
(1995) 03 AHC CK 0046
In the Allahabad High Court
Case No : Second Appeal No. 2162 of 1978

Sri Bidha @ Bidhi Chand and Ors.

APPELLANT

Vs

Yogendra Pal

RESPONDENT

Date of Decision : 09-03-1995

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10, 28, 46, 8, 9
Civil Procedure Code, 1908 (CPC) — Section 100, 9

Citation : (1995) 03 AHC CK 0046

Hon'ble Judges : R.B.Mehrotra, J

Final Decision : Dismissed

Judgement

R.B.Mehrotra, J.—This is defendant's second appeal. Plaintiffrespondent filed a suit No, 486 of 1969 Yogendra Pal v. Bidha which was tried by the court of Additional Munsif Magistrate, Aligarh. The plaintiffrespondent sought a relief for eviction of the defendant from the property in dispute described at the foot of the plaint after removal of construction over it and also prayed for recovery of mesne profits for wrongful user of the land by the defendant. The suit was contested by the defendant mainly on the ground that the plaintiff is not the owner of the land in dispute and the suit is barred by time.

2. The trial court dismissed the plaintiff's suit and held that the plaintiff has failed to prove his title over the land in dispute and also held that the suit is barred by limitation.

3. Aggrieved by the aforesaid judgment the plaintiff preferred an appeal in the Court of Civil Judge, Aligarh, being Civil Appeal No. 304 of 1977, Yogendra Pal v. Bidha. The appellate court reversed the finding of the trial court on both the counts and decreed the suit of the plaintiff directing the defendant to hand over possession of the land in dispute to the plaintiff and remove the debris constructed by the defendant on the land in dispute. However, no decree was passed for mesne profits.

4. Aggrieved by the aforesaid judgment, the defendant has preferred this second

present appeal.

5. I have heard learned counsel for the appellant Sri V. K. Gupta and learned counsel for the respondents, Sri S. U. Khan respectively in support of the appeal and in opposition thereof.

6. Learned counsel for the appellant, Sri V. K. Gupta has mainly contended following points:

(i) Firstly, since there was no sale deed executed by the competent authority under the Evacuee Property Act (hereinafter referred to as the Act) no valid title has passed to the plaintiff in respect of the aforesaid property as such, the plaintiff was not competent to file the suit in respect of the property in dispute.

(ii) Secondly this is admitted on the record of the case that the defendants were in possession of the land in dispute even prior to the sale certificate having been executed in favour of the plaintiff by a competent authority under the Act and since then the defendants continue to be in possession, the plaintiff has no right to evict the defendants. Under the provisions of the Act, only the authorities under the Act in accordance with the provisions of Sections 8 and 9 of the Act were authorised to evict the defendants.

(iii) Thirdly, the plaintiff has no such authority to evict the plaintiff from the property in dispute.

7. In support of first contention, learned counsel for the appellants has relied upon division bench decisions of this Court in *Mazhrul Islam v. Khacher Bus*, AIR 1969 All 554 and *Assistant Custodian, General Evacuee Property, U. P., Lucknow v. Ali Abbas*, AIR 1972 All 141.

8. The learned counsel for the respondent in reply to the aforesaid submission has contended that once the property is declared to be an evacuee property all the rights in relation to the aforesaid property can be decided only under the provisions of the Act and no person can be permitted to agitate any question in relation to the evacuee property in the civil court, as the jurisdiction of the civil court is barred under Sections 28 and 46 of the aforesaid Act. In turn he has relied upon a decision of Hon'ble Supreme Court in *Custodian, Evacuee Property, Punjab v. Jafram Begum*, AIR 1968 SC 169.

