

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 1214 of 2022

**Shamim Ahmed Alias Rafique Ahmed
Vs.
The custodian of Enemy Property of India and others**

For the petitioner : Mr. Dhruba Ghosh,
Mr. Sarathi Dasgupta,
Mr. Rohit Banerjee,
Mr. Asoke Basu

For the
respondent nos.2 to 4 : Mr. Dhiraj Trivedi,
Mr. S. Singhania

Hearing concluded on : 28.06.2022

Judgment on : 05.07.2022

The Court:

1. The writ petitioner alleges to be a co-owner of the premises no.21, Ganesh Chandra Avenue, Kolkata – 700 013.
2. The petitioner alleges that he resides with his family on a portion of the fifth floor of the premises. The rest of the premises, according to him, is occupied by his tenants.
3. Due to accidental fire and consequential damages, repair work was going on at the said premises. The petitioner had been residing elsewhere with his family due to the renovation and repair work going on at the premises no.21, Ganesh Chandra Avenue, Kolkata – 700 013.

4. On November 27, 2021, the petitioner discovered a noticed issued by one Avishek Agarwal, Assistant Custodian of Enemy Property/Estate Officer, which declared that the property is an enemy property as per the provisions of the Enemy Property Act. It further stated that, in compliance of Order dated November 24, 2021 issued by CEPI under Section 8 of the Act, the vacant possession of property bearing no.21, Ganesh Chandra Avenue, Kolkata – 700 001 was thereby taken over and the property had been sealed by the CEPI and that any trespasser shall be prosecuted in accordance with law.
5. The petitioner replied to the said notice, informing that he is an Indian citizen and the premises cannot be declared as an enemy property.
6. On December 03, 2021, a purported show-cause notice issued by the said Avishek Agarwal was hung at the entrance of the premises indicating that a personal hearing had to be attended on December 07, 2021 at 11 a.m. at the Office of the Custodian.
7. On February 2, 2022, the petitioner came to know that certain persons had entered the premises and had sealed the petitioner's flat situated on the fifth floor at the said property by sealing the padlock on the front-door and pasting a notice on the door. The notice purported to be issued by the same Avishek Agarwal, Assistant Custodian of Enemy Property/Estate Officer claiming that the property was an enemy property under the provisions of the Enemy Property Act (as amended).
8. On February 2, 2022, the petitioner received a notice dated February 1, 2022 addressed by name to the petitioner asking the petitioner to show cause. The notice was apparently issued under Section

4(1)(b)(ii) and Section 4(2) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as 'the 1971 Act').

- 9.** It was alleged that the petitioner was in unauthorized occupation of the disputed premises, which was allegedly a public premises.
- 10.** A General Diary entry was lodged by the petitioner on February 2, 2022 with the Officer-in-Charge, Boubazar Police Station to bring the said incident of February 1, 2022 to the notice of the police. The petitioner allegedly went to the Office of the Custodian of Enemy Property at Kolkata to make enquiries about such sudden action and found that Avishek Agarwal does not sit in the Kolkata Office but operates from Delhi.
- 11.** However, the said Avishek Agarwal denied having given any notice to the petitioner. Thereafter the representative of the petitioner, on February 7 2022 went to the Office of the Custodian and requested them to take steps and asked the police personnel to unlock the premises where vital belongings of the petitioner and his family were lying.
- 12.** On February 10, 2022, the petitioner visited the Officer-in-Charge of the Boubazar Police Station (respondent no.5) and requested the said respondent to start an investigation. However, after repeated visits to the Office of the Custodian and the Police Station, no fruitful result came about, for which the present writ petition has been filed. The primary challenge in the writ petition is against the notices dated November 7, 2021 and February 1, 2022.

