

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI
AND
HON'BLE SRI JUSTICE RAKESH THAPLIYAL

21ST JULY, 2023

WRIT PETITION (M/B) No. 180 OF 2023

Between:

Mahmood Ali and others. ...Petitioners

and

The Government of India and others. ...Respondents

Counsel for the petitioners. : Mr. B.P. Nautiyal, learned Senior Counsel assisted by Mr. Jitendra Chaudhary, Mr. Mohd. Matlub, Mr. Syed Kashif Jafri and Mr. Shashi Kiran, learned counsels.

Counsel for the Union of India/ respondent nos. 1 and 3. : Mr. Rajesh Sharma, learned Standing Counsel for the Union of India.

Counsel for the State of Uttarakhand/ respondent nos. 2, 4 and 5. : Mr. S.N. Babulkar, learned Advocate General assisted by Mr. C.S. Rawat, learned Chief Standing Counsel for the State of Uttarakhand.

Counsel for respondent no. 6. : Mr. Ajay Singh Bisht, learned counsel.

JUDGMENT : (per Sri Vipin Sanghi, C.J.)

Nine individual petitioners have preferred the present Writ Petition to seek the quashing of the Eviction Notices dated 04.05.2023 issued by respondent no. 5 – Sub Divisional Magistrate (SDM)/ Assistant Custodian of Enemy Property for India, Nainital, District Nainital. They also assail the order dated 24.06.2023 passed by

respondent no. 5, disposing of the aforesaid notices after considering the replies of the petitioners, and directing the eviction of the petitioners from the property known as Metropole Hotel, Mallital, Nainital. The petitioners also seek directions to the respondents, not to evict the petitioners in pursuance of the Eviction Notice dated 04.05.2023, and the order dated 24.06.2023, aforesaid. The petitioners also seek a direction to the Government of India, and the State of Uttarakhand to provide alternative places for their residence, or their rehabilitation, in nearby places of Nainital city.

2. The case of the petitioners is that all of them, since the time of their forefathers, have been residing in the outhouses of the property known as “Metropole Hotel”, Mallital, Nainital. The petitioners, *inter alia*, state that Metropole Hotel at Nainital vested in the custodian of the Enemy property, eventually, with amendment of the Enemy Property Act in 2017.

3. The petitioners state that on 04.05.2023, respondent no. 5 – the SDM, Nainital issued individual eviction notices to the petitioners, stating therein that the petitioners are in unauthorized occupation of enemy property, and directed them to appear before him within

one week, and produce documents in their favour to show that their possession of the said property is legal, or else to remove their encroachment, failing which they shall be removed as per law, and at their own expense. The petitioners filed their replies to the notices issued to them by the SDM. However, on 24.06.2023, the impugned order was passed by the SDM, rejecting the petitioners' defenses, and directing their eviction. Since the petitioners now apprehend their dispossession, they have approached this Court by filing this Writ Petition.

4. At the outset, we may note that learned Senior Counsel for the petitioners – Mr. B.P. Nautiyal submitted that the property in question, i.e. the Metropole Hotel, is an enemy property, under the Enemy Property Act, 1968. The petitioners also admit the fact that they have absolutely no title to any portion of the said property, and the petitioners also do not dispute the fact - as is also recorded in the impugned order dated 24.06.2023, that the possession of the property in question was taken over – upon vesting of the same in the Custodian of enemy property, on 05.08.2010, by the Pargana Magistrate, Nainital.

5. In this regard, we may notice that Mr. Babulkar, the learned Advocate General - who has appeared on advance notice on behalf of the State of Uttarakhand, has tendered the communication dated 05.08.2010 issued by the District Magistrate, Nainital, along with the on-the-spot proceedings, recording the taking over of the possession of the property in question by the Pargana Magistrate, Nainital on 05.08.2010 for, and on behalf of, the Custodian of enemy property.

