

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.01.2018

+ **W.P.(C) 10654/2015 & CM No. 27270/2015**

NAIMA KHATOON & ORS

..... Petitioners

Versus

GOVERNMENT OF INDIA & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Rajat Aneja and Ms. Chandrika Gupta.
For the Respondents : Mr. Abhay Prakash Sahay, CGSC with
Mr. Santosh Kumar Pandey.
Mr. Manish Mohan, CGSC with Ms.
Manisha Saroha, Advocate.
Mr N. Pandey, Advocate for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition, *inter alia*, impugning Notices dated 16.09.2015 and 17.09.2015 (hereafter 'the impugned Notices') issued by the Custodian of Enemy Property of India, Respondent no. 2 (hereafter 'the Custodian'), to various tenants in occupation of the immovable property bearing no. 3837 to 3839, 3840/1, 3840/2 and 3841, Ward No. IX, Sarak Prem Narain Churiwalan, Delhi-110000 (hereafter 'the property') claiming rent from the said tenants.

2. The petitioners claim to be co-owners of the property. Admittedly, the said property belonged to Hazi Rehman Elahi and Haji Rehmat Elahi,

who were brothers and had purchased the property in equal shares by a registered sale deed dated 05.02.1943. The petitioner states that Shri Hazi Rehman Elahi gifted his share of the property to his daughter Mst. Asifa Khatoon. The petitioner states that there were some disputes and Mst. Asifa Khatoon filed a suit (Suit No. 143 of 1975) captioned ***Mst. Asifa Khatoon v. Shri Rehman Elahi***, which was decreed on 18.08.1975 and Mst. Asifa Khatoon was declared to be the owner of one half of the undivided shares of the property.

3. Thereafter, Mst. Asifa Khatoon filed another suit before this Court being Suit No. 736 of 1977 captioned ***Asifa Khatoon v. Shri Rehmat Elahi*** for partition of the property. During the course of the said suit, a settlement was arrived at between the parties and an application under Order 23 Rule 3 of CPC was filed. In terms of the said compromise, Mst. Asifa Khatoon acquired the share of Hazi Rehmat Elahi in the Property in exchange of another property bearing Municipal No. 1511 and 1512 situated at Pataudi House, Darya Ganj, New Delhi-110002.

4. The petitioners state that Mst. Asifa Khatoon out of her free will and consent and out of love and affection gifted the property to the petitioners herein by an oral *Hiba* on 15.04.1994. This was also subject matter of another suit before the Additional District Judge being suit No. 962 of 1995 captioned ***Mst. Naima Khatoon and Ors. v. Mst. Asifa Khatoon***, which was decreed on 23.09.1997.

5. In view of the above, the petitioners claim to be absolute owners of the property.

6. On 12.08.2009, a Public Notification was issued by the Custodian under Section 11 of the Enemy Property Act, 1968 (hereafter 'the Act'). Paragraph 2 and 3 of the said notification read as under:-

“2. WHEREAS it is alleged and I have reason to believe that Shri Rehman Elahi and his natural legal heirs & successors namely Mst. Memoona Bi (wife), Shri Sheikh Saleem Ahmed (son), Shri Sheikh Mehboob Elahi (son), Shri Sheikh Atur Rehman (son), Mst. Raisa Khatoon (daughter), Mst. Nafisa Khatoon (daughter), Mst. Shamim Parveen (daughter) and Shri Megbool Elahi and Mst. Swaleha Khatoon son and daughter of Shri Rehmat Elahi were Pakistan nationals during the aforesaid period held following properties in India:

