

(1990) 11 CAL CK 0021
In the Calcutta High Court
Case No : A.F.O.O. Tender No. 3877 of 1988

Mumtaz Begum

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 05-11-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35
Enemy Property Act, 1968 — Section 2, 8

Citation : AIR 1991 Cal 241

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : Mukul Prakash Banerjee and Md. Nizamuddin, for the Appellant;
Samarendra Nath Banerjee and Qudrat-E-Kabir, for the Respondent

Judgement

G. N. Ray, J.—This appeal is directed against the judgment dated November 28, 1988 passed in C.O. No. 6933(W) of 1984. By the aforesaid order, the writ petition by the appellants was dismissed by the learned trial Judge, inter alia, on the ground that such dispute should be better decided in an appropriate suit. The writ petitioners-appellants contended that one Hussain Ara Begum alias Sugan Bibi was owner of various properties at Patna and Premises No. 14, 14/1 and 15 Karrum Hussain Doctor Lane at Calcutta. The said property at Calcutta was purchased from the Calcutta Improvement Trust by a Registered Deed of Conveyance and the said premises is now numbered as 36, Circus Avenue. After the death of Hussain Ara Begum the predecessors-in-interest of the writ petitioners-appellants and the respondents Nos. 4 to 9 had inherited all the said properties at Patna and in Calcutta. It is the case of the writ petitioner-appellants that some time in October, 1949 after the death of Hussain Ara Begum, one Abu Waser Alaud-din Ahmed along with his adopted daughter Alam Ara Begum had trespassed into the Premises No. 36, Circus Avenue and they had also managed to get their names recorded in the Municipal record after striking out the name of Hossainara Begum. The predecessor-in-interest of the writ petitioners and respondents Nos. 4 to 9 filed a misjudicial petition before the learned Additional

Subordinate Judge, Patna for declaration of their shares and partition of properties between the co-sharers of the properties at Patna and Calcutta upon declaration that the said Abdu Naser and Alam Ara Begum were trespassers. A decree for mesne profit were also prayed. The said two trespassers were made defendants Nos. 1 and 2 in the said suit which was numbered a Title Suit No. 12 of 1952 subsequently renumbered as Title Suit No. 57 of 1953, on December 22, 1953. The said title suit was decreed with costs and such decree was put into execution, which was numbered as Execution No. 16 of 1955. So far as the decree for eviction of the trespassers and recovery of possession was concerned, the execution of such decree was transferred to this Court as it transpired that the properties were outside the original ordinary civil jurisdiction of this Court. This Court therefore sent the execution case back to Patna Court. Thereafter execution proceeding was transferred to 9th Court of the learned subordinate Judge at Alipore which was numbered as Money Execution Case No. 13 of 1968. The Execution Court at Alipore issued the writ for delivery of possession under Order 21, Rule 35 of the CPC and notice was also issued to show cause why money claim should not be executed, it appears that possession of the said premises had been delivered to decree-holder on July 27, 1968 through court and the decree holder was directed to take steps for realising the Money Decree by September 4, 1968. As the decree-holder did not take steps to implement the money decree the execution Case was disposed of by noting that the same was disposed of on part satisfaction. The Enemy Property Act was enacted in 1968 by replacing the Enemy Property Ordinance, 1968. The said Enemy Property Act, 1968 was enacted for continuance of the vesting of enemy property under the Custodian of Enemy Property under Defence of Indian Rules, 1962 and for matters connected therewith. It appears that the possession of the property was purported to have been taken by the Custodian of the Enemy Property in terms of notification dated September 10, 1965 because the said Alauddin Ahmed and Alam Ara Begum were Pakistani Nationals and the said properties were recorded in the names of those two persons in the record of the Corporation of Calcutta. It may be noted that one Shahabuddin Ahmed brother of Alauddin Ahmed filed a suit for declaration in the 9th court of the learned Subordinate Judge at Alipore for a declaration that Alauddin Ahmed had made an oral gift to Shahabuddin in respect of the said property namely premises No. 36 Circus Avenue. The writ petitioners and/or any of the heirs of Hussain Ara Begum were not impleaded as parties in the said suit and the suit was decreed ex parte. It appears also that the Asstt. Custodian of Enemy Property also instituted a suit being title suit No. 14 of 1967 subsequently renumbered Title Suit No. 59 of 1969 in the court of the learned Subordinate Judge Alipore against Shahabuddin Ahmed, Alauddin Ahmed and Alam Ara Begum for a declaration that the ex parte decree passed in T.S. No. 48 of 1967 was not binding upon the Custodian and the property had already vested in the Custodian of Enemy Property. In the said suit none of the writ petitioners and other heirs of Hossains Begum were impleaded as parties. Such suit was also decreed ex parte. The predecessor-in-interest of the writ petitioners namely Yawar Hossain wrote a letter to the Custodian of Enemy Property at

