

(1957) 12 PAT CK 0001
In the Patna High Court
Case No : A.F.O.O. No. 83 of 1953

Bhirgunandan Prasad and Others	Vs	APPELLANT
The Assistant Custodian and Others		RESPONDENT

Date of Decision : 04-12-1957

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 17
Constitution of India, 1950 — Article 31, 31(5)

Citation : AIR 1958 Patna 266 : (1958) 6 BLJR 52

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : S.N. Dutta, Prem Lal and Parmeshwar Prasad Sinha, for the Appellant; Govt. Pleader and A.C. Mitra, Shivanugarh Narain, Kamleshwari Prasad Sinha, Shadho Saran Sahai, Ramnarain Tiwari and Shreenath Singh, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, C.J.—This appeal is brought on behalf of the decree-holders against the order of the Additional Subordinate Judge of Patna, dated 11-2-1953, setting aside the sale of a house u/s 17 of the Administration of Evacuee Property Act, 1950, as subsequently amended by Act XXII of 1951. Civil Revn. No. 318 of 1953 is filed on behalf of the same decree-holders against the same order of the Additional Subordinate Judge, dated 11-2-1953. The Civil Revn. application has been filed by way of precaution and has been heard along with, the Miscellaneous Appeal.

2. The house in question was mortgaged on 19-7-1928, by Ayodhya Prasad and others in favour of Damodar Prasad. On 23-10-1937, the mortgagors sold the equity of redemption to Musammatt Chand Tara for about Rs. 12,000/- on 21-12-1939, the mortgagees brought a suit upon the mortgage against the original mortgagor and a preliminary decree was obtained on 31-2-1942. A final mortgage decree was passed on 24-5-1945, and the decree-holders applied for

execution of the decree on 11-3-1948. It appears that on 29-10-1949, Musammat Chand Tara was declared an evacuee and her properties were declared evacuee properties under the Bihar Administration of Property Ordinance.

On 26-11-1952, the mortgaged house was sold in execution proceedings and was purchased by Sri-mati Lakshmi Devi, respondent No. 25. On 20-12-1952, the Assistant Custodian applied to the Subordinate Judge for setting aside the execution Sale u/s 17 of the Administration of Evacuee Property Act. The application was allowed by the Subordinate Judge on 11-2-1953 and the sale of the house was set aside.

3. It is necessary at this "stage to reproduce section 17 of the Administration of Evacuee Property Act, 1950, as amended by Act 22 of 1951, as much of the argument in this case turned upon the language of the section. Section 17 is in the following terms:

"17. Exemption of evacuee property from processes of court, etc. (1) Save as otherwise expressly provided in this Act, no evacuee property which has vested or is deemed to have vested in the Custodian under the provision of this Act shall, so long as it remains so vested, be liable to be proceeded against in any manner whatsoever in execution of any decree or order of any court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on such commencement and shall be deemed to be void.

(2) Where, after the 1st day of March, 1947, only evacuee property which has vested in the Custodian or is deemed to have vested in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any court or other authority, the said shall be set aside if an application in that behalf has been made by the custodian to such court or authority on or before 17-10-1950".

4. On behalf of the appellants the argument put forward by learned counsel is that the right of the mortgagees to the disputed house was tantamount to right of property within the meaning of Article 31 of the Constitution and cannot be taken away without payment of compensation to the mortgagees. It was submitted that if Section 17 of the statute was intended to affect the right of the mortgagees, that would be violation of the guarantee under Article 31 of the Constitution, and the provisions of Section 17 would be invalid. Proceeding to elaborate this argument learned counsel said that if two constructions of the statute are possible, the court must favour such a construction as to make the operation of the statute *infra vires* and not to make it *ultra vires*.

It was contended, therefore, on behalf of the appellants that the language of section 17 of the statute must be cut down so as not to apply to the petitioners' case. The principle is that no intention can be attributed to the Parliament that it

will exceed its own jurisdiction. On the contrary, the Court must presume that the Parliament in enacting. The statute was dealing within its jurisdiction and that no violation of the constitutional guarantees was intended. The argument put forward on behalf of the appellants was based upon the well known authorities like *Macleod v. Attorney General for New South Wales* 1891 AC 455 (A) and a decision of the Federal Court in AIR 1941 72 (Federal Court) , .