- 1) Property no. 1511 and 1512 Pataudi House Darya Ganj, Delhi.
- 2) Property no. 1078 to 1085 and 1088, Kashmiri Gate, Delhi.
- 3) Property no. 2182, Ahata Kaley Saheb, Qasim Jan Street, Delhi
- 4) Property no. 1897 to 1899, Chandni Chowk, Delhi.
- 5) Property no. 14 and 14/1, Ratu Sarkar Lane, Calcutta.
- 6) Property no. 9 Radha Bazar Street, Calcutta.
- 7) Property no. 142/1, Radha Bazar Street, Calcutta.
- 8) Property no. 10950 to 10953, Multani Dhanda, Motia Khan, Sadar Bazar, Delhi.
- 9) Property no. 6386 to 6388, Masjid Tehwar Khan, Khari Baoli, Delhi.
- 10) Property no. 2161 and 2162, Ahata Kaley Sahib, Qasim Jan Street, Ballimaran, Delhi.
- 11) Property no. 2174, Ahata Kala Sahib Qasim, Jan, Ballimaran, Delhi.

3. Notice is hereby given under Section 11 of the Enemy Property Act, 1968 to seek following information in respect of the above said enemy nationals and their properties in India.

- i) Details and Nationality of the owners of above properties during 10.09.1965 to 26.09.1977.
- ii) Death Certificates of the owners during the above period as mentioned in i) above.
- iii) Natural legal heirs and successors (Family Tree) of the enemy nationals.
- iv) Present claimants and basis of their claim.”

7. Thereafter, an order dated 07.12.2009 was issued by the Custodian under Section 5 of the Act holding that Sh. Rehman Elahi was a Pakistani National and further vesting his properties (as listed in the above notice dated 18.08.2009) with the Custodian.

8. The aforesaid order was subject matter of challenge before this Court in *W.P.(C) 137/2010* captioned *Tasleem Mirza v. Union of India and Ors.* The said petition was disposed of by an order dated 01.02.2010, whereby it was directed that the order dated 07.12.2009 be treated as withdrawn.

9. Thereafter, the Custodian passed an order on 05.07.2010 under Section 5, 5A and 24 of the Act, *inter alia*, holding that Shri Rehman Elahi was not a Pakistani National and hence, could not be characterised as an enemy for the purposes of the Act. However, the Custodian also held that some of the heirs of Shri Rehman Elahi were Pakistani Nationals at the time of the demise of Shri Rehman Elahi and their undivided share of the property of Shri Rehman Elahi (which was computed at 48.959%) vested with the Custodian.

10. The said order is subject matter of challenge in W.P.(C) No. 2517 of 2011 captioned *Mst. Kausar Iram v. Govt. of India and Ors.* and W.P.(C) 2518/2011 captioned *Ms Rashida Khatoon and Ors. v. Govt. of India and Ors.*

11. The said order was also subsequently recalled by the Custodian by an order dated 21.04.2016 holding that Shri Hazi Rehman Elahi was a Pakistani National and consequently, the properties owned by him vested with Custodian. The said orders are also subject matters of challenge before this Court in *Mst. Kausar Iram v. Union of India*: W.P.(C)11143 of 2016; *Mohd. Iqbal v. Union of India and Ors.*: W.P.(C) 11159 of 2016 and *Mst. Naina Khatoon and Ors. v. Union of India*: W.P.(C) 7553 of 2016.

12. The present petition was moved on 18.11.2015 and at the material time, the order passed by the Custodian on 05.07.2010 holding that Shri Hazi Rehman Elahi was not an enemy national, had not been recalled.

13. Mr Aneja, learned counsel appearing for petitioner pointed out that the property was not included in the list of properties as mentioned in the notice dated 12.08.2009 and no proceedings in this regard had been initiated by the Custodian. Mr Aneja also drew the attention of this Court to the provisions of the Enemy Property Rules, 2015 (hereafter 'the Rules'), which were notified on 19.03.2015 and came into force with effect from the said date. He referred to Rule 3 of the Rules, which specified the procedure required to be followed for identification of the immovable property. He submitted that none of the procedures as prescribed had been followed. He further submitted that no show cause notice under Rule 3(7)

of the Rules had been issued and, therefore, any decision to consider the property to be an enemy property, was not sustainable.