- 13.** Prayers have also been made in the writ petition for a direction on the respondent no.5 to proceed in accordance with law, register a first information report on the basis of complaints of the petitioner dated February 2, and February 4, 2022 as well as to initiate investigation on the basis of such complaints.
- 14.** An omnibus prayer has been made in the writ petition in the form of relief (e) to the effect that any other appropriate writs or orders or directions considered necessary to grant the necessary protection and relief be granted.
- 15.** The learned Senior Advocate for the petitioner argues that the Enemy Property Act, 1968 (for short, 'the 1968 Act'), and the synonymous Rules of 2015 ('the 2015 Rules', for short) require specific procedures to be followed before declaring an immovable property as an enemy property and before taking of possession of the same by the Custodian.
- 16.** The claim of the respondents with regard to physical possession, it is contended, it is not sustainable in law and on facts. The statutory mandate, it is argued, for obtaining vacant possession by the Custodian has been specifically laid down in Section 8(2)(iva).
- 17.** The procedure contemplated in the 1971 Act, it is submitted, has to be followed, as stipulated in Rule 5(1) of the 2015 Rules.
- 18.** It is clarified by the petitioner that the writ petition is restricting his challenge to the purported seals put on the fifth floor of the petitioner's premises in the month of February, 2022 and ancillary action of the respondents.

19. It is further contended that there is no order of eviction or recovery of possession against the petitioner by any competent forum and the proceedings under the 1971 Act are still pending, without any hearing having taken place as yet. The respondents, it is argued, were never in physical possession of the flat. The petitioner seeks to reserve his right to make appropriate application against the proceedings initiated under the 1968 Act, under Section 18 of the said Act.
20. Learned counsel appearing for the respondents submits that the notice dated February 1, 2022 was not issued by the respondents. However, the respondents reiterate that the notices dated November 22, 2021 and December 3, 2021 (respectively annexed at pages 24 and 35 of the writ petition) were issued by the respondents.
21. It is also admitted that the notice dated December 3, 2021 was issued to specific individuals, as mentioned in the notice itself.
22. Learned counsel for the respondents further contends that the building-in-question belongs to Pakistani nationals and vested in the Custodian of Enemy Property for India (CEPI) *vide* vesting orders dated August 16, 1977 and October 20, 2016 purportedly. It is submitted that the petitioner is fully aware that the said premises are enemy property and have challenged the vesting order and letter dated April 9, 2022 issued by the respondents in terms of Section 11 of the 1968 Act, in WPO No.1749 of 2022.
23. It is submitted that, in a similar matter in *WPO No.563 of 2022 [G.S. Chandhok (Developers) Private Limited Vs. Union of India and others]*, the notices dated November 27, 2021 was challenged and a co-

ordinate bench of this court directed the petitioner to avail alternative remedy under Section 18 of the 1968 Act.

24. It is submitted that the report of the Special officer submitted in this court upon inventory indicates that there were movable items in the fifth floor flat which were never proved by the petitioner to be his.
25. Upon considering the submissions of learned counsel for the parties, the scheme of the 1968 Act acquires importance for proper adjudication of the present *lis*.
26. Section 8 of the said Act confers powers on the Custodian in respect of enemy property vested in him. One such power is enumerated in sub-section (2)(iva) thereof, which stipulates that the Custodian can obtain vacant possession of the enemy property by evicting the unauthorized or illegal occupant or trespasser and remove unauthorized or illegal constructions, if any.
27. Again, Clause (iv) of sub-section (2) of Section 8 provides that the Custodian may institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities or preserving the enemy properties vested in him.
28. Again, the 2015 Rules, framed under the 1968 Act, clearly stipulates in Rule 2(1)(h) that “unauthorized occupants” have the meaning assigned to it in Section 2(g) of the 1971 Act.
29. Clause (f) of sub-section (2)(i) of the 2015 Rules defines “public premises” to have the meaning assigned to it in Section 2(4)(e) of the 1971 Act.

