IN THE SUPREME COURT OF BANGLADESH

Appellate Division

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Ms. Justice Krishna Debnath

CIVIL APPEAL NO. 332 OF 2008

(From the judgment and order dated 07.04.1997 passed by the High Court Division in Writ Petition No.784 of 1991).

Chariman, Court of Settlement and another. **.....Appellants.**

=Versus=

Moulavi Syed Karim. **.....Respondent.**

For the Appellants.	:	Mr. SK. Md. Morshed, Additional Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondent.	:	Mr. M. I. Farooqui, Senior Advocate with Ms. Razia Sultana, Advocate instructed by Ms. Shahanara Begum, Advocate-on-Record.
Date of Hearing.	:	The 13th April, 2022.
Date of Judgment.	:	The 26th April, 2022.

J U D G M E N T

Borhanuddin, J: This civil appeal by leave is directed against the judgment and order dated 07.04.1997 passed by the High Court Division in Writ Petition No.784 of 1991 making the Rule absolute.

Facts leading to disposal of the appeal are that the respondent herein as petitioner filed Case No.449 of 1988 before the Court of Settlement (1st Court), Dhaka, under section 7 of The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No.LIV of 1985)

(hereinafter referred as 'the Ordinance') for excluding/releasing his purchased property being holding No.A/53, 3rd Colony, Basupara, Mirpur, Dhaka, from the 'Kha' list of abandoned properties published on 23rd September, 1986 in the Bangladesh Gazette (extraordinary) contending interalia that the aforesaid holding was originally allotted to one Md. Yusuf Miah son of late Ismail Miah by the then Governor of East Pakistan as a refugee vide agreement dated 10.02.1956; During possession said Md. Yusuf Miah died on 10.11.1972 leaving his only daughter Salma Khatun; After death of her father said Salma Khatun filed Succession Case No.486 of 1981 in the Court of 3rd Sub-ordinate Judge, Dhaka, for succession certificate; After owning and possessing the property by way of inheritance, Salma Khatun transferred the property to one Md. Anwar Hossain son of late Md. Lal Miah vide registered sale deed dated 25.02.1980 and delivered possession thereof; After purchase, said Md. Anwar Hossain mutated his name and paid rents; Subsequently, Md. Anwar Hossain transferred the property to the petitioner by registered kabala dated 16.06.1983 and delivered possession thereof; The petitioner mutated his name in the local revenue office

and paid rents regularly to the Government exchequer; The petitioner also mutated his name at Dhaka Municipal Corporation on payment of municipal taxes and also taken connection of utility services and living in the house with his family from the date of his purchase; The petitioner becomes surprised to know that his purchased property is included in the 'Kha' list of abandoned property vide gazette notification dated 23rd September, 1986; The property is not an abandoned property and as such the petitioner filed the case to exclude/release the property from the 'Kha' list.

The respondent though contested the case but did not file any written statement. Their case is that Md. Yousuf Miah left this country during liberation war leaving the property uncared for without making any arrangement for its management and as such the property was declared abandoned and included in the list of abandoned property.

In support of his case, the petitioner submitted registered kabala dated 25.02.1980 and 16.06.1983 respectively, two burial certificates, certified copy of the application in Succession Certificate Case No.486 of 1981 and successions certificate granted in that case and

other documents by way of firisty. The petitioner deposed as PW.1 and produced Salma Khatun as PW.2. Respondent cross-examined both the witnesses but neither produce any witness to examine nor submit any document in support of their case.

However, the Court of Settlement dismissed the case raising doubt to the genuineness of the documents produced by the petitioner in support of his claim and also expressing doubt whether Salma Khatun executed any kabala in favour of the petitioner's vendor during possession of the property in question at the material time and thus rejected claim of the petitioner for releasing the property from the 'Kha' list of abandoned buildings vide judgment and order dated 04.10.1990.

Having dissatisfied, the petitioner filed Writ Petition No.784 of 1991 before the High Court Division under Article 102(2)(a)(ii) of the Constitution.

Upon hearing the petitioner, a Division Bench of the High Court Division issued Rule Nisi upon the respondents to show cause as to why the order passed by the Court of Settlement should not be declared to have been passed without lawful authority and is of no legal effect.

