
(1959) 10 AHC CK 0001
In the Allahabad High Court
Case No : Sp. A. No. 206 of 1955

Ek. Nawaz Khan

APPELLANT

Vs

Competent Officer and Others

RESPONDENT

Date of Decision : 06-10-1959

Acts Referred:

Constitution of India, 1950 — Article 226
Evacuee Interest (Separation) Act, 1951 — Section 10, 11, 12, 13, 14
Penal Code, 1860 (IPC) — Section 193, 223
Transfer of Property Act, 1882 — Section 55

Citation : (1960) 30 AWR 375

Hon'ble Judges : Mcotham, C.J;K. Dayal, J

Bench : Division Bench

Advocate : S.N. Kacker, for the Appellant; Mukhtar Ahmad, for the Respondent

Final Decision : Allowed

Judgement

K. Dayal, J.—This is a special appeal against an order of a learned Judge rejecting the Appellant's petition under Article 226 of the Constitution praying for the quashing of the order of the Competent Officer Allahabad dated the 6th of May 1956 and for the issue of a writ of prohibition prohibiting the Competent Officer from proceeding further with Case No. 96 of 1957 regarding house No. CK 66/3, Benia Bagh, Phatak Sheikh Salim, Varanasi.

2. The house in suit was sold by the Competent Officer Allahabad in exercise of his powers u/s 10 of the Evacuee Interest (Separation) Act (LXIV of 1951) hereinafter called the Act. The sale took place on the 28th of June 1855 and was in favor of Respondents 2 and 3. The Competent y Officer issued a notice to one Haq Newaz Khan and two others on the 30th September 1956 informing them about the sale of the house to these Respondents and directing them to pay the entire house rent at Rs. 60/- per mensem to the vendees with effect from the 1st of August 1955. This notice substantially complied with the requirements of the notice in Form "M" to the occupant of the property sold and referred to in Sub-

rule 3(a) of Rule 11-E of the Evacuee Interest (Separation) Rules, 1951. On the 5th of November 1955 Haji Manzoor Ahmad, Respondent No. 2, made an application to the Competent Officer praying for the delivery of actual possession over the house in suit to him through a Commissioner appointed for the purpose with police aid. Possession was sought against twenty-one persons mentioned in that application. These persons included the Appellant Ek Nawaz Khan, The Appellant filed an objection before the Competent Officer contending that proceedings for his forcible eviction could not be taken before the Competent Officer subsequent to the Competent Officer's separating the interest of the evacuee and the delivery of symbolic possession to the vendee Respondents and that he was not a trespasser but was an occupant entitled to occupy the house in suit, he being one of the persons to whom the notice dated the 30th September 1956 had been issued. He alleged that he was also called Haq Newaz Khan. Later on he asked the Competent Officer to decide the question of his competency to deliver possession against him on the allegation that he was a trespasser and not a person entitled to occupy the house in suit. The Competent Officer decided the issue about his competency to order the eviction of a trespasser on the application of the vendee and held that he had jurisdiction to do so. It is this order which the Appellant desired to be quashed by his writ petition. He prayed also for a writ of prohibition prohibiting the Competent Officer from continuing these proceedings for the forcible eviction of the Appellant from the house in suit.

3. The learned judge held that the prayer for the quashing of the order of the Competent Officer was premature as no actual order for evicting the Appellant had been issued. He further held that no writ of prohibition could be issued as, in view of the decision of the Competent Officer that he had jurisdiction to evict the Appellant forcibly, that officer had jurisdiction to take further proceedings in the matter. He also held that there was nothing patently wrong with the decision given by the Competent Officer as he had the power to put the auction purchaser in possession when he had the power to sell the house. He further took into consideration the fact that the Appellant if evicted unlawfully would have a right to sue for the recovery of possession in a civil court.

4. The learned Counsel for the Appellant has urged that the Competent Officer could not order the forcible eviction of the Appellant as his powers have to be found within the provisions of the Act and as those provisions do not give any power to evict forcibly a person in possession, though not entitled to possession of the property sold by the Competent Officer. We agree with this contention.