9. In the light of the aforesaid submission I have considered the matter. The admitted facts on record are that the land in dispute has been declared as evacuee property under the provisions of the Act by the order of the Assistant Custodian (Judicial), Aligarh Circle, dated 7/6/1968. The land in dispute was auctioned by the custodian authorities in favour of the plaintiff on 16/12/1964. On 5/2/1968 a showcause notice under Section 8 read with Section 9 of the Act was issued to the defendantappellants as to why they should not be dispossessed from the plot in dispute removing their constructions. This notice was issued by the custodian authorities. The defendantappellants filed objection to the aforesaid notice. Thereafter no action was taken by the custodian authorities. On

2021968 a sale certificate was issued by the competent authority in favour of the plaintiffrespondent. The plaintiffrespondent filed a suit giving rise to the present second appeal in the year 1969.

10. The points raised by the appellants" counsel are being dealt with in the same seriatim as referred to earlier.

11. The defendantappellant never took any objection regarding passing of title in favour of the plaintiff on the basis of certificate of sale neither any such objection was raised in the court below that the aforesaid sale certificate is not registered or no valid title passed in favour of the plaintiff for nonexecution of the saledeed despite the certificate of sale having been issued in favour of the plaintiff. No specific issue was framed on this count. The certified copy of the certificate of sale is on record. It is mentioned in the aforesaid copy that SubRegistrar of the Tehsil, district Aligarh may be informed of the sale certificate for necessary action. In this view of the matter for the first time it cannot be determined at the. second appellate stage as to whether the sale certificate was registered or whether the plaintiff acquired any title over the plot in dispute on the basis of the aforesaid sale certificate. Krishna Kumar Sinha v. Kayastha Pathshala (Prayag), Allahabad, AIR 1966 Alld. 570 at p. 576 (para 87).

12. In Mazhrul Islam"s case (supra) a Division Bench of this Court only decided a question of law holding that even under the provisions of the Act the evacuee property cannot be transferred except by a registered instrument. It only means that sale certificate itself was required to be registered if the value of the property was more than Rs. 100. The Division Bench also held that the provisions of the Transfer of Property Act are applicable to the property declared as an evacuee property under the provisions of the Act.

13. In Assistant Custodian General Evacuee Property (supra) case the Division Bench affirms the view in Mazhrul Islam case but the aforesaid decision was concerned with different issue as to whether a prior approval by the Custodian General is required for conducting and auctionsale of the evacuee property. The Court held that the said approval is required only at the stage when the sale certificate is issued or a saledeed is executed and not at a stage when auctionsale is conducted. The ratio of the aforesaid decision has no relevance with the present controversy.

14. In any case in the present case, defendantappellants cannot be permitted to dispute the right of the plaintiff to sue whether failed title passed over to the plaintiff by sale certificate or not. This dispute can be a lis between the purchaser and the custodian authority, but the trespassers over the land cannot be permitted to agitate the said question and that too for the first time in second appeal. So far as the defendants are concerned the plaintiff had a prima facie title to get possession of the land which he purchased from the competent authority on the basis of the sale certificate. The contention raised by the appellant"s counsel on this point is accordingly rejected.

15. For considering the second contention of the appellant it is necessary to refer to Sections 28 and 46 of the Act.

Section 28 of the Act provides:

"Save as otherwise expressly provided in this Chapter, every order made by the CustodianGeneral, Custodian, Additional Custodian, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian shall be final and shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceedings."

Section 46 of the Act is reproduced as under:

"Save as otherwise expressly provided in this Act, no civil or revenue court shall have jurisdiction

(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or

(c) to question the legality of any action taken by the CustodianGeneral or the Custodian under this Act; or

(d) in respect of any matter which the CustodianGeneral or the Custodian is empowered by or under this Act to determine."