- 30.** Section 2(1)(e) prescribes that the “Estate Officer” shall have the meaning assigned to it in the 1971 Act as well.
- 31.** Rule 3 of the 2015 Rules lays down the procedure for identification of immovable property by the Custodian. Under the said Rule, the Custodian may seek assistance of the District Authority who shall, on identifying any immovable property, belonging to or held by the enemy or enemy subject or enemy firm, forward to the Custodian the complete details of such enemy property and the name and address and other particulars of the person who is in possession of such property or the name of the occupier or manager or agent of the owner.
- 32.** Rule 4 of the 2015 Rules provides the procedure for declaring and vesting of enemy property. The rule lays down sufficient procedure, contemplating prior notice and hearing to the person concerned.
- 33.** Moving on to Rule 14 of the 2015 Rules, it is provided that if any occupant of the enemy property repeatedly defaults in paying rent or refuse to pay rent, the District Authority, in consultation with the Custodian, may take steps to terminate the lease or evict the occupant forthwith in accordance with the 1971 Act, upon giving a prior notice to the occupant. Rule 14 B squarely provides that the mention of particular matters in the 2015 Rules shall not be held to prejudice or affect the general application of the 1971 Act with regard to the effect of the disposal of immovable enemy property by way of sale or otherwise or eviction of the immovable property, being the public premises and Custodian being the Estate Officer under that Act.

- 34.** From the aforesaid provisions, as laid down in the 1968 Act and the Rules of 2015, it is abundantly clear that although the Custodian of immovable property can, upon issuance of a notice, take control and manage the affairs of the enemy property, Section 8(2)(iva) specifically stipulates that the vacant possession of the enemy property can be secured by evicting the unauthorized or illegal occupant or trespasser and removal of unauthorized or illegal constructions, if any. Clause 4 of Section 8(2) further empowers the custodian to institute any suit or other legal proceeding.
- 35.** The definitions given in Rule 2(1)(e), (f) and (h) of the 2015 Rules clearly enumerate that the expressions “Estate Officer”, “public premises” and “unauthorized occupants” shall have the same meaning as assigned under the 1971 Act.
- 36.** It is explicitly clear from the provisions of the Act and Rules of 1968 and 2015 respectively that although the Custodian can take steps for affixation of a notice at a property deemed be enemy property for the purpose of vesting the same in the Custodian, the Custodian is required to follow a specific procedure, including issuance of notice and giving an opportunity of hearing to the occupants and all interested persons as well as owners and clearly provides that such possession, though notional, may be taken by the Custodian, and physical, vacant possession can only be taken by instituting a suit or legal action in due process of law. The procedure to be followed has also been amply provided to be governed by the 1971 Act, by instituting a due proceeding under the 1971 Act against unauthorized occupant, if any.

- 37.** However, both the 1971 Act and the 2015 Rules contemplate that if a person is in occupation of the premises, due time has to be given to the person and a right of hearing is to be afforded to the occupant as well before passing an order of eviction and taking consequential steps.
- 38.** In the present case, in fact, admittedly the respondent-Authorities have issued a notice under Section 4 of the 1971 Act. A purported notice under Section 4 of the 1971 Act dated February 01, 2022 issued to the petitioner by name and describing the petitioner to be an unauthorized occupant of the premises-in-question has also been produced.
- 39.** In fact, it is explicit from the Special Officer's report filed in Court that the key of the flat at the 5th floor of 21, Ganesh Chandra Avenue, came from the custody of the petitioner and his family/representative and was duly returned to the petitioner.
- 40.** In view of the aforesaid circumstances and the materials-on-record, the petitioner has shown *prima facie* that the petitioner was in occupation of the 5th floor flat of the premises-in-question, prior to being dispossessed illegally, during pendency of a purported proceeding initiated by the respondents for eviction under the 1971 Act. It is an admitted position that a notice under said Act was issued by the respondents, at least on December 3, 2021.
- 41.** Custody of the keys to the 5th floor flat of the building was with the petitioner when the Special Officer visited the property.
- 42.** It is nobody's case that any order of eviction was passed against the petitioner within the contemplation of Section 5 of the 1971 Act

and/or that any hearing was given to the petitioner, who was not only in occupation of the premises, at least of the 5th floor flat thereof, but claims to be a co-owner of the said building.