14. Mr Mohan, learned counsel appearing for the Custodian submitted that certain complaints were received by the Custodian pursuant to which an investigation was carried out and the report was placed before the Custodian on 23.04.2015. The same was approved by the Custodian on 26.08.2015 and thereafter, a certificate under Section 12 of the Act was issued on 09.09.2015. He also handed over a copy of the said certificate.

15. I have heard the learned counsel for the parties.

16. Indisputably, the property was not a subject matter of notice issued on 12.08.2009. The questions whether Hazi Rehman Elahi and whether certain heirs of Hazi Rehman Elahi are enemy nationals were subject matter of proceedings with regard to other properties and notices of such proceedings had been issued to the petitioners; however, there is no dispute that no show cause notice in respect of the property had been issued to the petitioners.

17. Before proceeding further, it would be relevant to refer to Rule 3 of the Enemy Property Rules, 2015 which reads as under:-

“3. Procedure for identification of immovable property -

(1) The Custodian may seek assistance of the District authority for examination of the tehsil-wise or block-wise revenue records for the purposes of identifying any immovable property belonging to or held in the name of an enemy.

(2) The concerned District authority shall on identifying any immovable property belonging to or held in the name of an enemy, forward to the Custodian the complete details of such

enemy property including the nationality of the owner thereof.

(3) If the District authority receives any information or complaint from any person or from any source in respect of an enemy property, he shall forward such information or complaint to the Custodian along with details referred to in sub-rule (2).

(4) The Custodian may direct the District authority in which the enemy property is located, to carry out physical inspection or verification of the enemy property for obtaining the information as specified by the Custodian.

(5) On receipt of the direction from the Custodian under sub-rule (4), the District authority shall check the relevant revenue or municipal or police records to verify the location or area and other details of the enemy property and conduct survey for obtaining the information as specified by the Custodian.

(6) On obtaining the required information referred to in sub-rule (5), and on being satisfied that the property or interest therein is prima facie enemy property, the Custodian or his authorised representative shall cause a notice to be served in Form 1, on the person claiming title to such property or interest and on any other person or persons whom he considers to be interested in the property.

(7) The notice referred to in sub-rule (6) shall, as far as practicable, mention the grounds on which the property is sought to be declared as an enemy property and shall specify the provisions of the Act under which such property is alleged to be an enemy property.

(8) (a) The notice shall be served personally to the person concerned or his manager, or to other members of his family; or be sent through registered post; or affix it on some conspicuous part of the premises concerned or at the last known place of the business of the person concerned. (b) The Dasti service of notice through police may be resorted to only in the case of persistent non-compliance of the notice.

(9) The Custodian or his authorised representative shall observe the principles of natural justice by giving sufficient opportunity to the noticees to present their case before them and hear them or their representative.

(10) Where a notice has been duly served, the party shall be called upon to show cause as to why the subject property should not be declared as an enemy property:

Provided that if the party fails to appear on the dates fixed for hearing even after giving reasonable opportunity, the Custodian or his authorised representative may proceed further to hear the matter ex -parte and pass a reasonable order on the material before them as the Custodian or his authorised representative deem fit. (11) Where the party appears and contests the notice, the Custodian or his authorised representative shall state the reasons to be recorded in writing, as to why the subject property should not be deemed to be an enemy property. (12) Any other person or persons claiming to be interested in the proceedings relating to enemy property, may file an application before the Custodian who shall then, either on the same day or on any subsequent day to which the hearing may be adjourned, proceed further to hear the applicant himself or cause the same to be heard by his authorised representative. (13) The authorised representative of the Custodian shall prepare a detailed report of all cases identified as enemy property in respect of which hearing is complete, and shall submit the same to the Custodian along with his recommendations thereon. (14) All properties under examination and in the process of identification or verification shall be considered as Process Case and details of such cases shall be recorded in Annexure-I till its declaration.”

