

(2009) 02 DEL CK 0104
In the Delhi High Court
Case No : LPA No. 370 of 2006

Smt. Hasina khatoon thr. LRs. and Others	APPELLANT
Vs	
The Competent Officer and Others	RESPONDENT

Date of Decision : 18-02-2009

Acts Referred:

Citation : (2009) 02 DEL CK 0104

Hon'ble Judges : Sudershan Kumar Misra, J;Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Hameed S. Shaikh and Amit Kumar, for the Appellant; Jyoti Singh and Ankur Chhibber for the UOI and S.P. Jha and B.K. Jha for Respondents 4 to 10, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—CM No. 16173/2006 (Under Section 151 CPC)

The application has been filed praying for exemption from substituting the legal representatives of respondent No. 12 as the legal representatives are already on record and have been transposed as the appellants.

The application is accordingly allowed.

LPA No. 370/2006

1. The property bearing municipal No. XIV/6533 (old number), XIV/5105 (new number), Gali Qudratullah, Quresh Nagar, Sadar Bazar, Delhi was co-owned by various persons pre-partition. Some of the co-owners migrated to Pakistan and to the extent of share of such persons the property became an evacuee property. The evacuee interest is 17/48th share while that of the appellants is 7/48th share. The private respondents 4 to 10 own 24/48th share. The property, thus, became a composite property within the meaning of Section 2(d) of the Evacuee Interest (Separation) Act, 1951 (hereinafter referred to as the Separation Act). It became necessary to separate the interest of evacuees in terms of Section 10 of

the Separation Act, the relevant portion of which reads as under:

10. Separation of the interest of evacuees from those of claimants in composite property.-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 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 partner,-

(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;

2. The separation of interest of evacuees and non-evacuees was not found feasible and thus the property was put to sale in terms of Section 10(a)(iii) of the Separation Act providing for sale of such property and distribution of sale proceeds between the custodian and the claimants in proportion to their respective shares. The public auctions proved fruitless on two occasions but finally in the third auction held on 10.2.1960 respondent No. 4 was the highest bidder. This sale was objected to by one Shri Abdul Majid who claimed that he was willing to pay a higher price and made a request to the Competent Officer, which request was accepted by the Competent Officer. The appeal filed by respondent No. 4 was rejected on 21.6.1962. Respondent No. 4 consequently challenged the proceedings in a writ petition which was disposed of on 29.3.1965 with the direction that if the said respondent No. 4 deposited a sum of Rs. 5,000.00 as security for the initial bid of Rs. 24,000.00 within a month, the property would be re-auctioned by bids.

3. The matter dragged on for a number of years till finally on 13.12.1978 the Competent Officer issued a Sale Certificate qua the entire property in favour of respondent No. 4 as the highest bidder. It may be noticed that Smt. Hasina Khatoon, the appellant herein was aggrieved by the actions of the Competent Officer as she wanted to deposit some amounts and claim rights but the writ

petition filed by her, being CWP No. 449/1967 was dismissed for non-prosecution on 20.1.1975 and the efforts to restore the same proved to be unsuccessful.

4. The appellant Smt. Hasina Khatoon thereafter filed CWP No. 670/1979 seeking to challenge the Sale Certificate issued by the Competent Officer in favour of respondent No. 4 primarily on the ground that she was willing to give a higher bid. This writ petition was dismissed on 15.10.1979 and that order was never challenged further. The result of the aforesaid was that the Sale Certificate issued in favour of respondent No. 4 for the whole property became final and he consequently became the absolute owner of the property.

5. The travails of respondent No. 4 did not end as he still did not get the possession of the property. It has already been mentioned hereinabove that he was already owner of the property to the extent of 24/48th share and through the auction purchased the evacuee interest of 17/48th and the interest of the appellants of 7/48th share. Smt. Hasina Khatoon resisted endeavours to dispossess her on the ground that the Competent Officer could not do so. She also pleaded that she had carried out improvements in the property and that there was some tacit understanding between her and respondents 4 to 10 that she would not be evicted from the property. Objection was also sought to be taken by one Shri Noor Mohammad, who is a legal heir/son of Smt. Hasina Khatoon (who is also now deceased) who has since been transposed as an appellant. Shri Noor Mohammad claimed to be residing on the second floor which he had constructed.

6. The Competent Officer, however, rejected the objections vide order dated 26.8.1991 and held that a reading of Section 10 of the Separation Act along with Rules 11-E (3)(a) and 11-E(5) of the Evacuee Interest Separation Rules, 1951 (hereinafter referred to as the Evacuee Rules) empowered the Competent Officer to do the needful. These sub-rules have been reproduced in para 16 of the impugned order and the same read as under:

11-E. Sale certificate and possession.-

(1) ...

(2) ...

(3) "(a) 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 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.

(3)"(b)"....

