

IN THE SUPREME COURT OF BANGLADESH  
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha.  
Mr. Justice Md. Abdul Wahhab Miah.  
Mr. Justice Syed Mahmud Hossain.  
Mr. Justice Md. Shamsul Huda.

**CIVIL APPEAL NO.133 of 2004.**

(From the judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April,2002 passed by the High Court Division in **Writ Petition No.1806 of 2000**)

The Government of the People's : .....**Appellant.**  
Republic of Bangladesh, represented  
by the Secretary, Ministry of  
Housing and Public Works,  
Bangladesh Secretariat, Dhaka.

**-Versus-**

Orex Network Limited and others. : .....**Respondents.**

For the Appellant. : Mr. Murad Reza, Additional  
Attorney General (with Sheikh  
Shaifuzzaman, Assistant Attorney  
General), instructed by Mrs. Sufia  
Khatun, Advocate-on-Record.

For Respondent No.1. : Mr. Mahmudul Islam, Senior  
Advocate (with Mr. M. A. Samad,  
Senior Advocate), instructed by  
Nurula Islam Bhuiyan and Mr. Md.  
Shamsul Alam, Advocate-on-Record.

Respondent Nos.2-5. : Not represented.

**Dates of Hearing.** : **The 20<sup>th</sup> June,2012.**

**JUDGMENT**

**SYED MAHMUD HOSSAIN, J:** This appeal, by the appellant, arises out of the judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April,2002 passed by a Division Bench of the High Court Division in Writ Petition No.1806 of 2000 making the Rule absolute.

The writ petition was filed questioning legality of listing House No.240 at Road No.  $\frac{21 \text{ (old)}}{11/A \text{ (new)}}$  in Dhanmondi Residential Area in the 'Kha' list of the abandoned buildings published in the Bangladesh Gazette.

The facts figured in this appeal are summarized below :

The writ petition was filed stating, inter alia, that the then Government of East Pakistan leased out the property mentioned before to Khawaja Mohammad Aref by the registered deed of lease dated 2.03.1959. He gifted the said property to his son Khawaja Md. Zarrar by a memorandum of Heba dated 01.01.1971. The donee recorded and mutated his name in the records of the Ministry of Works. He got his name mutated in the revenue records on 02.01.1980. On 01.07.1985, Khawaja Md. Zarrar gifted the property to his wife and the said donee got her name recorded in the Ministry of Works and also mutated her name in the revenue records. Khawaja Md. Zarrar's wife appointed one Mr. Ahmedur Rashid Chowdhury as her attorney for the purpose of transfer of the property in favour of one Mr. Fazlul Quadir Chowdhury. Upon procuring approval from the Ministry of Works, the attorney transferred the property to Mr. Fazlul Quadir Chowdhury by way of gift and the donee's name was recorded in the Ministry of Works as well as in the revenue records. On obtaining permission from the Ministry of Works, Fazlul Quadir Chowdhury transferred the property to writ petitioner No.1 (respondent No.1 herein) by a registered deed on 30.11.1998. The purchaser got his name recorded in the records of the Ministry of Works and also mutated his name in the revenue records. While respondent No.1 was owning and possessing the property, the same was listed as abandoned buildings. The petitioner had no knowledge of enlistment of the property in the 'kha' list of the abandoned buildings since it was never pointed out either by the Ministry of Works and by the Revenue Authority that the property is an abandoned property. In the early part of 2000 AD, the writ petitioner came to know that the property has been enlisted in the 'kha' list and thereupon he served legal notice demanding justice upon the writ-respondents by delisting the property from the list of the abandoned buildings but to no avail.

Being aggrieved by and dissatisfied with the gazette notification dated 23.09.1986 and for delisting of the House No.240 at Road No.  $\frac{21 \text{ (old)}}{11/A \text{ (new)}}$  in Dhanmondi Residential Area in the 'Kha' list of the abandoned buildings, the writ-petitioner moved the High Court Division by filing Writ Petition No.1806 of 2000 and obtained Rule Nisi.