Though the respondent contested the case but filed no affidavit-in-opposition and even did not produce any materials before the court.

After contested hearing, a Division Bench of the High Court Division made the Rule absolute vide judgment and order dated 07.04.1997 holding that no notice was served under section 4(b) of the ordinance on the occupier to surrender possession or signifying Government's intention to take possession of the property though admittedly the property in question was in possession of the petitioner.

Feeling aggrieved, the respondent and another as appellants preferred civil appeal for leave to appeal before this Division and obtained leave granting order on 09.07.2008. Consequently, present civil appeal arose.

Mr. SK. Md. Morshed, learned Additional Attorney General by filing additional paper book submits that in view of the fact that the original allottee Md. Yusuf Miah left the country during liberation war leaving the disputed property uncared for or without making any arrangement for the management of the property as such the same assume the character of the abandoned property and listed as abandoned property. He also submits that the Court of Settlement upon

expressing doubts about the genuineness of the documents on the basis of which the writ petitioner raised his claim rejected the case but the High Court Division erred in law in setting aside the findings of the Court of Settlement sitting in writ jurisdiction as such the impugned judgment and order is liable to be set aside. He next submits that since disputed question of facts relating to title of the immovable property is involved in the case as such the High Court Division erred in law in entertaining the writ petition and making the Rule absolute. He further submits that the High Court Division cannot sit as an appellate forum on the findings of the Court of Settlement in the writ jurisdiction.

On the other hand, Mr. M I Farooqui learned Advocate appearing on behalf of the respondent submits that the appellant neither filed the present bunch of documents in the Court of Settlement nor has filed any affidavit-in-opposition with those documents in the High Court Division and now making an attempt to introduce 'de novo trial' on the issues for the first time without any pleadings in their concise statement which is beyond the scope of law. He further submits that under the present facts of non

production of documents either in the trial court or in the High Court Division the principle of estoppel will come into play and by this principle a person is precludes from asserting something contrary to what is implied by a previous judicial statements or actions which includes no action or keeping silence as well in previous judicial proceedings and thus such litigant will be barred in a legal proceedings from making any plea contrary to his previous act in previous adjudication under the doctrine of estoppel. He also submits that the decision of the Court of Settlement is hit by the principle of 'no evidence rule' and is liable to be set aside inasmuch as the decision of the Court of Settlement is not based upon logically probative materials but based on mere speculation or mere suspicions having no quality affording proof or evidence as such the appeal is liable to be dismissed.

Heard learned Additional Attorney General for the appellant and learned Advocate for the respondent. Perused the papers/documents contained in the paper book as well as the additional paper book.

We have gone through the judgment and order passed by the Court of Settlement as well as the High Court Division.

Admittedly neither in the Court of Settlement nor in the High Court Division the present appellants filed any written statement or affidavit-in-opposition, not even a scrap of paper in support of their contention. Leave was granted on 09.07.2008 and consequently instant Civil Appeal arose. The appellants by swearing affidavit filed additional paper book on 27.08.2020 annexing some papers and documents such as notice issued by the Ministry of Works dated 29.12.1985, application of Salma Khatun filed before the Court of 3rd Sub-Judge, Dhaka, praying for succession certificate and copy of succession certificate issued to her dated 17.06.1981 and 17.08.1981 respectively, applications filed by the present respondent before the Court of Settlement dated 09.08.1986 and 20.01.1987. None of these documents were before the Court of Settlement or the High Court Division. The appellants by filing these documents on 27.08.2020 before this Division now trying to take an attempt for introducing 'de novo trial' on the issues raised for the first time without any pleadings in their concise statement. This civil appeal has been filed under Article 103 of the Constitution. No doubt there are some limitations under Article 103 unlike Article 104 of

the Constitution. Both are dissimilar or different from each other. The distinction between the two Articles must be maintained. Under Article 103 we cannot turn this Division into a trial court for some extraneous plea in appeal on a matter of certiorari. When the documents were not produced either in the trial court or in the High Court Division the principle of estoppel will preclude the appellant from asserting something contrary to what is implied by a previous judicial statement or actions. In the case of Ashbridge Investments Limited Vs. Minister of Housing and Local Government, reported in (1965) 3 all E.R.371, their lordships held:

