S Plot No. 356, B.S Plot No. 1527, 1528 and 1529 measuring total land of 46 decimals was recorded in the name Harendra Kishore Dutta alias Harekrishna Dutta and Narendra Dutta, son of Surendra Kishore Dutta alias Prafulla Dutta. Harekrishna Dutta alias Harendra Dutta and Narendra Dutta were unmarried and died leaving behind their sister Moni Dutta. That is, Prafulla Dutta alias Surendra Dutta had 2(two) sons and 1(one) daughter. Moni Dutta was married to Sattandra Dutta of village Sultanpur. Mihir Dutta was born in the womb of Moni Dutta. Moni Dutta, when she was unmarried inherited her father's property since her two brothers were dead. Moni Dutta died leaving behind her only son Mihir Dutta who inherited the suit land. It is to be noted here that, after the death of first wife, Sattandra Dutta took his second wife Nibedita Dutta, daughter of Ashutosh Dhar of village Chittna under Nasirnagar Police Station (Annexure-'D').

10. Government contested the suit by filing a written statement and denied the material allegations made in the suit and further stated inter alia, that S.A Khatian No. 133 in respect of 1.03 acre land including 0.46 acre of plot No. 356 was prepared in the name Harendra Kishore Dutta, Narendra Kishore Dutta and Harendra Kishore Dutta who left the country for India forever during the war of 1965. Government enlisted the suit property as enemy property and subsequently as vested property. Thereafter, vide V.P case No. 37 of 1972-73 0.41 acre of land of plot No. 356 was leased out to Shahjahan Miah and others. The petitioners claimed the ownership of the suit land by creating forged documents. 0.41 acre of land of plot No. 356 was enlisted in 'Ka' schedule and 0.1 acre of land in the 'Kha' schedule (Annexure-'C').

11. Further, case of the Government as it appears from paragraph 7 of the additional written statement of the opposite party No. 1 in short, is, that S.A Khatian No. 133 was prepared in the name of Harendra Kishore Dutta and Narendra Kishore Dutta, son of Surendra Kishore Dutta and Surrendra Kumar Dutta, son of Prosanna Kumar Dutta in respect of 1.03 acres of land including 0.46 acre land of C.S plot No. 131, S.A plot No. 356 of 259

Paikpara Mouza, Harendra Kishore Dutta and other left the country for India before 1964 and the Evacuee property Management Committee took over the charge of the property on 01.09.1963 vide EPMC No. 1906 which was published in the Dacca Gazette on 24.10.1963. 0.41 acre of land of plot No. 356 was leased out to Abdul Malek, son of Saber Ali Hazi of Poirtola vide EPL case No. 1247 of 1963, dated 24.01.1964. 5 decimals of land of plot No. 356 was leased out to A.F.M Shahidullah, son of Dhon Miah of Paikpara vide EPL case No. 313 of 66-67, dated 11.05.1967. Thereafter, the aforesaid 5 decimals of land was leased out to Dhon Miah, son of late Hazi Abul Hossain of Paikpara vide EPL case No. 10/69-70 and on 12.10.1974 possession of the said land was handed over to him by the Government. After the death Abdul Malek lease of 0.41 acre of land was approved in the name of his four sons namely, Ismail Miah, Younus Miah, Idris Miah and Ibrahim Miah vide V.P Case 37/72-73, dated 06.07.1976. On 16.03.1978 lease of 0.41 acre of land of plot No. 356 was approved in the name of Dhon Miah, son of late Hazi Abul Hossain of Paikpara by obtaining 'No Objection' from Ismail Miah and others. Dhon Miah paid the lease money up to 1384 B.S and on 23.03.1978 possession of the land was handed over to him. Accordingly, possession and control of the whole land of disputed plot No. 356 was taken over by the Government. Later on, some people in collusion with lease holders claimed the ownership of the suit land by creating false and fabricated documents. Since the lease-record was lying in the Court the Government was not in a position to renew the lease agreement.