The Rule was contested by writ-Respondent No.1 (appellant No.1 herein) by filing an affidavit-in-opposition as well as supplementary affidavit-in-opposition. The case of the appellant, in short, is that during the War of Liberation, Khawaja Mohammad Aref left Bangladesh leaving the property uncared for and when the P.O. (President's Order) 16 of 1972 was promulgated neither the owner nor anybody on his behalf was there to look after, manage or control the property in question and as such, the property by operation of law became an abandoned. The memorandum of gift dated 01.01.1971 is an anti-dated and manufactured document to raise claim in the property. The so called gift is hit by the provision of clauses 20 and 21 of the leased deed. Recording of the names in the records of Ministry of Works was an act of collusion with the personnel of the Ministry. The gift alleged to have been made by Khawaja Md. Zarrar to his wife had no legal validity as said Khawaja Md. Zarrar was not the lawful owner of the case property. Therefore, he had no authority to make gift of the property in favour of his wife and the said transfer was a malafide act to grab the property. As the property became abandoned making of gift by Khawaja Md. Zarrar did not change the nature and character of the property as abandoned. Writ petitioner No.1 by his purchase did not acquire any right, title and interest in the case property and because of the said purchase by writ petitioner No.1 the character of the

property was not changed. On 07.04.1973, the Government took possession of the property and Khawaja Md. Zarrar applied to the Government for allowing him to stay in his father's property. Accordingly Khawaja Md. Zarrar was allowed to stay in the property in question. Khawaja Md. Zarrar at one time described himself as an attorney of his father and filed Settlement Case No.744 of 1988 in the Court of Settlement seeking release of the property from the list of abandoned buildings. The Court of Settlement found the property as an abandoned property and thereupon Court of Settlement dismissed the case on 19.09.1995. Suppressing the said facts, the writ-petitioner filed the writ petition and as such he was not entitled to any relief. Prior to listing of the property in the 'Kha' list, notice was issued on 01.04.1986 and the occupant replied thereto on 26.04. 1986.

The learned Judges of the High Court Division upon hearing the parties made the Rule absolute by the judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April,2002.

Feeling aggrieved by and dissatisfied with judgment and order dated 16<sup>th</sup> and 17<sup>th</sup> April,2002 passed by the High Court Division, writ-respondent No.1 moved this Division by filing Civil Petition for Leave to Appeal No.1314 of 2002 in which leave was granted resulting in Civil Appeal No.133 of 2004.

Mr. Murad Reza, learned Additional Attorney General, appearing on behalf of the appellant, submits that the writ-petitioner, Orex Network Limited, did not challenge the judgment passed by the Court of Settlement and therefore that judgment remains valid till date and that the writ-petitioner only challenged the gazette notification dated 23.09.1986 in which the property was listed as abandoned in 'kha' list and that so long the judgment of the Court of Settlement stands the writ-petitioner cannot claim that the property is not abandoned and that without considering this aspect of the case the High Court Division made the Rule absolute and as such, the impugned judgment should be set aside. He further submits that the High Court Division having not a Court of appeal, it could not adjudicate the facts which have already been decided by the Court of Settlement and as such, the judgment delivered by the High Court Division should be set aside. He then submits that no original documents relating to the abandoned building were produced by the writ-petitioner and that even those deeds were not produced before the Court of Settlement and without taking into consideration this broad aspect of the case, the High Court Division made the Rule absolute declaring that the property is not abandoned. He also submits that the oral gift in favour of Khawaja Md. Zarrar by his father Khawaja Mohammad Aref dated 01.01.1971 and the oral gift dated 01.01.1988 by Khawaja Md. Zarrar in favour of his wife were not proved and that the High Court Division without giving any finding in respect of the oral gifts found that the disputed property was wrongly listed in the 'kha' list of the abandoned buildings. He goes on to submit that subsequent events i.e. according permissions transfer of the disputed property by some unscrupulous employees of the Ministry should not be taken into account while deciding the question of whether the property is abandoned or not.

Mr. Mahmudul Islam, learned Senior Advocate appearing on behalf of respondent No.1, on the other hand, submits that the disputed property was not listed in the 'kha' list in compliance with the requirements of section 4 of the Ordinance No.54 of 1985. He further submits that the actions of the concerned Ministry led the writ-petitioner to believe that the disputed property is not abandoned property and that the writ petitioner being a bonafide purchaser for valuable consideration should not suffer for the actions of the concerned Ministry. He lastly submits that before treating a property as abandoned property, the Government is to form an opinion that the property assumed the character of abandoned property and in the case of the instant property, formation of opinion is lacking, treating the property as abandoned property and listing of the same in the 'kha' list was illegal and as such, the judgment should not be set aside.

We have considered the submissions of the learned Additional Attorney General for the appellant and Mr. Mahmudul Islam, learned Senior Advocate for writ-respondent No.1, perused the impugned judgment and the papers incorporated in the paper-book.

To begin with, it is necessary to have a glimpse on the submissions on which leave was granted by this Division.