6. The submission of Mr. Nautiyal, learned Senior Counsel for the petitioners is that, under the Enemy Property Act, 1968, the Enemy Property Rules, 2015 have been framed, which were amended in the year 2018. He submits that Rule 5 of the said Rules states that, where any vested immovable property, in respect of which no income is received by the Custodian, is under occupation of a person, or persons, or a company, the Custodian may serve a notice directing them to enter into an agreement with the Custodian, and such occupant shall pay all arrears, as may be determined by the District Authority, with effect from the date of occupation of the property, or the date of vesting, whichever is earlier. The proviso to Rule 5 states that, where the occupant is

unwilling to enter into an agreement, the Custodian may initiate the process for the eviction of the occupant, and take control of the property in accordance with the manner provided under the Enemy Property Act, and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and the Rules made thereunder. For the sake of convenience, we reproduce Rule 5 of the Enemy Property Rules, 2015, which reads as under :-

“5. Procedure for preservation, management and control of immovable enemy property.—(1)

Where any vested immovable enemy property in respect of which no income is received by the Custodian, is under occupation of a person or persons or a company, the Custodian may serve a notice directing them to enter into an agreement with the Custodian in Form 5 and such occupant or occupants or the company, shall pay all arrears as may be determined by the District authority with effect from the date of occupation of the property or the date of vesting, whichever is earlier:

Provided that where the occupant of the vested immovable enemy property is unwilling to enter into an agreement, the Custodian may initiate process for the eviction of the occupant and take control over the property in accordance and in the manner provided under the Act and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the rules made thereunder:

Provided further that where the share of the enemy in such property exceeds one-half of the whole immovable enemy property, the control over the whole property may be taken over by the Custodian.

(1-A) The lease, leave and licence agreement, or tenancy or occupancy of the enemy property shall not be transferable by the tenant, lessee or licensee, as the case may be.

(1-B) The provisions of entering into a leave and licence agreement under sub-rule (1) or payment of rent, standard rent, lease rent, licence fee or usage charges, as the case may be, by any occupant shall not

confer a perpetual right to continue as a tenant, lessee or licensee, as the case may be.

(2) Where the vested immovable enemy property is jointly owned by an enemy and an Indian National or is an undivided share in joint property, the income and expenses in respect of such property shall be apportioned for its preservation, management and control.

(3) All vested enemy property which is unoccupied at the time of taking over of control by the Custodian or has become vacant due to eviction under these rules shall be leased out through open auction to the highest bidder.

(4) The Custodian shall prepare a list of all enemy properties out of which any income is received or receivable, in Annexure III which shall be reviewed and updated from time to time.

Explanation.—For the purposes of this rule, “date of vesting” means the date of vesting of any property declared as enemy property in the Custodian which shall be with effect from 10th September, 1965, as notified under the notification of the Government of India in the Ministry of Commerce number 12/2/65-E.Pty. dated the 10th September, 1965.”

7. Mr. Nautiyal submits that the Custodian was, therefore, obliged to proceed under Rule 5 of the Enemy Property Rules, 2015, and to serve notice on the occupants, requiring them to enter into an agreement with the Custodian, and to pay the arrears, as may be determined by the District Authority and, only in the eventuality of the occupants not agreeing to enter into an agreement, eviction could be ordered to be undertaken under the Act, and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and the Rules made thereunder. He submits that in the present case, the

Custodian has not offered to enter into an agreement with the occupants, including the petitioners, and straightway eviction is sought to be undertaken, without even complying with the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and the Rules made thereunder.

8. We have considered the submissions of Mr. Nautiyal. As admitted by the petitioners themselves, and stated by Mr. Nautiyal, the property in question is, admittedly, an enemy property which has vested in the Custodian, and the Custodian has also proceeded to take possession thereof on 05.08.2010 by drawing up the proceedings on the spot. In the face of this admitted factual position, the first and foremost issue that arises for consideration, in our view, is whether we are obliged to entertain the present Writ Petition, in exercise of our discretionary jurisdiction under Article 226 of the Constitution of India, to grant the reliefs, as sought by the petitioners.

9. The jurisdiction vested in this Court, under Article 226 of the Constitution of India, is a discretionary jurisdiction, which the Court would exercise with a view to protect the legitimate rights of the petitioners, against

any infraction of those rights by the State, or its instrumentalities. In the present case, the petitioners have no right in the property in question. Admittedly, they are rank trespassers. The jurisdiction that this Court exercises, under Article 226 of the Constitution of India, is an equity jurisdiction. It is to be exercised for the benefit and protection of those petitioners, who come to the Court with clean hands, and seek reliefs, which advance the Rule of law. It is well settled that, in exercise of the writ jurisdiction, the High Court would not pass orders, which protect and promote an illegality. The High Court would not pass orders, which have the effect of perpetuating an illegality. The continued possession of the petitioners, over the property in question, is completely illegal, since the same vests in the Custodian of enemy property, and the petitioners have no right, title or interest thereon. The Court, in exercise of its jurisdiction, under Article 226 of the Constitution of India, would not lend its hand to grant protection to an illegality. We may notice a few judgments of the Supreme Court on this aspect. ***In Sangram Singh v. Election Tribunal, (1955) 2 SCR 1***, the Supreme Court observed as follows :-

“14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.”