Bombay, inter alia, intimating that the said Hosain Begum and her heirs and successors were all Indian citizens and the property belonged to Hossain Ara Begum and her heirs and successors and the said Alauddin Ahmed and Alamara Begums were trespassers to the said premises No. 36, Circus Avenue, Calcutta and in the Title Suit instituted at Patna the said persons were declared trespassers and the title of the predecessor-in-interest of the writ petitioners and other respondents were declared by the competent Civil Court at Patna and the decree for eviction of the said trespassers and for recovery of possession had also been passed. It may be noted that Mr. M. K. R. Chari the Custodian of Enemy Property by his letter dated July 1, 1970 addressed to the said Shri Yawar Hussain inter alia stated that by the decree passed by the Patna Court, title to the property of the said Yawar Hossain and his brother and sisters was declared and one-third share of Yawar Hossain was also declared by the Civil Court at Patna but if the said Yawar Hossain alone would desire to take over possession of the whole property namely 36, Circus Avenue, Calcutta on behalf of the brother and sisters, it would be advisable for him to obtain a power of Attorney from them and if necessary to make an application to the Alipore Court that possession of the entire property should be handed over to him. It is the case of the writ petitioners appellants that even inspite of such admission about the title of the predecessor-in-interest of the writ petitioner respondents, the Asstt. Custodian of Enemy Property of Calcutta took a curious stand and had insisted that since the property was recorded in the names of the said two trespassers in the Municipal register who were Pakistani nationals and possession of the said properties had been taken under the Enemy Property Act on that score and a declaration was also obtained by the Assistant Custodian of Enemy Property that such property had vested as enemy property there was no question of delivering possession to the heirs and legal representatives of Hossainara Begum and or Yawar Hossain. As the Asstt. Custodian was not at all inclined to hand over the possession of the said property to the writ petitioners and/or other heirs and co-sharers of the said properties, the writ petition had to be moved before this court for appropriate direction on the custodian of Enemy Property and the Asstt. Custodian of Enemy Property so that they would hand over the possession of the said property to the writ petitioners and other heirs and legal representatives being respondent Nos. 4 to 9 in the writ petition. It may be noted here that the Asstt. Custodian of Enemy Property on the basis of the said Act of taking possession of the property had inducted a number of tenants in the said premises and had been realising rents and profits of the premises. A prayer was also made in the writ proceeding for appropriate direction so that the rents and profits of the property realised by the Asstt. Custodian of Enemy Property be also handed over to the writ petitioners and other co-sharers of the said property.

2. As aforesaid, the learned trial Judge had although noted that the Asstt. Custodian of Enemy Property was not justified in proceeding on the footing that the properties were enemy properties, in the fact and circumstances aforesaid, the learned trial Judge was of the view that the dispute should be resolved in an

appropriate civil suit.

3. Being aggrieved by the aforesaid judgment of the learned Trial Judge, the instant appeal has been preferred by the writ petitioners.