The submissions on which leave has been granted are quoted below :

- I. The High Court Division failed to appreciate that the case property having been enlisted in the 'kha' list published under the provisions of Ordinance No.54 of 1985 it shall be presumed that the property is an abandoned property and it is the obligation of the claimant to prove that the same is not an abandoned property.
- II. The High Court Division failed to consider that K.M. Zarrar did not disclose even on 7.4.73 that he got a power of attorney from his father and/or he became the owner of the case property by virtue of a gift as alleged and in the circumstances the judgment and order of the High Court Division is not sustainable in law and liable to be set aside.
- III. The requirements of Section 4 of the Ordinance, 54 of 1985 in order to enlist the case property in the 'kha' list were fulfilled and therefore the legality of the enlistment of the case property in the 'kha' list as abandoned property has been proved and as such cannot be challenged.
- IV. The successive transfers as evidenced by Annexure D, E(1) and G (to the writ petition) were the acts of collusion and fraud on the part of some of employees of the present petitioner and it was/is not the fault of the present petitioner which was not erroneously considered by the High Court Division and thus there has been occasioning of failure of justice.
- V. The High Court Division erred in law in not considering whether a property is an abandoned property or not, depends on the definition clause of P.O. 16 of 1972 and admittedly the owner was not in Bangladesh in 1972 and there is no document to show that the case property was under occupation of the tenant of the real owner in February, 1972 and that the claim of Mr. K.M. Zarrar that the Polish national occupying the case property was a tenant under his father was not proved by any document or material and therefore the claim of possession of the predecessor-in-interest of the petitioner has not been proved.
- VI. In view of the admitted fact that the original lessee of the property in question left Bangladesh during the period of liberation leaving the property uncared for and the said lessee was neither present in Bangladesh nor there was any body to look after his property at the time of promulgation of P.O.16 of 1972, the property assumed the character of abandoned property by operation of law and thus the High Court Division erred in law in failing to decide the correct legal position in the facts and circumstances of the present case.

- VII. In view of the inconsistent and contradictory claim made by K.M. Zarrar, son of original lessee (as evident from Annexures-X, X-I & X-II of the affidavit-in-opposition and Annexure-‘C’ of the writ petition), the said K.M. Zarrar acquired no right, title, interest and possession to cause transfer of the property in question and consequently the alleged transferee from said K.M. Zarrar acquired no right, title, interest in the property in question and as such, the High Court Division erred in law in failing to consider the aforesaid aspect of the case thereby erroneously made the Rule absolute.
- VIII. Serious disputed question of facts being involved and collusion with the government staff being apparent in manufacturing papers, the High Court Division erred in law in not holding that neither the Government is bound by the illegal acts of its officials, nor the abandoned character of the property in question has been changed by such acts of government officials and the writ-petitioner having not come with clean hands, he is not entitled to get equitable relief.

Admittedly, the property belonged to Khawaja Mohammad Aref, who got the same by a registered deed of lease dated 24.03.1959. Respondent No.1 claims that Khawaja Mohammad Aref gifted the said property to his son Khawaja Md. Zarrar by a memorandum of hiba dated 01.01.1971 and that the donee got his name recorded and mutated in the record of the Ministry of Works.

The appellant annexed the judgment delivered by the First Court of Settlement in Case No.744 of 1988 with its affidavit-in-opposition. From the judgment, it appears that Khawaja Md. Zarrar filed the above case for delisting the disputed property from ‘kha’ list of the abandoned buildings. The Court of Settlement found that the petitioner Khawaja Md. Zarrar was absent on many dates of hearing. Khawaja Md. Zarrar as the petitioner lastly prayed for adjournment on 12.11.1991 and that, after that date, Khawaja Md. Zarrar did not come to the Court for taking further step. The Court of Settlement found that the claim of Khawaja Md. Zarrar on the basis of oral gift appeared to be highly questionable and that Khawaja Md. Zarrar did not file any original document to substantiate that he was appointed attorney of his father by power of attorney dated 03.09.1971. When Khawaja Md. Zarrar claimed to have acquired the property by way of oral gift from his father on 20.11.1970 his appointment as the attorney of his father by the power of attorney dated 03.04.1971 is mysterious. The Court of Settlement noticed that the power of attorney was available in the file of the Ministry.

The Court of Settlement tried to procure attendance of Khawaja Md. Zarrar in the Court of Settlement by issuance of official letter but failed. The Court of Settlement observed that the report of the process server dated 25.10.1994 revealed that Khawaja Md. Zarrar was not available at the address of the case property and that the registered letter addressed to him at the address of the case property returned unserved with the postal report. On 01.07.1985, Khawaja Md. Zarrar was stated to have gifted the disputed property to his wife. When the Court of Settlement could not secure the attendance of Khawaja Md. Zarrar by issuing notice by normal course and by registered post at the address of the disputed property, the question of making gift of the disputed property by him to his wife on 01.07.1985 was highly doubtful.

