

(1952) 10 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Civil Miscellaneous Petition No. 20 of 1952

Hira Singh Bam

APPELLANT

Vs

The State of Himachal Pradesh and Another

RESPONDENT

Date of Decision : 27-10-1952

Acts Referred:

Constitution of India, 1950 — Article 226, 31(1)

Citation : AIR 1953 HP 57

Hon'ble Judges : Chowdhry, J.C.

Bench : Single Bench

Advocate : K.C. Pandit, for the Appellant; L.N. Sethi, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Chowdhry, J.C.

(1) The petitioner purchased a house in Nahan, known as the "Rose View", from the ex-Government of Sirmur for Rs. 8,000/- on 28-1-2005 B., corresponding to 9-4-1948, and he has ever since been in possession of the same.

(2) One of the terms of the sale-deed was that in case of need the Ruler will have the right to repurchase the house for Rs. 8,000/-without any objection by the vendee. On 2-7-1952 the Deputy Commissioner, Sirmur at Nahan served the petitioner with a notice. Reference was made to the terms of the petitioner's sale-deed, and he was informed that the house was urgently required by the military authorities. The Deputy Commissioner then went on to say that he had been directed to ask the petitioner to vacate the house before 31-7-1952 and hand over possession of the same to Lt.-Colonel Onkar Chand, Commanding Officer Military Station, Nahan. It was also stated in the communication that after handing over possession the petitioner might make a demand for refund of sale price to the proper authorities.

(3) On 11-7-1952 the petitioner made a representation to the Lieutenant-

Governor through the Chief Minister, Himachal Pradesh, contesting his liability to eviction from the house, and prayed that the_ said communication from the Deputy Commissioner be cancelled and his possession of the house not interfered with. The petitioner has vouchsafed no reply to the representation, and as the time limit for vacating the house was drawing near, he preferred the present application under Article 226, Constitution of India on 28-7-1952, complaining that the said action of the Government amounted to an infringement of the fundamental right of the petitioner under Article 31 of the Constitution, and praying for the issue of such directions and orders to the respondents as might be just and expedient to prevent the respondents from interfering with the petitioner's possession and enjoyment of the property in question. By an interim order enforcement of the said order of the Deputy Commissioner was stayed.

(4) The application has been resisted by the respondents, the State of Himachal Pradesh and the Deputy Commissioner of Sirmur at Nahan. Arguments were advanced on both sides on the question of whether the State of Himachal Pradesh, as successor-in-interest of the ex-State of Nahan, was entitled to enforce against the petitioner the said term in the sale-deed relating to the vendor's right of repurchase. In the view that I take of the matter, however, it is not necessary to express any opinion on the point. Indeed, in view of a possible litigation between the parties any such expression of opinion will be improper. The only question that calls for determination in this case is whether any fundamental right of the petitioner guaranteed to him under the Constitution has been infringed by the manner in which he was required by the respondents to vacate the house in dispute, and, if so, whether the petitioner is entitled to any, if so what, relief.

(5) It was argued by the learned Government Advocate on behalf of the respondents that the mere fact that the petitioner claims the right to undisturbed proprietary possession of the house in dispute does not amount to any fundamental right. That is however a misinterpretation of the petitioner's claim. The petitioner seeks to enforce the fundamental right contained in Article 31(1) of the Constitution, which lays down that no person shall be deprived of his property save by authority of law. Subject to whether the State of Himachal Pradesh has, or has not, a right of repurchase under the said clause of the sale-deed, it is conceded that the petitioner is in proprietary possession of the house in dispute. That being so, the said Article of the Constitution guarantees to the petitioner the fundamental right of not being deprived of the property save by authority of law.

(6) The next question that arises, therefore, is whether the said fundamental right is being threatened, or, in other words, whether the petitioner is threatened with deprivation of the property save by authority of law. The learned Government Advocate argued that due merely to the issue of the said communication by the Deputy Commissioner to the petitioner it could not be said that the petitioner's right had been threatened. He contended that the said

communication by itself, without anything more, did not give the petitioner any right to come to this Court and the present petition under Article 226 of the Constitution was therefore premature. He was asked what he meant by the words "without anything more." The respondents' written reply is quite silent on the point, and the learned Government Advocate was not prepared to say that the said communication of the Deputy Commissioner was merely a prelude to the institution of a suit by the State against the petitioner. All that the learned Government Advocate stated was that the State sought to enforce the said term of the sale-deed. But he was not prepared to give out what action would the State have taken if the petitioner did not comply with the said communication of the Deputy Commissioner. The only other point specifically urged by the learned Government Advocate was that it was for the petitioner, and not for the State, to go to Court, and that, if the petitioner agreed to do so, the State would not dispossess him of the house in question during the period of notice u/s 80, Civil P. C., and for a reasonable time thereafter uptill the institution of a suit by him to ventilate his so-called right to remain in possession of the house despite the said term of the sale-deed.