5. The Act was passed, according to the preamble, to make special provisions for the separation of the interests of evacuees from those of other persons in property in which such other persons are also interested and for matters connected therewith. The, jurisdiction of tie Competent Officer is given in Section 5 of the Act which is:

5. A competent officer shall have jurisdiction to decide any claim relating to any composite property situate within the limits of the local area of his jurisdiction

and such cases or classes of cases as may, by general or special order, be transferred to him u/s 19 by the Central Government or the appellate Officer.

6. His jurisdiction therefore is simply to decide a claim relating to a composite property. It is not disputed that the house in suit was composite property. The word "claim" is defined in Clause (b) of Section 2 of the Act and means the assertion by any person, not being an evacuee, of any right, title or interest in any property--

(i) as a co sharer or partner of an evacuee in the property; or

(ii) as a mortgagee of the interest of an evacuee in the property; or

(iii) as a mortgagor having mortgaged the property or any interest therein in favour of an evacuee:

And includes any other interest which such person may have jointly with an evacuee and which is notified in this behalf by the Central Government in the Official Gazette. The Competent Officer therefore has to decide with respect to the assertion by a person other than an evacuee of any right, title or interest in the composite property.

Section 6 of the Act requires the Competent Officer to issue a notice requiring all persons claiming any interest in a composite property to submit his claim in respect of that property for the purpose of determining or separating the evacuee interest in the composite property. The scope of the decision of the claim thus is the determination or separation of the evacuee interest in a composite property.

Section 7 of the Act provides how the claims are to be filed.

Section 8 deals with the decision by a Competent Officer and provides for the Competent Officer holding an inquiry into the claim in accordance with the procedure laid down in Section 17 and to pass an order determining the interest of the evacuee and the claimant in the property in question.

7. The separation of these interests is done in accordance with Section 10 which reads thus:

10. Notwithstanding anything to the contrary in any law or contract or any decree or order of a Civil Court or other authority, the competent officer may, subject to any rules that may be made in this behalf, take all such measures as he may consider necessary for the purpose of separating the interests of the evacuees as he may consider necessary for the purpose of separating the interests of the evacuee from those of the claimants in any composite property and in particular may--

(a) in the case of any claim of a co-sharer or partners,--

(i) direct the Custodian to pay to the claimant the amount "of money assessed in respect of his share in the composite property or deposit the same in a civil Court having jurisdiction over such property and deliver possession of the

property to the Custodian and the claimant may withdraw the amount in deposit in the Civil Court; or

(ii) transfer the property to the claimant on payment by him of the amount of money assessed in respect of the share of the evacuee in the property; or

(iii) sell the property and distribute the sale proceeds thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property; or

(iv) partition the property according to shares of the evacuee and the claimant and deliver possession of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively;

(b) in the case of any claim of a mortgagor or a mortgagee,--

(i) pay to the Custodian or the claimant the amount payable under the mortgage debt and redeem the mortgaged property; or

(ii) sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof; or

(iii) partition the property between the mortgagor and the mortgagee having regard to the share to which the mortgagee would be entitled in lieu of his claim;

(c) adopt a combination of all or some of the aforesaid measures:

Provided that before taking any measure under this section, the competent officer shall take into account the order of preference filed by the claimant under Clause (f) of Sub-section (2) of Section 7 and in any case where the claimant is a mortgagor and tenders the amount due, the competent officer shall accept the same in full satisfaction of the mortgage debt.

8. Under this section the Competent Officer can take all such measures as he considers necessary for the purpose of separating the interests of the evacuees from those of the claimants. Clauses (a) to (c) specify, though not exhaustively, what steps he can take for this purpose. One of the steps consists of selling the property and distributing the sale proceeds thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property. It was in pursuance of this power to sell the composite property that the Competent Officer had sold the house in suit to Respondents 2 and 3. He must have received the sale price and must have distributed the sale proceeds and thus he did all that was required to be done by him under Sub-clause (iii) of Clause (a) of Section 10 of the Act.

9. Section 11 provides for the vesting of the property in the Custodian and empowers the Custodian to take possession of any such property by evicting the claimant and other persons who may be in occupation thereof and for that purpose to use or cause to be used such force as be necessary. He is however not to disturb the possession of any person, other than the claimant, who was in

lawful possession of the property at the commencement of the Act and continued in such possession. It may be noticed that under Sub-section (2) of Section 11 the Custodian himself can evict a person not in lawful possession of the property and has not to seek the help of the Competent Officer for the purpose.