43. The effect of the notice dated November 27, 2011, which is at best a notice within the contemplation of Section 8 of the 1968 Act, can confer certain powers on the Custodian to take notional control of the entire building. However, Section 8(iv) and (iva) clearly envisage the institution of a suit or legal proceeding for the purpose of securing the possession of the enemy property by evicting the allegedly unauthorized or illegal occupant or trespasser from the said property. In the absence of any eviction order being passed in any such proceeding, as in the present case, there is no scope of holding that the physical possession of the 5th floor flat lies with the Custodian or lay so at any point of time.
44. Although the notice dated November 27, 2021 can be challenged by the petitioner under Section 18 of the 1968 Act before the appropriate authority, that is, the Central Government, the physical vacant possession of the 5th floor flat lay with the petitioner at all relevant points of time.
45. In fact, the affixation of the padlock physically on the 5th floor flat entrance has been disowned by the Custodian and the respondents.
46. Hence, there was admittedly no occasion for the Custodian to have taken physical possession of the premises by evicting the petitioner in due process of law.
47. The cited judgment of the Supreme Court, being *Roshina T. v. Abdul Azeez K.T. & Ors.*, reported at AIR 2019 SC 659, lays down that the

special and extraordinary jurisdiction under Article 226 of the Constitution is to be exercised only if there is allegation of violation of statutory duty by statutory authority and that claim of parties/private individuals regarding ownership and possession of flat can be decided only by Civil Court in civil suit or by Criminal Court in Section 145 of the Criminal Procedure Code.

- 48.** In the present case, the right, title, interest and/or legal possession are not required to be decided finally. However, in order to decide the questions involved herein, the issue of physical possession of the petitioner has to be tested incidentally. As observed above, the possession of the petitioner is *ex facie* evident in the present case from the admitted documents on record. Moreover, the respondents have acted *de hors* their statutory jurisdiction and contravened the law, as laid down in the 1968 Act and the 2015 Rules, in seeking to oust the petitioner from physical possession in respect of the fifth floor flat of the disputed building without resorting to due process of law. Hence, it is the incumbent duty of the court to interfere under Article 226 of the Constitution to do justice between the parties, particularly since the parties are unequal in strength, one being an individual and the other the 'mighty' State.
- 49.** Hence, WPO 1214 of 2022 is disposed of by setting aside the purported Notice dated February 1, 2022 which was affixed at the entrance of the 5th floor flat No. 21, Ganesh Chandra Avenue, Kolkata – 700 013 as fictitious and unlawful, having admittedly not been issued by the respondents.

- 50.** Insofar as the Notice under Section 8 of the Enemy Property Act, 1968 dated November 27, 2021 is concerned, the petitioner shall be at liberty to challenge the same by way of a representation as contemplated under Section 18 of the 1968 Act. Such challenge will be subject to limitation; however, the period lost during pendency of the writ petition shall be considered sympathetically in calculating the period of limitation, inasmuch as the petitioner proceeded *bona fide* with the writ petition with a challenge to the said notice as well.
- 51.** It is further declared that the petitioner has all along been in possession of the 5th floor flat No.21, Ganesh Chandra Avenue, Kolkata – 700 013 and the respondents have never got physical possession thereof. As such, the respondents shall be restrained by an order of injunction, till eviction of the petitioner is obtained in due process of law, from disturbing the petitioner's physical possession and enjoyment of the 5th floor flat of the said building in any manner whatsoever. Of course, such injunction shall operate subject to the result of any eviction proceeding which may be initiated against the petitioner by the respondents in due process of law.
- 52.** There will be no order as to costs.
- 53.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)