5. The argument is attractive, but it has hardly any relevance in this case. The argument is built upon the underlying assumption that if Section 17 of the Evacuee Property Act applies to the case of the mortgagees and the right of the mortgagees to proceed against the property is taken away, the Parliament would be contravening the guarantee under Article 31 of the Constitution. I do not accept this assumption as valid. The reason is that section 17 merely exempts the evacuee property from the processes of court and prevents it from being proceeded against in execution of a decree so long as the property remains vested in the Custodian. There is no deprivation of the mortgagee's right, There is no deprivation of property within the meaning of Article 31 of the Constitution, nor is there any question of taking possession of the property or acquisition or requisition of property within the meaning of Article 31(2) of the Constitution. The entire scheme of the Administration of Evacuee Property Act is that there should be provisions made for custody, preservation and management of evacuee property and there is no question of confiscation. The title of the evacuee to the property is not affected by the provisions of the statute.

The Custodian acts as a statutory agent with large powers, but there is a duty imposed upon him to keep accounts of receipts and disbursements with regard to the property. The Act also contemplates that the evacuee property should be restored ultimately to the evacuee or to his heirs on satisfactory proof of title. It is true that Section 17 exempts. The evacuee property from the processes of court so long as it remains vested in the Custodian, but the rights of the mortgagee are not extinguished and the mortgage decree obtained by the appellant is not destroyed or affected in any way. On the other hand, the rights of the creditors of the evacuee are expressly preserved under the various provisions of the statute. The provision contained in section 17 does not affect the duties and powers of the Custodian u/s 10 of the Act or under Rule 22 of the rules framed u/s 56 of the Act,

6. Section 10(1) enacts as follows:

"10. Powers and duties of the Custodian generally:

(1) Subject to the provisions of any rules that may be made in this behalf, the Custodian may take such measures as he considers necessary or expethent for the purposes of securing, administering, preserving and managing any property and generally for the purpose of enabling him satisfactorily to discharge any of the duties imposed on him by or under this Act and may for any such purpose as aforesaid, do all acts and incur all expenses necessary or incidental thereto."

Section 10(2)(m) is in the following terms;

"10. (2) Without prejudice to the generality of the provisions contained in Sub-section (1), the custodian may, for any of the purposes aforesaid.

XX X

(m) incur any expenditure, including the payment of taxes, duties, cesses and rates to Government or to any local authority or of any amounts due to an employee of the evacuee or of any debt due by the evacuee to any person".

Rule 22 makes provision for registration of claims of the creditors of the evacuee, Rule 22 is in the following terms:

"22. Claims by third parties: (1) Any person claiming the right to receive any payment from any evacuee or from the property of such evacuee, whether in repayment of any loan advanced or otherwise may present a petition to the Custodian for registration of his claim. Such application shall be signed and verified by the claimant in the same manner as a plaint is required to be signed and verified under the CPC 1908.

(2) (a) Where a claim made under Sub-rule (1) is supported by

(i) a decree of a competent court; or

(ii) a registered deed executed and registered before the 14th August, 1947; or

(iii) a registered deed executed and registered on or after 14-8-1947 and the transaction in respect of which the deed was so executed and registered has been confirmed by the Custodian; or

(iv) an acknowledgement in writing executed by the evacuee himself before the 1st March, 1947; or (b) where such claim is of the nature referred to in the "Explanation" to Sub-rule (1) and the Custodian holds that the transfer of the property in respect of which the claim is made was a bona fide transaction, the Custodian may register the claim or such part thereof as has not been satisfied :

Provided that in the case of a claim of the nature referred to in the Explanation to Sub-rule (1), the claim shall be registered only for that amount of money which is proved to have been paid as consideration for the transfer of the property.

(2A) In any case which does not fall under Sub-Rule (2) the Custodian shall direct the claimant to establish his claim in a civil court,

(3) The mere registration of a claim shall not entitle the claimant to payment and the Custodian may for reason to be recorded refuse payment.

(4) No debt incurred by the evacuee before the property vested in the custodian shall be paid without the sanction of the Central Government or Custodian General."

Section 16 provides for the restoration of the evacuee property to the evacuee and Section 16(3) is important in this connection. Section 16(3) states:

"16(3) Upon the restoration of the property to the evacuee or to the heirs, as the case may be, the custodian shall stand absolved of all responsibilities in respect of the property so restored, but such restoration shall not prejudice the rights, If any, in respect of the property which any other person may be entitled to enforce against the person to whom the property has been so restored." I consider, therefore, that Section 17 does not extinguish a mortgagee's right, nor does it wipe out the effect of a mortgage decree and there is no deprivation of property within the meaning of Article 31 of the Constitution. I hold, therefore, that the provisions of Section 17 of the statute do not infringe the guarantee under Article 31 of the Constitution. Counsel on behalf of the appellants was unable to make good his submission on this point and his argument must, therefore, be rejected.