> *"Fresh evidence should not be admitted save in exceptional circumstances. It is not correct for the court to approach the case absolutely 'de novo' as though the court was sitting to decide the matter in first instance. The court can receive evidence to show what material was before the minister; but it cannot receive evidence of the kind which was indicated in the present case so as to decide the whole matter afresh."*

Again in the case of BALDWIN & FRANCIS LTD. Vs. PATENTS APPEAL TRIBUNAL AND OTHERS reported in (1959) Appeal Cases, page 663 their lordships held that:

"In some of those cases it has been said that the tribunal, in falling into an error of this particular kind, has exceeded its jurisdiction. No tribunal, it is said, has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. This is good sense and enables the court of Queen's Bench to receive evidence to prove the error. But an excess of jurisdiction in this sense is very different from want of jurisdiction altogether which is, of course, "determinable at the commencement, not at the conclusion of the inquiry" (See Reg. v. Bolton). Whereas an excess of jurisdiction is determinable in the course of or at the end of the inquiry. But allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction, as I am prepared to do, nevertheless I am quite clear that at the same time it falls into an error of law too: for the simple reason that it has "not determined according to law." That is, indeed, how Blackburn J. put it in Reg. v. De Rutzen. And the decision in the Northumberland case itself shows that, even though no evidence is given, nevertheless if such an error appears from the documents properly before the court, or by legitimate inference therefrom, then certiorari may be granted to quash the decision: and the certiorari can properly be said to be for error of law on the face of the proceedings. It may be excess of jurisdiction as well, but it is certainly error of law."

We have looked into the documents annexed with the additional paper book dated 27.08.2020 filed before this Division for the first time and considered the same. On analyzing the same we find that in none of the courts below these documents were filed by the appellants. Neither was any submission on ground to that effect was taken earlier. Even in the memorandum of appeal or in the concise statement filed in this Division no such ground has been urged or mentioned. Therefore, the issue is being raised, for the first time, at the time of hearing of the case before us which, according to us, cannot be permitted to be raised for the first time for the simple reason that the issue that is being urged now is not only a question of law but is a mixed question of law and facts. The said facts were required to be urged evidentially before the courts below. Unless such a factual foundation is available it is not possible to decide such a mixed question of law and facts. Therefore, such a mixed question of law and facts should not be allowed to be raised at the time of final hearing of appeal before this Division.

Furthermore, it is apparent that the decision of the Court of Settlement is based on mere speculation or mere

suspicions having no quality affording proof of evidence. There is no substantial evidence to rebut the claim of PW.2 Salma Khatun who in her deposition asserted that her father died in Dhaka in 1972 leaving behind her as only heir to succeed. In cross examination there is no suggestion (a) that Salma is not the daughter of Md. Yusuf Miah, (b) No suggestion that burial certificates produced by her are false, (c) or no suggestion that Md. Yusuf Miah left the country for Pakistan, (d) or that Salma did not sell the house to Anwar Hossain.

While mentioning the grounds for 'no evidence rule' Wade in 11th edition of Administrative Law has emphasised on the principle of 'no evidence rule' as follows:

> *"Despite lack of any decision reviewing the old authorities against a 'no evidence' rule, it seems clear that this ground of judicial review is now firmly established. There have been so many sporadic references to it on this assumption, and it conforms so well to other developments in administrative law, that the older authorities to the contrary, impressive though they are, must now be consigned to the scrapheap of history. 'No evidence' thus takes its place as yet a further branch of the principle of ultra vires.*

> *The time is ripe for this development as part of the judicial policy of preventing abuse of discretionary power. To find facts without evidence is itself an abuse of power and a source of injustice, and it ought to be within the scope of judicial review. This is recognised in other jurisdictions where the grounds of review have been codified by statute. In Australia the Administrative Decisions (Judicial Review) Act 1977 expressly authorises review on the ground that there was 'no evidence or other material' to justify the decision where some particular matter has to be established, and a somewhat analogous provision has been enacted in Canada."*

In view of the above, we find no merit in the appeal. Accordingly, the appeal is dismissed. The judgment and order dated 07.04.1997 passed by the High Court Division in Writ Petition No.784 of 1991 is hereby maintained.

No order as to costs.

J.

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The 26th April,2022
/Jamal,B.R./*Words-2588*