The Court of Settlement came to a definite finding that the alleged gift by Khawaja Mohammad Aref in favour of Khawaja Md. Zarrar was not genuine and that the ownership of the property did not pass from Khawaja Mohammad Aref to Khawaja Md. Zarrar.

The appellant in its affidavit-in-opposition before the High Court Division referred to the judgment of the Court of Settlement (Annexure-X-2) to the affidavit-in-opposition which fact was concealed by the writ-petitioner. The writ-petitioner did not controvert the facts alleged in the affidavit-in-opposition about the judgment of the Court of Settlement. Keeping the judgment of the Court of Settlement intact the writ-petitioner cannot have any declaration that enlisting of the disputed property in the 'kha' list of the abandoned buildings was illegal and without jurisdiction. The High Court Division noticed the existence of the judgment of the Court of Settlement but did not give any finding about it. Therefore, even after pronouncement of the judgment by the High Court Division, the findings of the Court of Settlement remain intact.

On consideration of note No.2 dated 24.06.1973 of the file of the Ministry of Works, the High Court Division came to a finding that the Ministry of Home Affairs admitted that father of Khawaja Md. Zarrar was a Bangladeshi and that the Ministry issued a certificate to that effect and that in note No.13 dated 17.07.1973 the then Secretary of the Ministry of Works confirmed that the Ministry of Home Affairs issued citizenship certificate in favour of the owner of the case house. The High Court Division made futile exercise in holding that the original allottee, Khawaja Mohammad Aref was a Bangladeshi and that the property was under his control and management through his tenant till 1973 and that subsequently, the possession of case property being with the legal heirs of Khawaja Mohammad Aref and the successor-in-interest and as such, the case property could not be said to have been left uncared for as alleged by the appellant. When Khawaja Md. Zarrar was stated to have got the property by a memorandum of heba dated 01.01.1971 from his father what was the necessity of obtaining the citizenship certificate of Khawaja Mohammad Aref on 17.07.1973 was mysterious.

It is contended that without complying with the requirements of section 4 of the Ordinance No.54 of 1985, the disputed property was enlisted in the 'kha' list of the abandoned buildings. It is now well settled that the property having been enlisted as abandoned property and the list having been published in the official gazette, the Government has no obligation either to deny the facts alleged by the claimants or disclose the basis for treating the property as abandoned property merely because the same is disputed by the claimants.

Section 3 of the Ordinance of 1985 provides that the provisions of this Ordinance shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force. Therefore, the provisions of the Ordinance of 1985 shall have overriding effect over the provisions of the Bangladesh Abandoned Property Order, 1972.

Admittedly, the original lessee of the property in question left Bangladesh during the period of liberation leaving the property uncared for and the said lessee was neither present in Bangladesh nor there was any body to look after his property at the time of promulgation of P.O.16 of 1972, the property assumed the character of abandoned property by operation of law.

In the case of ***Government of Bangladesh represented by the Secretary, Ministry of Works Vs. Md. Jalil and others (1996) 48 DLR (AD)10***, this Division held as under :

"The onus, therefore, is squarely on the claimant of the building to prove that the building is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned property merely because the same is disputed by the claimant."

Reliance may be made in the case of the ***Government of Bangladesh represented by the Secretary, Ministry of Works V. K. M. Zaker Hossain and others (2003) 8 BLC (AD)27***, it has been held as under :

"18. Since the property has been listed under section 5 (1) of the Ordinance as abandoned property and the said list has been published in the official Gazette, the claimant to the property i.e. respondent No.1 was required to dislodge statutory presumption as under section 5 (2) of the Ordinance that the property in question was not an abandoned property and that the same has been wrongly listed as abandoned property."

It has been further held as under :

"19. The listing of an abandoned property either in the 'ka' list or in the 'kha' list is not a mistake or a default of the kind that makes the list so prepared illegal. Once a particular property is abandoned property then listing thereupon either in the 'ka' list or in the 'kha' list as provide in section 5(1) of the Ordinance is not of vital importance or, in other words, is not material. In this connection reference may be made to the case of **Hazerullah vs. Chairman, 1<sup>st</sup> Court of Settlement and another reported in 3 BLC (AD) 42**. In the reported case it was contended that although the property is in possession of the appellant which as per provision of section 5 (1) (a) of the Ordinance in the 'ka' list. In the background of the said contention, it has been observed in the aforesaid case "this contention will stand only when the claimant can prove that the disputed building was not an abandoned property."