4. Mr. Mukul Prakash Banerjee, the learned counsel for the appellants has strongly contended that it is an admitted position that the said Abu Naser and Alamara Begum were trespassers to the said property namely 36, Circus Avenue and the property belonged to Hossainara Begum and after her death to her heirs and legal representatives who were plaintiffs in the said Title Suit No. 12 of 1952 at Patna since renumbered as Title Suit No. 57 of 1953. The civil court at Patna decreed the said suit by declaring the said Abu Naser and Alamara Begum as trespassers and the court also passed a decree for recovery of possession after evicting them. The said suit was decreed on December, 27, 1953 which was long before any question of Enemy Property coming into existence. Mr. Banerjee has also contended that as a matter of fact the decree so far as recovery of possession after evicting the trespassers was concerned, has been executed and satisfaction of that part of the decree was also noted by the Executing Court at Alipore in its order dated August 14, 1968. In view of the aforesaid facts and circumstances, there cannot be any question of treating the said property as enemy property only because the names of the, said trespassers were recorded in the Register of Calcutta Municipal Corporation. Mr. Banerjee has submitted that when the proper facts were brought to the notice of Custodian of Enemy Properties, the Custodian of Enemy Properties by his letter dated July 1, 1970 informed the said Yawar Hossain who is the predecessor-in-interest of the petitioners that title of the said property was declared by the Civil Court in favour of Yawar Hossain and his brothers and sister. It was only indicated in the said letter that since Yawar Hossain had only 1/3rd interest in the property, the possession of the entire property would be delivered to him if he would obtain a power of attorney from his brother and sisters or obtain a suitable direction from the civil court at Alipore. Mr. Banerjee has submitted that after such admission on the part of the Custodian of Enemy Property that the property belonged to the said Yawar Hossain and his brothers and sisters namely the predecessor-in-interest of the writ petitioners and respondents 4 to 9, it was not at all proper and legal on the part of the Assistant Custodian of Enemy Property at Calcutta to treat the property as Enemy Property and/or for taking steps in furtherance of the said unauthorised act of possession of the said property to the loss and detriment of the heirs and successors of the said plaintiff in T.S. 57 of 1953. Mr. Banerjee has submitted by the illegal and improper action on the part of the Assistant Custodian of Enemy Property at Calcutta, the writ petitioners and other heirs and legal representatives of the said plaintiffs in T.S. No. 57 of 1953 have suffered loss and damages because various tenants and/or licencees had been inducted in the said property and the writ petitioners and other heirs and co-sharers of the property reserve the right to file appropriate suit for damages against the said Assistant Custodian of Enemy Property and/or other persons for indulging in illegal activities. Mr. Banerjee, in this connection has referred to the

definition of Enemy Property as appearing in S. 2(c) of the Enemy Property Act, 1968. "Enemy Property" according to the said Act means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm, Mr. Banerjee has contended that when in 1952 the said enemy or enemy subjects were declared as rank trespassers in respect of the said property, and decree for recovery of possession had been passed against them, such property could not be treated as enemy property under the said Act and the action taken by the Custodian of Enemy Property and/or Asstt. Custodian of Enemy Property, Calcutta was per se illegal and unauthorised. He has submitted that even if it is assumed that initially the Custodian of Enemy Property or the Asstt. Custodian of Enemy Property had bona fide reasons for treating the said property as enemy property because the names of two Pakistani nationals were recorded in the Register of Municipal Corporation of Calcutta, they should have delivered the possession of the said property to the owners and/or their successors and legal representatives in terms of the decree passed in the said Title Suit No. 57 of 1953. Mr. Banerjee has submitted that as the title of the writ petitioners and/ or respondents Nos. 4 to 9 flow from the decree passed in the said civil suit, the continuance of possession by the Custodian or Asstt. Custodian of Enemy Property on the footing that the property is an enemy property is per se illegal and no further declaration to that effect by any competent civil court is necessary. The learned trial Judge is therefore not justified in relegating the parties to another civil suit to their serious loss and damage. Mr. Banerjee has, submitted that the court of appeal should set aside the order passed by the learned trial Judge and direct the Custodian of the Enemy Property at Calcutta to immediately hand over the possession of the disputed property to the writ petitioners and the said respondents Nos. 4 to 9 and/or to their authorised representative and to give a detailed account of the earning and profits realised from the said property from the date when the Custodian or Asstt. Custodian has taken illegal unauthorised possession of the said property.