16. A bare reading of the aforesaid two provisions make it clear that a finality has been attached to the orders passed by the custodian authorities under the Act which is not to be questioned in any court except under the provisions of the Act itself. Section 46 of the Act specifically bars the jurisdiction of civil and revenue courts in respect of the aforesaid property. The property was declared as an evacuee property in the year 1958. The said declaration has become final under Section 28 of the Act. The defendants' right, if any, in regard to the aforesaid property ceased to be in existence after the declaration of the aforesaid property as an evacuee property. The defendants are estopped from claiming their right in any revenue or civil court, it was open to the defendants to challenge the aforesaid declaration by means of filing a writ petition under Article 226 of the Constitution of India. In view of the law laid down in Assistant Custodian General Evacuee Property's case (supra), since the defendantappellants failed to challenge the aforesaid declaration, as such, the defendants cannot be permitted to claim their right over the property in dispute on the basis of their long possession. In case the defendants claimed their possession prior to the declaration of the property as an evacuee property and claim any right over the property in dispute on the basis of their long possession. Such claim is barred by the provisions of Sections 28 and 46 of the Act. Even otherwise showcause notice issued by the Custodian Authority in the year 1968 cannot be a basis for upholding the defendants' right on the basis of long possession over the property in dispute or upholding the defendants' contention that the suit of the plaintiff was barred by limitation, as admittedly the suit was filed in the year 1969.

17. Besides that I have perused the findings of the trial court considering the objection of the defendants that the suit is barred by limitation. The trial court only held that since the plaintiff has failed to prove that the plot in dispute has vested in the Custodian and since the defendants have proved that a "Dharamshala" is situated over the plot in dispute for the last 25 years, therefore, the suit is barred by limitation.

18. The appellate court has considered the matter with precision and on the basis of the record has held that the plot in dispute is the same property which has been purchased by the plaintiff by means of sale certificate executed in favour of the plaintiff by a competent authority under the Act. The finding on the question of limitation by the trial court was based on wrong assumption of evidence and has been rightly reversed by the appellate court.

19. The above view is fortified by the decision of the Hon'ble Supreme Court in Assistant Custodian General Evacuee Property's case (supra).

20. The third contention of the appellants' counsel that since the Custodian Authorities themselves issued notice to the defendants for removing encroachment over the property in dispute, only they were competent to evict the defendants under Sections 8, 9 and 10 of the Act and not the plaintiff, is also misconceived. The competent authorities having sold the plot in dispute in favour of the plaintiff, the plaintiff became the owner of the property in dispute and the title so acquired by the plaintiff by means of sale certificate made him full owner of the land and after the execution of the aforesaid sale certificate only the plaintiff was entitled to seek possession of the plot in dispute. The authorities under the Act were left with no title to evict the appellants.

21. Section 8 of the Act provides vesting of the evacuee property in the custodian after declaration of the aforesaid property as evacuee property under Section 7 of the Act. Section 8(4) of the Act provides that after evacuee property has vested under the custodian, any person who is in possession thereof, shall be deemed to be holding it on behalf of the custodian and shall on demand surrender possession of it to the custodian or any person duly authorised by him in this behalf. Section 9 of the Act provides that in case the person in possession refuses or fails on demand to surrender possession, the custodian or any person authorised by him may use such force as may be necessary for taking possession of such property and may for this purpose remove or take upon any lock, bolt or door for taking such possession. These two sections authorise the custodian or a person authorised by the custodian to take forcible possession of the evacuee property after the property has been declared to be evacuee property. The plaintiff in the present case in any case was a person authorised by the custodian and was entitled to take forcible possession of the property from the defendants, instead thereof, the plaintiff chose to file a regular suit which the defendants contested. The defendant-appellants cannot be permitted to bring in their aid the aforesaid two provisions of the Act for contending that the plaintiff had no right to evict the defendants except in accordance with the provisions of Sections 8

and 9 of the Act. The plaintiff chose a proper legal course to evict the defendants instead of using the force. The defendants cannot urge that they could have been only evicted by force under Section 9 of the Act.

22. The contention of the defendants that plaintiff was not competent to file a suit after execution of the sale certificate in his favour is also misconceived and is rejected.

23. The appeal, therefore, fails and is dismissed with costs.