

(1960) 05 AHC CK 0002

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3115 of 1957

Paras Nath Singh

APPELLANT

Vs

State of U.P., Sabhapati Gram Samaj and Tahsildar

RESPONDENT

Date of Decision : 04-05-1960

Acts Referred:

Uttar Pradesh Land Revenue Act, 1901 — Section 17, 223, 224

Citation : (1960) 30 AWR 327

Hon'ble Judges : M.C. Desai, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.C. Desai J.

1. The Petitioner, who claims to be in possession of certain land, has been ordered by opposite party No. 3 to be ejected from it on the grounds of the land vesting in the Gram Samaj of the village and of his being trespasser upon it. The Petitioner through this petition asks for certiorari to quash the order of the opposite party.

2. The Tehsildar opposite party No. 3 purports to have passed the order of ejectment in exercise of the power conferred by Rule 115F of the UP Zamindari Abolition and Land Reforms Rules. The gist of Rules 115C, 115-D and 115-F is as follows. It is the duty of the Land Management Committee to manage, maintain, preserve and protect all property vested in the Gaon Samaj. All cases of interference with the property are to be reported to the Collector by the Land Management Committee through its Chairman, Secretary or member with a request to have the encroachments removed, The Collector on being informed of an encroachment is required to call upon the trespasser to remove the encroachment or to show cause against it within a certain time. If the trespasser shows cases the Collector has to determine whether his possession is as a tenure holder or as a trespasser. If his possession is found to be as a trespasser, he

must, be informed of the finding and served with an order requiring him to hand over possession to the Gaon Samaj within ten days. If he does not comply with the order, orders for his ejectment are required to be passed by the Collector and a warrant of execution is to be issued to the Tahsildar who has to execute it in accordance with certain rules.

3. These rules make it clear that the final order of ejectment is to be passed under Rule 115 F by the Collector and is to be executed by the Tehsildar. What has happened in the present case is that the final order of ejectment has been passed by a Tehsildar and the Collector has never dealt with the matter at all at any stage. The Tehsildar started the proceedings against the Petitioner on the report of the Lekhpal, who is the Secretary of the Land Management Committee. The Tehsildar had no jurisdiction under Rules 115-C to 115-F to deal with the report of the Lekhpal, to make any inquiry into the objection filed by the Petitioner and to order his ejectment from the land in dispute. His jurisdiction was simply to execute the order of ejectment if passed by the Collector. It is not understood how the Tehsildar usurped the jurisdiction of the Collector and passed the order of ejectment himself.

4. The Tehsildar is a revenue officer appointed under the Land Revenue Act Section 17. Another Officer to be appointed by the State Government under the Land Revenue Act is an Assistant Collector of the 1st class or of the 2nd class. A Tehsildar as such is not an Assistant Collector either of the 1st or of the 2nd class. Section 224 of the Land Revenue Act empowers the State Government to confer upon any Tehsildar all or any of the powers of the Assistant Collector of the 2nd class, so a Tehsildar can be conferred the powers of an Assistant Collector 2nd class but not with those that of an Assistant Collector of 1st class. Still the State Government has issued a notification conferring upon all Tehsildars powers of Assistant Collector 1st class. This is a thing which is not understood; how the State Government in face of the clear language of Section 224 conferred the power of an Assistant Collector 1st class upon the Tehsildar is beyond comprehension and the standing counsel has thrown no light on the matter. The Collector is one mere revenue officer appointed under the Land Revenue Act and u/s 223 the State Government has power to confer upon any Assistant Collector of 1st class all or any of the powers of the Collector and in exercise of this power the State Government conferred the powers of a Collector upon all Assistant Collectors of the 1st class. If by virtue of these conferment?s of power the Tehsildar claimed the powers of a Collector he was entirely in the wrong. In the first place he could not be invested with the powers of Assistant Collector of First class at all as already explained. Secondly even if he could be invested, he could not thereby become an Assistant Collector of the 1st class and could not become the Collector. u/s 223 the powers of a Collector can be conferred upon an Assistant Collector of the 1st class and not upon any other officer, even though he might have been invested with the powers of an Assistant Collector of the 1st class. Even when a Tehsildar is invested with the powers of an Assistant Collector of the 1st class he remains a Tehsildar and does not become an Assistant

Collector of the 1st class; if he does not become an Assistant Collector of the 1st class he cannot become a Collector. Only an Assistant Collector of the 1st class can exercise the powers of the Collector under the notification of the Government and not another officer though he may be exercising his powers. There is a distinction between an Assistant Collector of the 1st class and an officer exercising his powers. The order passed by the Tehsildar is, therefore, without jurisdiction and must be quashed.