5. Mr. Samarendra Nath Banerjee, the learned counsel appearing for the respondent Union of India and the Custodian of Enemy Property has, however, contended that in execution of the decree, the possession was delivered under Order 21, Rule 35 of the CPC and such possession was only a symbolical possession. In spite of such delivery of possession as noted in the execution case, the Municipal Register of the Corporation of Calcutta had not been corrected and the names of Pakistani nationals namely Alauddin Ahmed and Alamara Begum had not been changed and the said Pakistani nationals were shown to be in possession of the said property. The Custodian and/or Asstt. Custodian of the Enemy Property were therefore justified in treating the said property as enemy property and were also justified in taking possession of the same. Mr. Banerjee has contended that as the decree passed by the learned Subordinate Judge, 9th Court, Alipore in the suit executed by Shahabuddin Ahmed raised a cloud to the title of the said property so far as the Custodian was concerned, the Assistant

Custodian of Enemy Property at Calcutta instituted Title Suit No. 114 of 1967 in the 9th Court of the learned Subordinate Judge at Alipore and got a decree to the effect that neither Shahabuddin nor Alauddin Ahmed nor his daughter Alamara Begum were owners of the said properties and the decree passed in the said suit instituted by Shahabuddin Ahmed was not binding on the Custodian or Assistant Custodian. Mr. Banerjee has submitted that so long the decree obtained by the Asstt. Custodian of Enemy Property is not set aside, the writ petitioners and the respondents Nos. 4 to 9 cannot take possession of the property even though a decree was passed in favour of the predecessor in interest of the said persons by the Civil Court at Patna. The learned trial Judge was, therefore, justified in relegating the parties to an appropriate civil suit and no interference is required to be made against the said judgment of the learned trial Judge. In this connection Mr. Banerjee has referred to a Bench decision of this Court made in the case of Tanvar Egbal and Others Vs. Union of India (UOI) and Others, . The Division Bench has held in the said decision that properties would be deemed to be vested to the custodian of enemy property when a prior decision is made by authority concerned as to whether a particular property is an Enemy property or not but when no such prior determination is made, the concerned authority cannot initiate any proceeding for taking possession on mere assumption that property in dispute is an enemy property. Mr. Banerjee has submitted that in the instant case, the possession of the property had not been taken on mere surmise and conjecture but on the basis of the Municipal records the determination had been made by the Custodian of Enemy Property that the said property was enemy property. Accordingly, no illegality has been committed by the Custodian.

6. Mr. Mukul Prakash Banerjee, the learned counsel for the appellants, has, however, submitted that the said decision does not come in aid of the contention sought to be raised on behalf of the Custodian and/or Asstt. Custodian of Enemy Property. He has submitted that if the Custodian or Asstt. Custodian simply on the basis of Municipal record determines that the property is an enemy property when in fact such property is not the enemy property and the entries in the record of the Municipal register has been held incorrect by the Competent Civil Court by declaring title of the plaintiffs in the said Title Suit No. 57 of 1953, it cannot be contended that because an erroneous determination had been made by the Custodian and/or Asstt. Custodian of Enemy Property, such authorities have jurisdiction to take over possession of the said property and/or to continue such illegal possession.

7. After considering the respective contentions of the learned counsel appearing for the parties and giving our anxious consideration to the facts and circumstances of the case as indicated hereinbefore it appears to us that the said Premises No. 36, Circus Avenue had never belonged to the said Alauddin Ahmed and Alamara Begum whose names were recorded in the Register of Calcutta Municipal Corporation. The said persons were declared as trespassers and a decree for eviction of the said trespassers were also passed in the Title Suit No. 57 of 1953 by a Competent Civil Court at Patna. There has been a clear

