

(2010) 11 AHC CK 0251
In the Allahabad High Court
Case No : Second Appeal No. 2341 of 1978

Burhamal Lamba

APPELLANT

Vs

Maresh Chand and Others

RESPONDENT

Date of Decision : 23-11-2010

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 2, 46, 6(2)

Citation : (2011) 1 ADJ 31

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sanjay Misra, J.—Heard Sri K.N. Saxena, learned Counsel for the Defendant-Appellant. Although the cause list has been revised none appears on behalf of the Respondents. This second appeal is of the year 1978 and has been listed for hearing under the heading of old cases. At the time this appeal was admitted the following substantial questions of law were framed by order dated 10.5.1979:

1. Because the learned lower appellate Court having held that the land leased to Fariduddin in dispute had vested in custodian, erred in holding that it reverted to Plaintiff's by implied surrender.
2. Because Plaintiffs having never set up the case that Custodian department surrendered their lease hold rights, the appellate Court erred in making out a new case never set up by Plaintiff.
2. According to Sri Saxena, the first appellate Court has illegally dismissed the appeal filed by the predecessor in interest of the Appellant herein on the ground that the custodian under the Administration of Evacuee Property Act, 1950 would be deemed to have surrendered his possession over the property in question since the Plaintiff-Respondent has been in possession of 1/3rd share for over seven years with the consent of the co-sharers.

3. Sri K.N. Saxena, learned Counsel for the Appellant submits that Kunwar Bihari Lal the original lessee had executed the sale-deed on 30.3.1943 with respect to 8 shops and gate in favour of Fariduddin. On 19.4.1943 Gopal Bihari Lal and his 5 sons executed a sale-deed of 1/3rd share in the plot including 8 shops in favour of Mahadeo Prasad and Kailash Nath. In the year 1943 Sant Narain, Raj Narain and Har Narain who are sons of Madho Narain executed a sale-deed of their 1/3rd share and 8 shops and gate in favour of Mahadeo Prasad and Kailash Nath. Against the aforesaid transfer Kunwar Bihari Lal filed a suit for pre-emption and ultimately the suit was decreed by the Civil Court, whereupon Kunwar Bihari Lal obtained possession in his favour. The appeals filed there against up to the stage of High Court were dismissed and the decree of the pre-emption suit was confirmed.

4. It appears that a suit No. 136 of 1956 was filed in respect of 1/3rd share by Mahadeo Prasad against Fariduddin and also the Custodian of evacuee property: That suit was decreed in 1959 where after the instant suit No. 59 of 1969 has been filed by Kunwar Bihari Lal against the predecessor in interest of the Defendant-Appellant herein. The Defendant-Appellant was leased some quarters and evacuee land by the Assistant Custodian who handed over possession of the same with respect to 1/3rd share of Fariduddin who had left the country permanently.

5. The question which was decided by the appellate Court was whether the Plaintiff i.e. Kunwar Bihari Lal through his heirs was owner in possession of the disputed land. The first appellate Court has given its finding for the reason that when possession of 1/3rd share of Fariduddin had been taken by the Plaintiffs and they remained in possession for more than 7 years with consent of the co-sharers then admittedly the Assistant Custodian was deemed to have surrendered his possession of that share in favour of the Plaintiffs which was with respect to the 1/3rd share flowing from Fariduddin.

6. Both the Courts have decreed the suit for the said reason i.e. surrender of possession of the share of Fariduddin by the Assistant Custodian.

7. While submitting on the substantial question of law No. 1 and 2 Sri K.N. Saxena has referred to the Administration of Evacuee Property Act, 1950 (hereinafter referred to as "Act of 1950") and points out to the definition of an evacuee in Section 2(d). The said provision is quoted hereunder :

2(d) "evacuee" means any person-

(i) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March 1947, left any place in a State for any place outside the territories now forming part of India, or

(ii) who is resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any

part of the territories to which this Act extends, or whose property in any part of the said territories has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorised person, or

(iii) who has, after the 14th day of August 1947, obtained, otherwise than by way of purchase or exchange, any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan: or

(iv) who has, after the 18th day of October 1949, transferred to Pakistan, without the previous approval of the Custodian, his assets or any part of his assets situated in any part of the territories to which this Act extends: or

(v) who has, after the 18th day of October 1949, acquired, if the acquisition has been made in person, by way of purchase or exchange, or, if the acquisition has been made by or through a member of his family, in any manner whatsoever, any right to, interest in, or benefit from, any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan:

8. From the aforesaid provision, it appears that when subsequent to the lease Fariduddin had left the country permanently his property came within the ambit of the Act of 1950. Although it is not disputed that Fariduddin had left the country permanently and the Custodian came in possession of the evacuee property yet the Courts below have decreed the suit only for the reason of possession of the Plaintiff-Respondent with consent of the co-sharers. No such consent of co-sharers to the possession of the Plaintiff could affect the rights of the Custodian over the evacuee property under the Act of 1950.

9. Section 46 of the Act of 1950 relates to jurisdiction of the Civil Court in certain matters. Sri Saxena has referred Section 46 of the Act of 1950 which is quoted hereunder:

46. 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

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

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

10. The above provision clearly indicates that no civil or revenue Court shall have jurisdiction to adjudicate upon any question referred to in Clauses (a) to (d) of the Section. When there is a special Act dealing with evacuee property then the statutory provisions contained therein are binding. The general law can be taken

recourse to in case the special Act does not contain any provision for a contingency. In the present case, admittedly the share of Fariduddin was within the definition of evacuee property and the Custodian General had by the notification u/s 6(2) of the Ordinance declared the same to be evacuee property and had taken possession. Such notification is available on record and it has statutory sanction.

11. Once the Custodian has taken possession by virtue of notification under the Ordinance of 1947 then any rights and interest in such property came within the ambit of the Act of 1950 with its enforcement. The Ordinance No. 1 of 1947 having been declared ultra vires would not in any manner affect the Custodians powers under the Act of 1950 for the reason that the property was declared as an evacuee property and was governed by the provisions of the Act. Therefore, a Civil Suit in the Revenue Court or the Civil Court was clearly barred u/s 46 of the Act of 1950. Consequently, the suit filed by Kunwar Bihari Lai for injunction with respect to the 1/3rd share of Fariduddin which was notified as evacuee property could not be maintainable against the Custodian or the leasee of the Custodian nor such an injunction could be granted against the Assistant Custodian who had lawfully possessed and competently leased out the property. The Assistant Custodian was made a Defendant in the Civil Suit, however, if he did not contest the suit it would not give jurisdiction to the Civil Court in view of Section 46 of the Act of 1950.

12. The substantial questions of law are answered in favour of the Defendant-Appellant and the suit for injunction filed by the Plaintiff-Respondents is liable to be dismissed. It is held that 1/3rd share of Fariduddin (declared as evacuee property) in the hands of the Custodian or his leasee his successor-in-interest would be governed by the provisions of the Act of 1950. Hence the transfer of the evacuee property made by the Assistant Custodian could not be held to be illegal for the reasons given by the Courts below. There was no surrender made by the Custodian.

13. For the aforesaid reasons, the impugned judgment cannot be upheld. It is accordingly set aside. This second appeal is allowed.

14. No order is passed as to costs.