5. There is another reason also for quashing the orders. Chapter VII consisting of Section 113 to 128 of the UP Zamindari Abolition and Land Reforms Act deals with Gaon Samaj and Gaon Sabha. Section 117 lays down that vacant land shall vest in the Gaon Samaj or the Land Management Committee. Section 122-A, which has been added by the UP Act No. 37 of 1958 charges the Land Management Committee with the general Superintendence, management, preservation and control of all land vesting in the Gaon Samaj u/s 117. Among the specific functions and duties of the Land Management Committee are included "such other matters as may be prescribed." Section 128 empowers the State Government to make rules for the purpose of carrying into effect the provisions of this chapter. Among the specific powers mentioned in Sub-section (2) is the power of making rules for the summary procedure for determination of encroachment upon land vested in the Gaon Samaj, removal of encroachment etc. Were this power did not exist in the original Section 128 (2) but was added by the amendment Act No. 20 of 1954. The question is whether Rules 115D to 115-F are rules validity made by the Government, these rules were made before the amendment Act No. 37 of 1958. Rule 115-C purports to have been made in exercise of the power conferred by Section 128(2)(kk), which provision was added, as I said, by the amendment Act No. 20 of 1954. At the time when it was made the present Section 122-A did not exist in the Act but instead there existed Section 118 which was in similar language. u/s 118(j) which was similar to present Section 122(sic)(c), the State Government had the powers to prescribe additional functions and duties of the Gaon Samaj. Rule 115C(1) makes it a duty of the Land Management Committee to manage, maintain etc. all property vested in the Gaon Samaj. Sub-rule (2) also makes it a duty of the Chairman, Secretary or a member of the Land Management Committee to report all cases of encroachment upon any land vested in the Gaon Samaj to the Collector for necessary action. No other duties and function have been prescribed for the Gaon Samaj or the Land Management Committee by Rules 115-C to 115-F, Rules 115E and 115F prescribe the duties of the Collector and the Tehsildar and not of the Gaon Samaj or of the Land Management Committee. Therefore, Rules 115-B, 115-E and 115-F cannot be said to have been made by the State Government by way of prescribing the functions and the duties of the Gaon Samaj and the Land Management Committee. Section 344(1)(h) of the Act lays down that every power to make rules given by the Act shall be deemed to include the power to provide for the procedure to be followed in suits, applications and other proceedings under the Act, in cases for which no specific provision has been

made therein. It is impossible to give any sense to this provision. It is not understood how in respect of every power to make rules given by the Act there can arise the question of procedure to be followed in suits applications and other proceedings. The power to make rules under the Act has been given in respect of so many matters which have no connection with any suit, application or other proceedings and it is beyond comprehension how every such power shall be deemed to include the power to provide for procedure. It is impossible to read Section 344(1)(b) along with the provision in Section 118(2)(j) or the present provision in Section 112A(2)(e) to any intelligible manner. If prescribing other functions and duties of the Gaon Samaj does not amount to making a rule within the meaning of Section 344 (1), the section cannot be read at all along with Section 118(2)(J) or 122A(2)(e) and it cannot be contended that the State Government has the power of not only prescribing additional functions and duties of the Gaon Samaj but also of providing for the procedure to be followed in suits, applications and other proceedings under the Act. The power that is conferred by Section 344(1)(b) is in respect of the procedure to be followed in suits, applications and other proceedings under the Act. The State Government has no power to make rules in respect of the procedure to be followed in any proceeding which cannot be said to be a proceeding under the Act. If provision for a proceeding is made, not in the Act but, in the rules it cannot be said to be a proceeding under the Act and the State Government cannot claim the power to make rules in relation to the procedure to be followed in it. The State Government, therefore, cannot claim to have made rules 115-E and 115-F in exercise of the power conferred by Section 118(2)(j) or by Section 344(i)(b).