adjudication of the title of Hassanara Begum the predecessor-in-interest of the said plaintiffs and it is nobody's case that the said plaintiffs were Pak Nationals or enemy so that the property can at all be held as enemy property. As a matter of fact there is report by the police administration that all the said heirs of Hossenera Begum are Indian citizens. In our view Mr. Banerjee is quite justified in his contention that Custodian of Enemy Property at Bombay had clearly accepted the title of the plaintiffs in the said Title Suit No. 57 of 1953 but he only indicated the difficulties in handing over possession to one of the decree-holders, in the absence of a power of attorney given by the other co-sharers or in the absence of suitable directions to that effect any Competent Civil Court at Alipore. When relevant facts relating to title to the property including the decree passed by the Civil Court at Patna were made known to the Custodian and Assistant Custodian of Enemy Property, we fail to appreciate how and under what circumstances the Assistant Custodian of Enemy Property at Calcutta could treat the said property as enemy property and continue possession of the same. Such action of the Custodian of Enemy Property and/or Assistant Custodian of Enemy Property at Calcutta, even it was justified at the beginning for want of proper notice, was wholly illegal and unauthorised, when the title of the parties was made known. It was the bounden duty of the Custodian and/or Asstt. Custodian of Enemy Property to ask the plaintiffs and/or their successors-in-interest to take delivery of possession of the said property immediately from the Asstt. Custodian of Enemy Property immediately from the Asstt. Custodian of Enemy Property. Unfortunately, the Asstt. Custodian of Enemy Property at Calcutta had taken a very unreasonable stand in the matter and tried to exercise control and possession over the property as a de jure authority under the said Enemy Property Act, 1968. In the facts and circumstances of the cases it does not appear to us that the writ petitioners and/or other heirs of Hossenera Begum should be relegated to a further suit for declaration of their title and consequential orders on the Custodian and/or Asstt. Custodian of Enemy Property. The decree passed in Title Suit No. 57 of 1953 is very specific and there is no manner of doubt that the title of the plaintiffs in the said suit and/or their heirs and successors-in-interest in Premises No. 36, Circus Avenue, Calcutta stands declared. We, therefore, allow this appeal, set aside the order passed by the learned trial Judge and direct the Custodian and/or Asstt. Custodian of Enemy Property at Calcutta to deliver possession of the said Premises No. 36 Circus Avenue, Calcutta to the appellants and respondents No. 4 to 9 or to the authorised representatives of the said appellants and respondents Nos. 4 to 9 within a period of six weeks from date. The Asstt. Custodian of Enemy Property is restrained from inducing any tenant and/or from subletting or encumbering the property in any manner whatsoever. He is further directed to send a detailed account of the occupiers of the said premises including the names of the tenants and other persons in possession, the said property together with date of inducing of tenancy or granting of any licence in their favour. The Asstt. Custodian of Enemy Property at Calcutta is also directed to indicate the rents and/or licence fees, if any, in respect of each of such tenants or licensee, or

persons in possession of the said Premises No. 36 Circus Avenue, Calcutta. Let such statement containing the names of the tenants, licencees or persons in possession of the said premises together with accounts of rent, licence fees etc. payable by each of such persons and also a detailed account of the collection made from the said premises till October 31, 1990 together with all expenses incurred in connection with the said property be handed over by the Asstt. Custodian of Enemy Property at Calcutta to each of the writ petitioners the respondents Nos. 4 to 9 within a period of four weeks from today. The Asstt. Custodian of Enemy Property at Calcutta is further directed to pay the entire sum of money lying in his hand out of earnings and profits and realisation of rent from the property to the authorised representative of the writ petitioners and the respondents Nos. 4 to 9 within the said period of six weeks from today. It is made clear that the writ petitioners and the respondents Nos. 4 to 9 or any of the co-sharers of the said property will be free to take any action against the tenants, licensee or any other persons in possession of the said property in accordance with law. The appeal is accordingly disposed of. There will be no order as to costs.

8. After the judgment was delivered a prayer was made for stay of the operation of the judgment by the learned counsel for the Union of India, but in the facts of the case such prayer is refused.

Altamas Kabir, J.

9. I agree.

10. Order accordingly.