12. As it has already been stated that after hearing the parties the Arpita Shamppatti Suit No. 63 of 2012 was decreed and Suit No. 390 of 2012 was dismissed by the judgment and decree dated 27.03.2017 and 03.04.2017 respectively. Subsequently, the respective parties preferred three appeals of which Mihir Dutta preferred appeal No. 32 and 33 of 2017 and government preferred appeal No. 34 of 2017. Arpita Shampatti Appellate Tribunal as it has been already mentioned by the judgment and decree dated 02.07.2018 and 05.07.2018 respectively allowed the appeal No. 32 and 33 of 2017 and dismissed the government appeal 34 of 2017.

13. Challenging the said judgment of Arpita Shampatti Appellate Tribunal the plaintiff petitioners of suit No. 163 of 2012 Abdur Rahman and others filed writ petition No. 1091 of 2018 and added defendant No. 4 in Arpita Shampatti Prattarpan Case No. 390 of 2012 one Farid Ahmed filed writ petition No. 10520 of 2018.

14. Dr. Kazi Akhter Hamid, the learned Senior Advocate, appearing in both the writ petitions for the petitioners after placing the petition, impugned judgment and decree of the Tribunal and the Appellate Tribunal and other materials on record mainly advanced the following arguments:

Firstly, he argues that judgment of the Appellate Tribunal has been passed without assessing and evaluating the evidences on record and on misconception of law and facts and those are bad in law as well as in fact and hence the impugned judgment and decree is without lawful authority having no legal effect.

15. Substantiating his argument the learned Counsel further contends that the Tribunal rightly declared that the petitioners are the owner of the disputed land as per provision of 2 (ভ) of the Ain, Moreso, as per section 2 (ঞ)(অ) of the Ain the land in question does not come within the definition of vested property but the Appellate Tribunal failed to appreciate the same.

16. Next, he submits that the instant petitioners were able to prove their right, title and possession over the suit land and the learned Tribunal rightly decreed the suit in favour of the

petitioners. But the learned Appellate Tribunal on misreading and non-consideration of the material evidences on record allowed the appeal arbitrarily. Hence, an interference from this Hon'ble Court is imperative. As he submits that the impugned judgment and decree are contrary to law and amounts to an improper exercise of jurisdiction resulting in miscarriage of justice. In other words, the Appellate Tribunal had exceeded its jurisdiction in making an adverse view about the Ewaznama deed No. 5322 which was executed on 03.09.1982 and registered on 11.09.1982.

17. Next, he submits that Mihir Dutta (respondent No. 5) is not a legal heir of S.A tenant Harendra Dutta and Narendra Dutta. He has submitted forged succession certificate. Actually, Mihir Dutta is the son of Monidhar (daughter of Ashudhar) which is evident from the certificate issued by the Chairman, Gouniaok Union Parishad under Nasirnagar Police Station of Brahmanbaria (exihibit-27), Ashudhar had only two daughters, namely, Monidhar and Dolidhar. That is, Monidhar had not brother. She was married to Sattendra Dutta of Sultanpur under Brahmanbaria Sadar police station. It is to be noted here that since Hindu-marriage is not required to be registered, therefore, the question of maintaining register-book does not arise at all. But the learned Appellate Tribunal failed to appreciate these vital facts.

18. Lastly, he concludes that Mihir Dutta (respondent No. 5) fraudulently produced a succession certificate and a pratyanpattra on 25.09.2012 wherein it was stated that late Surendra Kishore Dutta alias Profulla Dutta was a resident of ward No. 04 who died leaving behind Harendra Kishore Dutta alias Hore Krishno Dutta, Narendra Kishore Dutta and Moni Dutta as his legal heirs. Moni Dutta was the legal heir of her aforesaid two brothers who died leaving behind her only son Mihir Dutta. From a careful reading of the aforesaid documents (exhibit-2/kha & 2/ga of Arpita case No. 390 of 2012) it is evident that those are subsequent embellishment and the probative value of those certificates are seriously doubtful and inadmissible evidence. But the learned Appellate Tribunal failed to consider these important facts of the suit.