6. Coming to Section 128 the first point to be noticed is that Sub-section (1) contains the general power of the State Government to make rules and that Sub-section (2) only gives illustrations of the general power. Sub-section 2 does not confer any additional power i.e., any power in addition, to that conferred by Sub-section (1) on the other hand it specifies the powers that are included in the general power conferred by Sub-section (1). The general power is simply to make rules for the purpose of carrying into effect the provisions of Chapter VII. I have mentioned the relevant provisions of the Chapter. There are no provisions in the chapter which are to be carried into effect with the aid of Rules 115-C to 115F. u/s 118 the Gaon Samaj is charged with the duty of general Superintendence, management, preservation and control of the property vested in it; this duty does not include the duty of removing a trespasser without the recourse to law. It can exercise the powers of superintendence and management in respect of the vested property which is actually in its possession, if it goes out of its possession and is in the possession of a trespasser there arises no question of its exercising powers of superintendence or management. Similarly the duty of maintaining, preserving and protecting the property can be performed in respect of the property which is in its possession and cannot be performed in respect of property which is trespassed upon. It is its duty to prevent trespass; this duty is included in the duty of maintaining preserving and protecting the property. But

once a trespass is committed, it ceases to be charged within the duty of maintaining, preserving or protecting the property. Consequently rules 115-D, 115-E and 115F dealing with the procedure for the ejectment of a trespasser cannot be said to have been made by the State Government in order to carry into effect the provisions of Section 118. Once a property goes out of the possession of the Gaon Samaj, all it can do is to report the fact to the Collector. Rules laying down how the fact should be reported to the Collector may be said to be rules for the purpose of carrying into effect the provisions of Section 118, but not rules laying down what should subsequently be done by the Collector because what the Collector should do does not come within the scope of Section 118. It does not mention the Collector at all and refers only to the Gaon Samaj and in order to carry into effect its provisions, rules may be made governing the conduct of, or requiring compliance by, the Gaon Samaj. Consequently rules governing the conduct of, requiring compliance by, the Collector and the Tahsiidar cannot come within the scope Section 12(i).

7. Sub-section (2)(kk) of Section 128 is repugnant to Sub-section (1) because it does not come within the general scope of Sub-section (1). There is no reference anywhere in the chapter to determination of an encroachment, or to removal of an encroachment or to any summary procedure for the removal of an encroachment there is no doubt that this provision was added haphazardly by Act No. 20 of 1954. The State Government could not possibly make rules regarding the summary procedure for determination and removal of an encroachment unless the chapter contained provisions regarding determination and removal of an encroachment. Section 118 says nothing about determination or removal of an encroachment or about any procedure to be followed for determination or removal of an encroachment. I have explained that the general power contained in Section 118(1) does not deal with determination and removal of an encroachment. The State Government could not make any rule regarding the summary procedure in exercise of the power conferred by Sub-section (1) and therefore, enactment of Sub-section (2)(kk) is meaningless. The provision of Sub-section 2(kk) being repugnant to Sub-section (1) must be held invalid and must be ignored. Rules 115C etc. purport to have been made by the State Government in exercise of the power conferred by Section 128(2)(kk) if Section 128(2)(kk) itself is invalid the rules also must be held to be invalid.

8. The above conclusion is confirmed by the fact that Section 209 provides a remedy to a Gaon Samaj against a trespasser. The person taking or retaining possession of land vested in a Gaon Samaj without its consent is liable to ejectment on a suit of the Gaon Sabha or the Collector. Such a suit must be brought within the time prescribed in Appendix III to the rules. If it is not brought within the time, the trespasser would become an asami u/s 210(2). The enactment of Rules 115C to 115F providing a summary procedure for the ejectment of a trespasser is inconsistent with Sections 209 and 210. When there is a definite remedy by way of a suit provided for the ejectment of a trespasser from land vesting in the Gaon Samaj, the State Government had no power to

provide for a summary procedure for his ejectment. The rules take no account of the time that has passed since the trespasser took possession. An ejectment order u/s 115-F can be passed at any time; this conflicts with the provisions of Section 210 under which a trespasser becomes an asami; If his trespass continues for a certain time he could be an asami u/s 210 and also be liable to be ejected as a trespasser under Rule 115-F; this is an absurd result. When Section 209 allows a Gaon Sabha to file a suit for ejectment of a trespasser, ejecting him without recourse to law could not be said to be included in its general powers of superintendence, management etc. conferred by Section 118(1). I, therefore, hold that Rules 115-D to 115-F are invalid and no ejectment order could be passed against the Petitioner under Rule 115-F.

9. The petition is allowed and the order of the Tahsildar dated September 29, 1957 is quashed by certiorari.

10. The proper person from whom the Petitioner should get his costs was the Tahsildar, who passed the order but he has not been impleaded by name. I cannot award costs against opposite party No. 3, otherwise anybody who holds the office of Tehsildar would be liable to pay them. Opposite party No. 1 is not responsible for the order passed by the Tehsildar nor opposite party No 2. I, therefore, refrain from making any order as to the costs of the petition.