(4)

(5) Where the property is in the occupancy of a non-evacuee claimant whose interest in the property has been sold, and he refuses to vacate the property; in spite of the order of the competent officer, the competent officer shall order delivery to be made, by putting the auction-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 the non-evacuee claimant.

7. A reading of the aforesaid Rules show that Rule 11-E(3)(a) of the Evacuee Rules provides for a protection to a tenant, allottee or other person entitled to occupy the property pre-sale from being forcibly evicted as in such a case only symbolic possession is to be delivered. However, simultaneously Rule 11- E(5) of the Separation Rules clearly provides that once interest of a non- evacuee has been sold and he refuses to vacate the property, the Competent Officer can order delivery to be made by putting the auction purchaser in possession of the property by removing the non-evacuee claimants.

8. The Competent Officer relying on the aforesaid provision has held that he was fully empowered to put respondent No. 4 in possession. The claim of Shri Noor Mohammad was also rejected after considering the objections and it was concluded that if he or the other appellants had carried out any construction without having the right or title to do so, they could not claim any entitlement of occupation on such construction.

9. The appeal filed by the appellant against the order dated 26.8.1991 also met the same fate on 31.10.1991 and it was thereafter that a writ petition, being WP (C) No. 3498/1991 was filed. The writ petition has been dismissed by the impugned order dated 20.10.2005 with costs, which has given rise to the present Letters Patent Appeal, which is the forth tier of scrutiny as the appellants have lost in three forums below. Not only that this is the third round of litigation by the appellants to somehow claim rights in the property.

10. A perusal of the impugned order shows that the only issue urged was that the Competent Officer could not evict the appellants under the Separation Rules and the issues relating to the alleged construction, etc. were not even pleaded. It was argued on behalf of the appellants that Section 10 of the Separation Act was the only statutory provision.

11. The aforesaid contention has been rejected, in our considered view, rightly so, as the powers vested u/s 10 of the Separation Act in the Competent Officer are subject to any Rules to be made in that behalf. No doubt the Rules cannot be in conflict with the provisions of the Separation Act and only in furtherance thereof. It is clearly provided in Section 10 of the Separation Act that where a partition is effected or where the custodian buys out the non- evacuee co-shares or vice-versa, possession of the property has to be delivered. The plea that only a symbolic possession could be delivered has been negated.

12. We find that the learned single Judge in the impugned order has succinctly analysed the scheme of the Act and the Rules. The Rules have a statutory force and are made under the Act. A distinction has been made as to where a symbolic possession has to be given or not. As discussed above symbolic possession is to be delivered where a person in occupation has rights as a tenant, allottee or person entitled to occupy. The reason is obvious that any person having a legal authority or protection in that capacity should not be dispossessed merely by sale of the evacuee interest or otherwise. However, as a consequence of sale non-evacuee claimant can be evicted in terms of Rule 11-E(5) of the Separation Rules. The appellants contention, which is the same as before the learned single Judge seems to obsificate the whole issue by not recognizing the distinction in the nature of occupation in respect of cases where symbolic possession is to be delivered, i.e. tenant, allottee or person entitled to occupy as against the actual possession is to be given where a non-evacuee loses interest for consideration. The provisions of Section 10 of the Separation Act authorize the Competent Officer subject to the Rules made in that behalf to take all such measures as he may consider necessary for purposes of separating the interest of the evacuees from those of claimant in any composite property and thus the Rules are not ultravires or beyond the authority of the provisions of the Separation Act. There is, in fact, no conflict either between the sub-rules or with the Act.

13. The learned single Judge has also taken note of certain judgements cited at the bar by the appellants including Ek Nawaz Khan Vs. The Competent Officer, Allahabad and Others, where a trespasser was occupying a composite property. It has rightly been observed that the said judgement does not deal with the issue raised in the writ petition, i.e. the right of a non-evacuee co-sharer once composite property is sold. It has rightly been noticed that the status of the appellants were of owners in possession whose interests were purchased in auction and thus the possession must go with the transfer of ownership.

14. Learned Counsel sought to rely upon the Constitution Bench judgement of the Supreme Court in Azimunissa and Others Vs. The Deputy Custodian, Evacuee Properties, District Deoria and Others, . However, learned Counsel is not really able to point out the relevance of that judgement other than the fact that it deals with an evacuee property.

15. We, thus, find no merit in the appeal. We wish to add that the present case is a classic one where the appellants have been frustrating the perfection of title and occupation in favour of respondent No. 4 by initiating proceedings after proceedings before different forums causing wastage of judicial time despite settled legal principles. The appellants have even appropriated the amounts and want to continue to occupy the property illegally having lost the interest in the property and are trying to stop respondent No. 4 from perfecting the title. The appellants must be burdened with costs.

16. The appeal is accordingly dismissed with costs of Rs. 20,000.00 to respondents 4 to 10 to be paid within four (4) weeks.