19. Mr. Md. Oziulalh, the learned Advocate appearing for the respondents in both the writ petitions by filing affidavit-in-opposition dated 11.07.2019 opposes the Rule specifically on the grounds that in 1963 the land in question was declared as "Evacuee Property" and accordingly Government took it under its control, possession and management by publishing Gazette in 1963. Thereafter, the land in question was declared as "Enemy" Property in 1965 and accordingly Gazette was published in 1965 to that effect and as per law it vested in the Government as vested property. In this view of the matter, the "Enemy" Property/vested property cannot be transferred by registered deed to anybody else. As per provision of P.O 142 of 1972 no vested property/enemy property can be transferred by any registered instrument and if it is so done that will be void-ab-initio and as a whole null and void. Since the property in question stood as enemy/vested property till 1982 there was no scope to exchange the same by registered Ewajnama in favour of Malai Miah in 1982 as per said P.O 142 of 1972 and as such the exchange deed No. 5322 of 1982 does not create any legal interest in favour of said Malai Mia and it has no value in the eye of law.

20. He further submits that the claim of the petitioner of the disputed property has been emanating from the deed of exchange executed between Malai Mia and Shamir Kishore Dutta. He also submits that the Appellate Tribunal being last court of fact and law duly reversed the materials findings of the Tribunal after assessing and evaluating the evidences on record oral and documentary and duly reversed the materials findings of the Tribunal by giving cogent findings and reasoning. The appellate Tribunal found that the predecessors of the plaintiff Shamir Kishore Dutta, (who executed the Ewajnama with Mr. Malai Mia) were

not aware of S.A recorded tenant Harendra Kishore Dutta. The appellate Tribunal Found "সার্বিক পর্যালোচনায় অত্র আপীলেট ট্রাইব্যুনালের নিকট ইহা প্রতীয়মান হয় যে, মলয় মিয়ার ৫৩৩২/৮২ দলিলের দাতা সমীর কিশোর দত্তের পিতা বীরেন্দ্র কিশোর দত্ত এস,এ প্রজা হরেন্দ্র কিশোর দত্তের উত্তরাধিকার নহে" Therefore, as he submits that the judgment of Lower Appellate Tribunal being based on material evidence on record should be maintained.

21. He further submits that since the Appellate Tribunal by reversing the findings of the tribunal held that Somir Kishore Dutta, predecessor of the plaintiffs was not heir of S.A recorded tenant, he was never a মালিক (owner) of the land in question in terms of section 2 (ড) of the অর্পিত সম্পত্তি প্রত্যার্পন আইন, ২০০১। As he was not successor-in-interest of the S.A recorded tenant he was not the owner of the land in question. Claiming interest from him, the subsequent purchasers i.e the plaintiffs of Suit No. 163 of 2012 are not the owner of the land in question. Therefore, the findings of the Appellate Tribunal in respect of locus-standi of the plaintiffs, petitioners herein are legal and as such the Judgment of the lower Appellate Tribunal should be maintained.

22. He also submits that by giving findings, Appellate Tribunal found that the plaintiffs of Suit No. 163 of 2012 are illegal possessor of the land in question in as much as earlier as lessee, they got possession of the land in question and subsequently they are claiming that possession as their own possession. But the Tribunal totally ignored this vital and legal aspect of the matter while decreeing the suit.

23. Finally he submits that the lower Appellate Court being final court of fact, arrived at its findings on proper assessment of the evidence on record and appreciation of law involved in the instant case by finding that the plaintiff, Mihir Dutta of Suit No. 390 of 2012 is heir of S.A recorded tenants Horendra Kishore Dutta. While decreeing the suit, the Appellate Tribunal reversed the findings of the Tribunal in respect of locusstandi of said plaintiff Mihir Dutta and arrived at its decision by declaring that the plaintiff was মালিক (owner) of the Suit land and as such interference by this Court is not required.

24. We have heard the learned Counsels of both sides at length and considered their submissions carefully. We have also perused the impugned Judgment and decree of the Lower Appellate Tribunal and also the Judgment and decree of the Tribunal.

25. At the very outset it has to be seen what is the scheme of "অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ ও অর্পিত সম্পত্তি অবমুক্তি বিধিমালা, ২০১২" together with this let us first also visit what is the scope and limitation of application of Code of Civil Procedure in respect of this special law.