10. Sections 12 to 16 are not relevant for our purpose Section 17 is:

17. (1) A competent officer or an appellate officer shall, for the purpose of holding any inquiry or hearing any appeal under this Act, have the same powers as are vested in a Civil Court under the Code of Criminal Procedure, (Act V of 1908), when trying a suit in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) issuing commissions for the examination of witnesses;
- (d) any other matter which may be prescribed;

And any proceeding before the competent officer or the appellate officer shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 223 of the IPC and the competent officer or the appellate officer shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 Code of Criminal Procedure, 1898.

(2) An appellate officer shall, subject to the provisions of this Act, have such further powers as are vested in a court under the Code of Criminal Procedure when hearing an appeal.

(3) Subject to any rules made in this behalf, the competent officer shall follow the same procedure as a Civil Court does in regard to civil suits including recording of evidence and the provisions of the Code of Criminal Procedure shall, as far as may be, apply to such proceedings.

11. The contention for the Respondents is that in view of Sub-section (3) of Section 17 of the Act the Competent Officer could take steps to evict a trespasser in view of the powers of an execution court under the Code of Criminal Procedure to evict a trespasser in execution of a decree for possession.

12. Section 18 of the Act is:

Save as otherwise expressly provided in this Act, every order made by any appellate officer or competent officer shall be final and shall not be called in question in any court by way of an appeal or revision or in any original suit, application or execution proceedings.

13. In view of the very wide provision of this section it is all the more necessary that the provisions of the Act with respect to the power of the Competent Officer be strictly interpreted. It is to be noticed that every order of a Competent Officer

or of an appellate officer is final and not liable to be questioned in any court in any manner.

14. Section 23 of the Act empowers the Central Government to make rules to carry out the purposes of the Act. The Central Government has framed rules. Rule 11-D lays down the procedure to be followed by the Competent Officer when he proposes to sell any composite property. Rule 11-E provides under sub-Rule (1) for the issue of a sale certificate to the purchaser. Clause (a) of Sub-rule (3) of Rule 11 is:

Where the property sold or transferred on partition or otherwise is in the occupancy of a tenant, allottee or other person entitled to occupy the same, the competent officer shall, on the application of the purchaser or the transferee, order symbolical possession of the property to be delivered with immediate effect, by affixing a copy of the certificate of sale or order of transfer in some conspicuous place on the property and by serving a notice in form "M" on the occupant of the property, or by publication thereof in a newspaper having circulation in the locality and the expenses, incurred in this connection shall be paid by the Applicant.

15. It will be seen from the above that the Competent Officer has not been given any power u/s 5 or Section 10 of the Act to deliver possession to the purchaser, to whom he sells the property in exercise of his powers u/s 10 of the Act. It is significant that Sub-clauses (i) and (iv) of Clause (a) of Section 10 of the Act provide for the delivery of possession of the property to the Custodian, or of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively. There is no mention of the delivery of possession of the property to the purchaser in Sub-clause (iii) of Clause (a) of Section 10. It is not for us to interpret in this case what the provision about the delivery of possession in Sub-clause (i) and (iv) of Clause (a) of Section 10 means. We simply note that in case of sale under Sub-clause (iii) of Clause (a) of Section ID, no such power of the Competent Officer to deliver possession is specially mentioned. The seller is liable to deliver possession of the property sold to the buyer u/s 55 of the Transfer of Property Act, this does not mean that the buyer can forcibly take possession from the seller or that the seller can forcibly eject a trespasser and then deliver possession to the buyer. The seller or the buyer must take action provided by law for getting possession from the trespasser. An auction purchaser of the composite property is certainly entitled to possession of the property purchased, out this fact alone will not clothe the Competent Officer, the seller with the right to forcibly evict a person in un law full possession unless such a power is conferred on him by the Act. We have not been referred to any provision of the Act which specially empowers the Competent Officer to deliver actual possession to the auction purchaser of the composite property. It is also significant to notice in this connection that the Custodian is given power under Sub-section (2) of Section 11 of the Act to take forcible possession of the property which vests in him under the provisions of Sub-section (4) of that

section and that he is not to approach the Competent Officer for the purpose. The power of the Competent Officer u/s 10 to take all such measures as he may consider necessary for the purpose of separating the interests of the evacuees from those of the claimants in any composite property is limited to separating the interests and does not extend to the taking of steps necessary for the actual delivery of the separated interests to persons other than the evacuee and the claimant, that is for the delivery of actual possession to the auction purchaser from the person in unauthorised possession of the property.