(7) Although the point has not been cleared in so many words by the respondents in their reply, or by the Government Advocate in his arguments, the position is quite clear. The respondents do not want to go to Court to enforce the said right of repurchase, but they want the petitioner to do so in order to establish that the State of Himachal Pradesh is not entitled to enforce the said right. Furthermore, should the petitioner choose not to go to Court or to vacate the house in compliance with the said communication of the Deputy Commissioner, he would be dispossessed. The learned Government Advocate did not, as indeed he could not, point out to me any rule or law under which the State could dispossess the petitioner without first having the liability of the petitioner for dispossession adjudicated upon in a Court of law. It is manifest therefore that the respondents want to take the law into their own hands. This they are certainly not entitled to do, and in this respect it makes no difference that this violation of an elementary principle of jurisprudence emanates from the executive rather than from an individual citizen. In this connection I might do worse than quote the following observations of Lord Atkin in --"Eshugbayi v. Government of Nigeria" AIR 1931 PC 248, which, though used in another connection, are equally appropriate to the facts of the present case :

"As the executive he (the Governor of Nigeria) can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

In the present case the State of Himachal Pradesh seeks to deprive the petitioner of his property otherwise than by supporting the legality of such an action before

a Court of justice and in pursuance of no power given to it by law. In other words, the State is depriving the petitioner of his property save by authority of law, and therefore infringing the fundamental right guaranteed to the petitioner, by Article 31(1) of the Constitution.

(8) The next question that arises is whether, in view of the above finding, the petitioner is entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution. The alternative remedy by an ordinary suit in a Court of law could not have been equally efficacious since such a suit could not have been filed without a prior notice to the State u/s 80, Civil P. C., and the petitioner, who was given less than a month's notice to vacate, would have been dispossessed of the house before the expiry of the period of notice. Apart from that, this being a case where enforcement of a fundamental right under the Constitution was involved, an application to this Court under Article 226 of the Constitution was the only appropriate remedy open to the petitioner. Had the petitioner filed a suit in a subordinate Court, it would have involved a substantial question of law as to the interpretation of Article 31(1) of the Constitution the determination of which would have been necessary for the disposal of the case, and therefore it would have been incumbent on this Court, under Article 228 of the Constitution, to withdraw the case. Indeed, in cases of invasion of fundamental rights it has been held to be not merely a power but a duty of the High Court to grant relief by the issue of prerogative writs under Article 226. -- Sayeedah Khatoon and Others Vs. The State of Bihar and Others,

(9) The facts of the present case are analogous to those of -- "G. Kistareddy v. Commr. of City Police, Hyderabad", AIR 1952 Hyd. 36. That was a case where the petitioner had been in possession of the property in dispute, which he had purchased in a court sale, but the petitioner was dispossessed of the same under orders of the Commissioner of the City Police of Hyderabad after the issue of a notice to the petitioner to vacate the property by a certain date. The plea of the respondent that possession was taken over by the police with consent was repelled, and their Lordships agreed with the contention put forward on behalf of the petitioner that if the police had any claim to the property the matter should have been litigated in ordinary civil Courts as between party and party instead of recourse being had to forceful dispossession. They held therefore that the action of the police amounted to an infringement of the rights of property guaranteed to the petitioner under Art, 31(1) of the Constitution. It was further held as follows : "The duty to abide by the Constitution and to maintain the rule of law is cast upon all the three branches of the State i.e., the legislature, executive and the judiciary, see --"Gesulal v. State of Hyderabad" AIR 1951 Hyd 89 column 1 para 9 and if the first two in any way transgress the limits of the Constitution or violate any of the fundamental rights, it is the duty of the Courts to declare it so. Naturally, the High Court will be very reluctant to interfere with an order of the executive unless it is fully satisfied that the action of the executive cannot in any way be supported in view of the provisions of the Constitution. The High Court will exercise the utmost, restraint in interfering with the acts of the executive.

But where the High Court is satisfied that the fundamental rights guaranteed by the Constitution have been violated by any act or order of the executive it is the sacred, duty of the High Court to set it aside, vide -- "Mahbub Begum v. Hyderabad State" AIR 1951 Hyd 1 (FB). This High Court has power to do this under Article 226 by issuing a writ or any appropriate order so that a wrong done by the order of the Government may be remedied."

(10) The petition is allowed and the respondents are directed not to dispossess the petitioner of the house in dispute in execution of the said communication of the Deputy Commissioner of Sirmur at Nahan dated 2-7-1952, or, in execution of any mere executive order of the State. If the respondents have any claim to the property in dispute, they should first establish their right to the claim by the institution of a suit in the appropriate Court of law. The petitioner will have his costs of the present proceedings from the State of Himachal Pradesh, which I fix at Rs. 50/- (Rupees fifty).