26. In the preamble of the Ain it is 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।"

27. Section 2 gives 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 তত্বাবধায়ক 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;]

28. 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।

29. Now it can be said that any decision that has to be given under this special law should be given under the scheme and the provisions of this special law only. The law to this effect is very much clear and unambiguous but the fact remains that the application of Code of Civil Procedure though limited in terms of section 4 of the Ain but in any case the decision of the lower Appellate Court has to be given adverting to the real point upon which the decision of the Tribunal is based. Therefore, in our view, application of order 41 Rule 31 of the Code of Civil Procedure pertinently and relevantly comes into play.

30. Keeping all these things in the back of mind let us now evaluate the judgment of the Lower Appellate Tribunal. On our scrutiny we have found that by an elaborate and exhaustive judgment considering each and every evidence on record, oral and documentary, the Appellate Tribunal reversed the decision of the Tribunal. Clearly it held that in terms of section (2) as per definition part 2(kha) the appellate Tribunal found the property in question was first declared as evacuee property in the year 1963 and subsequently it was declared enemy property in the year 1965 and therefore, this property falls within the period of 1965 to 1969 and that being the admitted fact that the said property was declared enemy during this period, cannot be challenged before any court of law. This proposition of law has been well

settled and set at rest in the famous case of Dulichand vs. Omraolal 33 DLR AD 30. The Appellate Tribunal, as we have found rightly observed that the suit property admittedly was under the management and control as evacuee property and subsequently became enemy property cannot be transferred in any manner because of the P.O 142 of 1972. Therefore, by all emphasis it can be said that the exchange deed No. 5322 dated 11.09.1982 executed between Malai Mia and Shamir Kishore Dutta was void ab-initio and title cannot pass under the said Ewajnama to the subsequent transferee, that is to say, Abdur Rahman and others specifically. One Dhon Miah in whose favour 41 decimals of land was transferred subsequently. The said deed of Exchange was challenged by the government before Civil Court which was decreed in favour of the government but on an appeal preferred by Malai Mia that was reversed and the suit was dismissed against which government preferred Civil Revision which was rejected for default. In this aspect the appellate Tribunal has rightly brought section 44 of the evidence act which enjoins:

> "Fraud or collusion in obtaining judgment, or in-competency of Court, may be proved -Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

31. This provision of law has been well reflected, as observed by the appellate Tribunal in the decision of Md. Jahangir Alam vs. Shamsur Rahman and others VIII ADC (2011) 109 wherein our Hon'ble Appellate Division held:

> "When a judgment is given in evidence, the party against whom it is given in evidence may, in the proceeding in which it is given in evidence, show that the judgment was obtained by fraud or collusion , and a separate suit to have the said judgment set aside is not necessary. In view of the wide terms used in section 44 of the Evidence Act, it cannot be said that it is not open to a Court other than the Court from which the decree was passed, in cases fraud or collusion, to deal with the matter and decide whether the decree was obtained by fraud or collusion."

32. The fact that the property in question was evacuee property and then was listed as enemy property was not brought before the Appellate Court in Title Appeal No. 15 of 1993. Certainly had it been placed before the Appellate Court, the decision would have been otherwise. This thing has not escaped notice of the Appellate Tribunal while reversing the decision of the Tribunal.

33. As regard the property that belongs to the government the Court of Appeal came down in minute details as we have stated already when we narrated the facts of government case, by giving lease to several persons, the property assumes the status of a government property. This aspect has been clearly dealt with by the Appellate Tribunal and the chain of Title of Mihir Dutta has also been categorically dealt by the Court of Appeal. Factual aspect to this effect has been already stated above in clear terms. It held that Mihir Dutta is a S.A recorded tenant whose title emanates from Harendra Kishore Dutta and his mother Moni Dutta and also the fact that Prafulla Dutta three children, two sons and one daughter Moni Dutta, these are all admitted position which fully satisfy the scheme and laws of the Ain, 2001 outlined at the outset. The Appellate Tribunal properly adverted to the positive findings upon which the decision of the Tribunal is based which is absolutely in keeping with the scheme and relevant laws of the Ain, 2001.

34. 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.

35. 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."

36. Unequivocally, we are in respectful agreement 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.

37. In the result both the Writ Petitions are discharged, however, without any order as to cost. The orders of stay granted earlier by this Court is hereby recalled and vacated.

38. Send down the L.C.R at once.

39. Communicate at once