In the case of Government of **Bangladesh represented by the Secretary, Ministry of Works vs. Md. Jalil and others, (1997)49 DLR (AD)26**, this Division held as under :

"14.....Section 5(2) of the Ordinance clearly provides that the list published under sub-section (1) shall be conclusive evidence of the fact that the buildings included therein are abandoned property and have vested in the Government as such. Section 7 says that a person claiming any right or interest in any such building may make an application to the Court of Settlement for exclusion of the building from such list etc. on the ground that the building is not an abandoned building and has not vested in the Government under President's Order No.16 of 1972 or that his right or interest in the building has not been affected by the provisions of that Order. The onus, therefore, is squarely on the claimant of the building to prove that the building is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned property merely because the same is disputed by the claimant.

In the case of **Hazerullah vs. Chairman, 1<sup>st</sup> Court of Settlement and another (1998) reported in 3 BLC (AD) 42**, it has been held that onus lies upon the claimants of the building to prove that the building is not an abandoned property and that the appellant having failed to discharge such onus the High Court Division rightly upheld the order of inclusion of the disputed property in the list of abandoned buildings.

The principles expounded in the cases referred to above do not require further elucidation.

Admittedly, the disputed property was enlisted in the 'Kha' list of the abandoned buildings on 23.09.1986 and the case was challenging the enlistment was filed before the Court of Settlement in 1988 and the judgment was delivered on 19.09.1999 holding that the Government rightly included the case property in the 'kha' list of the abandoned buildings. The writ-petitioner contended that Khawaja Mohammad Aref gifted the disputed property to his son Khawaja Md. Zarrar on 20.11.1970 and confirmed the gift by a memorandum of Heba dated 01.01.1971. Khawaja Md. Zarrar was alleged to have gifted the disputed property by way of oral gift to his wife Mrs. Saima Zarrar on 01.07.1985. Subsequently, Saima Zarrar obtained permission to transfer the disputed property from the Ministry of

Works on 07.04.1971. Admittedly, the disputed property was enlisted in the 'Kha' list of the abandoned buildings on 23.09.1986 and how the Ministry of Works could accord permission to Saima Zarrar to transfer the disputed property on 07.04.1991 is not comprehensible. On 01.07.1993, by a power of attorney, Saima Zarrar appointed Ahmedur Rashid Chowdhury as her attorney who was stated to have gifted the disputed property to Fazlul Kadir Chowdhury by an oral gift and in support of that gift he swore an affidavit before the Notary Public on 08.07.1993. On 17.07.1993, the Ministry of Works accorded permission to mutate the name of Fazlul Kadir Chowdhury in the record of the Ministry of Works. On 04.10.1998, the Ministry of Works accorded permission to transfer the disputed property in favour of the writ-petitioner. Accordingly, Fazlul Kadir Chowdhury transferred the disputed property to the writ-petitioner by a registered deed of sale dated 30.11.1998.

Having considered the affidavit appended to the deed of sale dated 30.11.1998, it appears that Fazlul Kadir Chowdhury made a statement in the affidavit in clause-'kha', "*Zinn erj vt`k cwi Z`v³ AvBb, 1972 mtbi 16 bs Avt`tki etj cwi Z`v³ bñn/*" Admittedly, the disputed property was published in the 'kha' list of the abandoned buildings by a gazette notification dated 23.09.1986. Therefore, all the permissions accorded by the Ministry of Works on and from 23.09.1986 allowing mutation and transfer were void and those orders were obtained by collusion and fraud. Even when the Court of Settlement declared that the disputed property was rightly included in the 'kha' list of the abandoned buildings, the Ministry of Works accorded permission to Md. Fazlul Kadir Chowdhury to transfer the disputed property to the writ-petitioner No.1 on 30.11.1998. According such permission of transfer even after the judgment of the Court of Settlement is collusive and mala fide having no legal effect. In the light of above finding, it cannot be said that writ-petitioner No.1 is a bona fide purchaser of the disputed property for valuable consideration and that he has acquired no title in pursuance of the disputed deed. The writ-petitioner made inconsistent statements at different stages and such inconsistencies are reflected in the averments of the writ-petition itself.

In the light of the findings, we find that the High Court Division failed to appreciate the materials on record and the law involved in this case and erroneously came to a finding that the disputed property was wrongly included in the list of the abandoned buildings. Therefore, the appeal is allowed and the impugned judgment is set aside. The disputed deed being No.4196 dated 30.11.1998 is declared void. There is no order as to costs.

J.  
J.  
J.  
J.

**The 20<sup>th</sup> June, 2012**

/Rezaul, B.R./