16. The provisions of Sub-rule (3) of Rule 11-E do not empower the Competent Officer to deliver actual possession to the auction purchaser after forcibly evicting the unauthorised occupier. They certainly provide for the type of possession which is to be delivered with respect to the property sold when that property be in actual occupation of a person entitled to possession. In such a case only symbolical possession is to be delivered and the person in possession is to be informed of the change of ownership. It cannot be held on the basis of the provisions of Clause (a) of Sub-rule (3) of Rule 11-E that a person not entitled to possession can be forcibly evicted by the Competent Officer.

17. We are therefore of opinion that the Act or the rules framed under it do not empower the Competent Officer to evict a trespasser in possession of the property sold by the Competent Officer under Sub-clause (iii) of Clause (a) of Section 10.

18. We now consider whether the provisions of the Code of Criminal Procedure for the delivery of possession in execution proceedings apply to the proceedings before the Competent Officer and whether they empower the Competent Officer to evict the trespasser in possession on his own account.

19. According to Sub-section (3) of Section 17 of the Act, the procedure laid down by the Code of Criminal Procedure with respect to civil suits is to be followed in proceedings mentioned in Sub-section (1) of Section 17, i.e. the holding of an inquiry or the hearing of an appeal under the Act. The provisions for the execution of a decree do not thus become applicable to the proceedings before the Competent Officer. Even if they do, they too do not empower the execution court to evict a trespasser in execution of a decree. A decree can be executed only against the person bound by the decree. A person not bound by the decree cannot be so ejected. The persons who can be ejected, in other words are the judgment-debtor or a person holding on his behalf or a person claiming title under him. The person claiming title must do so from a period of time subsequent to the attachment of the property.

20. Rule 95, Order XXI, of the Code of Criminal Procedure is:

95, DELIVERY OF PROPERTY IN OCCUPANCY OF JUDGMENT-DEBTOR--Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a

certificate in respect thereof has been granted under Rule 94, the Court shall on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property and if need be, by removing any person who refuses to vacate the same.

21. The words "any person" in the last sentence of this rule do not refer to a trespasser as submitted for the Respondent but to the person mentioned in the earlier part of this rule in connection with the occupancy of the immovable property, Rule 96 deals with the delivery of property in the occupancy of a tenant. Rule 97 deals with the resistance or obstruction to possession of immovable property. A decree holder, if resisted or obstructed in obtaining possession of the property, can make an application to the court complaining of such resistance or obstruction. The court has to investigate the matter. Rule 98 as amended by this Court, then provides that if the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation. It shall direct that the Applicant be put into possession of the property and can take effective steps to deliver possession. But if the court finds that the resistance or obstruction was occasioned by any person, other than the persons mentioned in Rule 95 and 98, claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall dismiss the application in view of Rule 99. It is clear therefore that the execution court cannot order the eviction of a person other than the judgment-debtor or one acting on his behalf or one claiming under him. In fact, Rule 100 provides that where any person other than the judgment-debtor is dispossessed of immovable property by the purchaser at the execution sale, such person can make an application to the court complaining of such dispossession. Rule 101 provides for the restoration of possession to such dispossessed person if he had been in possession on his own account or on account of some person other than the judgment-debtor.

22. We are therefore of opinion that even if the provisions of the Code of Criminal Procedure with respect to execution of decrees apply to the proceedings under the Act, a trespasser cannot be forcibly evicted by the Competent Officer.

23. In view of the above, we are of opinion that a Competent Officer has no jurisdiction to take any action for evicting a trespasser from the property sold on the application of the auction purchaser and that in the present case a writ of prohibition should be issued to the Competent Officer not to proceed further in the matter.

24. We therefore allow the appeal with costs and direct that a writ of prohibition be issued against the Competent Officer Allahabad prohibiting him from proceeding further with Case No. 96 of 153 regarding house No. CK 66/3, Benia Bagh, Phatak Shiekh Salim Varanasi.