(emphasis supplied)

10. In ***M.I. Builders (P) Ltd. v. Radhey Shyam***

Sahu, (1999) 6 SCC 464, the Supreme Court observed

in paragraph no. 73 as follows :-

“73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. **Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality.** Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. **Judicial discretion cannot be guided by expediency.** Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. **Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles.** As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to

stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.”

(emphasis supplied)

11. The aforesaid decision was followed by the Supreme Court in ***Ranu Hazarika v. State of Assam, (2011) 4 SCC 798***. The Supreme Court observed in paragraph no. 21 as follows :-

“21. We are of the view that the impugned observation by the High Court would be clearly inimical to the rule of law. **While it is trite that courts can exercise judicial discretion in moulding the relief, however, such discretion cannot be exercised to perpetuate and encourage an illegality.** [See *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu* (1999) 6 SCC 464.”

(emphasis supplied)

12. The submission of Mr. Nautiyal, that under Rule 5 of the Enemy Property Rules, 2015, the Custodian is bound to offer an agreement in Form 5 to the occupants of enemy property, is completely meritless. The words used in the said Rule are “*the Custodian **may** serve a notice directing them to enter into an agreement with the Custodian in Form 5.....*” The word ‘may’ cannot be read as ‘shall’ in the context, in which it is used. The same Rule also uses the word ‘shall’ in relation to the obligation of the occupant to pay all arrears, as may be determined by the District Authority. The Legislature has consciously used the word ‘may’, in contradistinction with the word ‘shall’, in the same Rule, which leaves no manner of

doubt that the Custodian is not under a statutory obligation to offer the agreement in Form 5 to the occupants.

13. Section 8 of the Enemy Property Act, 1968 enumerates the powers of the Custodian in respect of the enemy property vested in him. Sub-section (1) of Section 8 states that, with respect to the property vested in the Custodian under this Act, the Custodian may take, or authorise the taking of such measures, as he considers necessary, or expedient for preserving such property till it is disposed of in accordance with the provisions of the Act. Sub-section (2) of Section 8 states that, without prejudice to the generality of the power vested under Section 8(1), the Custodian, or such person, as may be specifically authorized by him in this behalf, may for the said purpose, *inter alia*, “secure vacant possession of the enemy property by evicting the unauthorized or illegal occupant or trespasser and remove unauthorized or illegal constructions, if any.” [see Section 8(2)(iva)].

14. Pertinently, the aforesaid provision was inserted by Act 3 of 2017, w.e.f. 07.01.2016. Thus, the position which emerges is that the Parliament empowered the Custodian to secure the vacant possession of the

enemy property - by way of amendment of the Enemy Property Act, vide Act 3 of 2017, which power was not specifically conferred on the Custodian prior to the amendment.

15. The submission of Mr. Nautiyal, that the Custodian is obliged to offer an Agreement to the unauthorized occupants is in the teeth of the amended Section 8. There is no fetter or limitation placed by Section 8 on the power of the Custodian to take possession of the enemy property from the occupants, and Section 8 does not state that the power to take possession is conditional on the occupant not entering into the agreement in Form 5 under the Enemy Property Rules, 2015. A subordinate legislation, i.e. the aforesaid Rules, cannot curtail the scope of the authority vested in the Custodian under the parent Act.

16. The further submission of Mr. Nautiyal is that the proceedings for eviction could have been undertaken only under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and the Rules made thereunder.

17. Even this submission does not appeal to us, for the reason that the said Rule, *inter alia*, states “*and take control over the property in accordance and in the*

manner provided under the Act and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the Rules made thereunder". Therefore, the proceedings could be undertaken under the Act and not, necessarily, under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

18. In any event, admittedly, the petitioners have been show-caused by the respondents on 04.05.2023. The petitioners were put to notice that, on the basis of the earlier report filed by the Joint Team of the officers of the Municipality, and the Revenue Department, it was found that the noticees have encroached on the Metropole Hotel – enemy property, and; that the noticees should ensure to remove the illegal encroachment from the said enemy property, or present their case within a week, along with the relevant records, in the Office of the SDM, Nainital.