18. Rule 3 of the Rules indicates that the procedure required to be followed by the Custodian for identifying any immovable property belonging to or held in the name of an enemy. First of all, the Custodian is required to take the assistance of the District Authority - which in terms of Section 2(1)(d) of the Act means that the District Magistrate or District

Collector or Deputy Commissioner or any officer in-charge of the District - in identifying the immovable property, which could be considered as the enemy property. In terms of Rule 3(4) of the Rules, the Custodian is also empowered to direct the District Authority having jurisdiction over the area in which the enemy property is located, to carry out physical inspection and verification of the enemy property for obtaining the information as specified by the Custodian.

19. If on the basis of information received from the District Authority, the Custodian is, *prima facie*, satisfied that the property or interest therein is enemy property, the Custodian is required to issue a show cause notice in Form-I to the person claiming title to such property or to any other person or persons whom he considered to be interested in the 'enemy property'. In terms of Rule 3(7) of the Rules, the said notice is required to mention the grounds on which the property is sought to be declared as enemy property and is also required to specify the provisions of the Act under which the property is alleged to be the enemy property.

20. In terms of Rule 3(9) of the said Rules, the Custodian or his authorised representative is obliged to observe the principles of natural justice by giving sufficient opportunity to the noticees to present their case or to hear them or their representative. Rule 3(10) of the said Rules requires that the party to whom notice has been served in terms of Rule 3(6) of the Rules be called upon to show cause why the subject property should not be declared as an enemy property.

21. In terms of Rule 3(13) of the Rules, the authorised representative of the Custodian is required to prepare a detailed report of all cases identified

as enemy property and to submit the same to the Custodian alongwith his recommendations.

22. Rule 4 of the said Rules provides for the procedure for declaration and vesting of the enemy property. In terms of Rule 4(1) of the Rules, the Custodian is required to examine the report of his authorised representative submitted under Rule 3(13) of the said Rules. If the Custodian considers it necessary, he can also call for further investigation to be conducted. If on examination of the report and further investigation, the Custodian is satisfied that the property in question is enemy property, he is required to issue a Certificate in Form II declaring the subject property to be enemy property alongwith authorisation order in Form III authorising the District Authority to take over the property on his behalf. Rule 4 of the said Rules is set out below:-

“4. Procedure for declaration and vesting of the enemy property -

(1) On receipt of the report of the authorised representative referred to in sub-rule (13) of rule 3, the Custodian shall examine and cause further investigation, if considered necessary.

(2) If, on examination of the report or on further investigation under sub-rule (1), the Custodian is satisfied that the property is an enemy property, he shall issue a certificate in Form 2, declaring the property as enemy property and vesting of such property in the Custodian, along with an authorisation order in Form 3, authorising the District authority to take over the said property immediately on his behalf.

(3) On receipt of the authorisation order from the Custodian under sub-rule (2), the District authority shall proceed further to take control over the management of the enemy property and shall initiate action for recovery of arrears or dues recoverable from the occupier of the vested property and a

notice in Form 4 shall be affixed over the property declaring the said property as vested with the Custodian.

(4) The District authority shall prepare a list of the vested property pertaining to his district in the format given in Annexure II and a copy of the same shall be sent to the Custodian.”

23. Admittedly, the aforesaid procedure has not been followed. Further, it is also not disputed that the order approving the decision to vest the property was taken by the Custodian on 26.08.2015, that is, after the Rules had come into force.

24. In view of the above, the decision to declare the property as an enemy property and the consequent Certificate dated 09.09.2015 issued under Section 12 of the Act cannot be sustained. Consequently, the impugned notice to the tenants of the property, which are premised on the basis that the property is an enemy property, cannot be sustained.

25. In view of the above, the petition is allowed. The certificate dated 09.09.2015 and the impugned notices are set aside. However, it is clarified that this would not preclude the Custodian from instituting the proceedings afresh in accordance with the Rules.

26. The petition and pending application are, accordingly, disposed of.

VIBHU BAKHRU, J

JANUARY 03, 2018
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