7. In support of his argument Counsel on behalf of the appellants referred to the decision of the Supreme Court in the second *Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others*, . But the principle laid down in that case has no application to the present case. In the second Sholapur case the Supreme Court examined with some strictness the substance of the impugned legislation, namely, the Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance and Act 28 of 1950 in order to determine what it was that the Legislature had really done. After analysing the provisions of the Statute the Supreme Court found that the Government had not merely taken over the superintendence of the affairs of the Company, but had in effect and substance taken over the undertaking itself, and in the guise of superintendence the State was carrying on the business or trade for which the Company was incorporated, with the capital of the Company but through its own agents who take orders from it and are appointed by it.

The ordinance overrode the directors, deprived the shareholders of their legal rights and privileges and completely put an end to the contract of the managing agents. In substance, therefore, the Company and its shareholders as well as its directors and managing agents had been completely deprived of the possession of the property, and the effects of the Company and its possession had been taken over by the Central Government. In these circumstances it was held that in substance the impugned statute authorised deprivation of the property of the Company within the meaning of Article 31 without compensation and so the Statute had violated the fundamental right of the Company under Article 31(2) and as such was unconstitutional and void. In the present case the material facts are different and the provisions of Section 17 of the Administration of Evacuee Property Act are dissimilar in character. I am unable, therefore, to accept the argument of learned Counsel that the principle laid down in the second *Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others*, has any bearing on the question presented for determination in the present case.

8. I shall, however, assume in favour of the appellants that section 17 of the Administration of Evacuee Property Act amounts to acquisition or deprivation of property within the meaning of Article 31, of the Constitution. Even so, I am of the opinion that the provisions of section 17 are saved by Article 31(5) of the Constitution which states that nothing in clause (2) shall affect the provisions of any law which the state may hereafter make. In pursuance of any agreement entered into between the Govt. of Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property" Item 41 of List III of the Seventh Schedule relates to custody, management and disposal of property (including agricultural land) declared by law to be evacuee property" and Parliament has enacted the Administration of Evacuee Property Act, namely, Act XXXI of 1950, and all subsequent amendments, in exercise of its legislative power conferred under this head of the Seventh Schedule.

The object and the scheme of the Act leave little doubt that the Act is intended to provide for the administration of evacuee property; and as the Supreme Court has pointed out in Ebrahim Aboobaker and Another Vs. Tek Chand Dolwani and Others, , the property was ultimately to be used for compensating the refugees who had lost their property in Pakistan, and the Act contains elaborate provisions as to how the administration was to be carried out. In my opinion, the provisions of the Administration of Evacuee Property Act, including the impugned Section 17, come under the saving clause of Article 31(5)(b)(iii) of the Constitution and the constitutional objection raised on behalf of the appellants must be rejected for this reason also. This view is supported by a decision of a Division Bench of the Bombay High Court in Abdul Majid Haji Mahomed Vs. P.R. Nayak, , in which Chagla, C. J. has pointed out that the provisions of Article 31(5) of the Constitution apply to the Administration of Evacuee Property Act, and by reason of Clause (5) no obligation is attached to the State to pay compensation for taking possession of the evacuee property. There is a decision of a Division Bench of the Madras High Court to a similar effect in M.B. Namazi Vs. Deputy Custodian of Evacuee Property and Others, , where Raja-mannar, C.J. pointed out that Article 31(3) of the Constitution applied to this case and in one sense the subject matter of the enactment belonged more to the realm of international law rather than to municipal law. The same view has been taken by a Division Bench of the Punjab High Court in Sheikh Mohd. Din, Sheikh Mehtab Din Vs. Thakar Singh, Gurmukh Singh and Another, , in which it was held that section 17 of the Administration of Evacuee Property Act was not ultra vires of Article 31 of the Constitution. I respectfully agree with the view taken in all these three authorities.

9. For these reasons I hold that the provisions of section 17 of the Administration of Evacuee Property Act (Act XXXI of 1950), as amended by Act XXII of 1951, are not constitutionally invalid, and the argument of learned Counsel for the appellants must be rejected. In my opinion the order of the Additional Subordinate Judge of Patna, dated 11-2-1953, in Miscellaneous case No. 30 of

1952 is correct and this appeal must be dismissed with costs. The Civil Revision application is also dismissed.

Raj Kishore Prasad, J.

10. I agree.