19. Thus, the petitioners were all given a fair opportunity to present their case before the SDM, and they even availed of that opportunity. However, admittedly, they did not produce even a shred of paper to justify their continued occupation of the said enemy property. Their only plea was that they had been in

occupation of the said property for a very long time, and they have been residing thereat with their families. Their plea was that they shall be rendered homeless, if they are evicted.

20. The aforesaid pleas raised by the petitioners do not stand legal scrutiny. Thus, it is clear that the petitioners have been granted a hearing by the respondents, before issuance of the eviction order in question. There has been substantial compliance of the principles of natural justice, which is also the procedure under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. We are, therefore, of the view that no prejudice has been caused to the petitioners, in any event of the matter.

21. A perusal of the impugned order dated 24.06.2023 shows that the property in question is required for the purpose of developing a Parking Lot, which is a crying need for the town of Nainital. The impugned orders record that the removal of the encroachment from the property in question is in the public interest, and to ease the traffic congestion in Nainital City. Since claims of a few individuals - such as the petitioners, are pitted against the larger public

interest, in exercise of our discretionary jurisdiction, we are inclined to protect, preserve and advance the larger public interest, and that is another reason why we are not inclined to exercise our discretionary jurisdiction in favour of the petitioners.

22. A similar situation arose before us in Writ Petition (M/B) No. 73 of 2023, “**Arif Ali and another v. State of Uttarakhand and others**”, decided on 16.05.2023. The petitioners in that case as well had approached the Court to seek protection against their eviction from public property, over which they had no title. The counsel for the petitioner had placed reliance on the judgment of the Supreme Court in **Krishna Ram Mahale (Dead), By His LRs. vs. Mrs. Shobha Venkat Rao (1989) 4 SCC 131**. We dismissed the said Writ Petition, while observing as follows :-

“6. We find it, very often, that those who breach the law blatantly, remind the authorities and this Court of what the law is, to seek to protect their flagrant violation of law.

*7. At this stage, it is necessary to give reference to the judgment rendered by the Hon’ble Supreme Court in the case of **Joginder and another Vs. State of Haryana and others (2021) 3 SCC 300** wherein the Hon’ble Supreme Court has given a reference to the judgment rendered by it in the case of **Jagpal Singh and others Vs. State of Punjab and others (2011) 11 SCC 396**. Paragraph 14 of the judgment rendered in the case of Joginder (supra), which is relevant for the purpose, reads as under:*

“14. At this stage, the decision of this Court in Jagpal Singh [Jagpal Singh v. State of Punjab, (2011) 11 SCC 396 : (2011) 3 SCC (Civ) 694] is required to be referred to. In the said decision, this Court had come down heavily upon such trespassers who have illegally encroached upon on the Gram Sabha/Gram Panchayat land by using muscle powers/money powers and in collusion with the officials and even with the Gram Panchayat. In the said decision, this Court has observed that “such kind of blatant illegalities must not be condoned”. It is further observed that “even if there is a construction the same is required to be removed and the possession of the land must be handed back to the Gram Panchayat”. It is further observed that “regularising such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of the villagers of the village”. Thereafter, this Court has issued the following directions : (SCC pp. 401-402, para 23)

“23. Before parting with this case, we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorised occupants of Gram Sabha/Gram Panchayat/poramboke/ shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases e.g. where lease has been granted under some government notification to landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school,

dispensary or other public utility on the land.”

8. The judgment of the Supreme Court relied upon by the petitioners is of the year 1989, and it emanates from a situation, where a landlord had sought to evict the tenant without following the provisions of law. It was in that context that the Supreme Court had made its observations in Paragraphs 8 & 9, which read as follows:-

“8. Mr. Tarkunde, learned Counsel for defendant No. 3, the appellant herein, rightly did not go into the appreciation of the evidence either by the Trial Court or the High Court or the factual conclusions drawn by them. It was, however, strongly urged by him that the period of licence had expired long back and the plaintiff was not entitled to the renewal of licence. It was submitted by him that in view of the licence having come to an end, the plaintiff had no right to remain in charge of the business or the premises where it was conducted and all that the plaintiff could ask for was damages for unlawful dispossession even on the footing of facts as found by the High Court. We find ourselves totally unable to accept the submission of Mr. Tarkunde. It is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. If any authority were needed for that proposition, we could refer to the decision of a Division Bench of this Court in *Lallu Yeshwant Singh v. Rao Jagdish Singh and Ors* AIR 1968 SC 620. This Court in that judgment cited with approval the well-known passage from the leading privy Council case of *Midnapur Zamindary Company Limited v. Naresh Narayan Roy* AIR 1924 PC 144 where it has been observed (p-208):

“In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a court.”

9. The proposition was also accepted by a Division Bench of this Court in *Rant Rattan and Ors. v. State of Uttar Pradesh* (1977) 1 SCC 188. The Division Bench comprising of three learned Judges held that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing but this right is not available to the true owner if the

trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law. In the present case, we may point out that there was no question of the plaintiff entering upon the premises as a trespasser at all, as she had entered into the possession of the restaurant business and the premises where it was conducted as a licensee and in due course of law. Thus, defendant No. 3 was not entitled to dispossess the plaintiff unlawfully and behind her back as has been done by him in the present case. It was pointed out by Mr. Tarkunde that some of the observations referred to above were in connection with a suit filed under Section 6 of the Specific Relief Act, 1963 or analogous provisions in the earlier Specific Relief Act, 1877. To our mind, this makes no difference in this case as the suit has been filed only a few weeks of the plaintiff being unlawfully deprived of possession of the said business and the premises and much before the period of six months expired. In view of the aforesaid conclusions arrived at by us, we do not propose to consider the question whether the agreement between the plaintiff and defendant No. 3 amounted to a licence or a sub-lease."

9. *These observations certainly cannot come to aid of a person who is a rank trespasser of a public property. Neither the petitioners are having any title at present, nor they ever had one over the land in question.*

10. *In the light of the aforesaid, we are of the view that the reliance placed on the provisions of the Uttarakhand Zamindari Abolition and Land Reforms Act, 1950 and the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 is of no avail to the petitioners. The respondents are acting in terms of the orders passed by this Court; after getting a local inspection conducted through C.O. and; after having also issued a notice to the petitioners, who have responded to the same by falsely claiming that the land in question falling in Khasra No. 179 in Village Ratna Madaiyya, Kelakhera, Tehsil Bazpur, District Udham Singh Nagar had been allotted to them under the Nasbandi Yoajana (Family Planning Programme). The insistence by the petitioners on the respondents adopting the procedures of the aforesaid Acts is only to take advantage of the delays that they would entail. They are only seeking to prolong and perpetuate their illegality. It is not that they have any legally*

sustainable defence as none has been shown to us, even prima facie.”

23. A similar claim was made by the petitioners in Writ Petition (M/B) No. 74 of 2023, “**Anchal Kumar Paswan & others v. Union of India & others**”, decided on 17.05.2023. In that case as well, the petitioners were rank trespassers on public property. They approached the Court seeking protection against their eviction. This Court dismissed the said petition, while observing as follows :-

*“4) The petitioners are seeking a discretionary relief from this Court. It is well settled that any person, who approaches this Court seeking a discretionary relief, should come with clean hands. The petitioners, pertinently, have no title to the land which they have occupied, and are illegally occupying the government property. This Court will not lend its hands, and come to protection of such persons, who are encroaching and illegally occupying the government property. We cannot pass orders to protect or advance an illegality. The petitioners are rank trespassers over government land. Pertinently, they have not even claimed any rights in the land by adverse possession. That could have been their best case. Even in respect of such a claim, the Supreme Court has observed in **HemajiWaghaji Jat Vs Bhikhabhai Khengarbhai Harijan, (2009) 16 SCC 517**, as follows:*

“32....The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

33. We fail to comprehend why the law should place a premium on dishonesty by legitimising possession of a rank trespasser and compelling the owner to lose his possession only because of his inaction in taking back the possession within limitation...””

24. For the aforesaid reasons, we are not inclined to entertain the present Writ Petition, in exercise of our discretionary jurisdiction. We, accordingly, dismiss the present Writ Petition, leaving the parties to bear their respective costs.

25. Consequently, pending application(s), if any, also stand disposed of accordingly.

VIPIN SANGHI, C.J.

RAKESH THAPLIYAL, J.

Dt: 21st July, 2023
Rahul