(2012) 03 KL CK 0238

In the High Court Of Kerala

Case No : Writ Petition (C) No. 2409 of 2009

Joshi Thomas APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

- Constitution of India, 1950 — Article 14
- Defence of India Act, 1971 — Section 5
- Defence of India Rules, 1962 — Rule 133V, 133V
- Defence of India Rules, 1971 — Rule 151, 151
- Enemy Property Act, 1968 — Section 12, 8

Citation : AIR 2012 Ker 129 : (2012) 2 KarLJ 116 : (2012) 2 KLJ 116 : (2012) 2 KLT 96

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : M.K. Damodaran, Nikhila Soman and A.R. Sindhu, C.R. Sivakumar and M.K. Leela, for the Appellant; C.P. Peethambaran, Asst. Solicitor General of India, T.P.M. Ibrahim Khan and V. Vijulal, Government Pleader and Shyam Krishnan, C.G.C, for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique

1. The petitioner challenges Ext.P5 order passed by the Custodian of Enemy Property for India u/s 8 and 12 of the Enemy Property Act 1968 (hereinafter referred to as the Act). Ext.P5 is in different parts. The first part contains a certificate dated 21.7.2008 issued under S. 12 of the Act, which inter alia states that 1/3rd share of immovable property in R.S.No.18/2 of Kolathumala Desom, Paduvilayil Amsom, Tellichery Taluk, Cannanore District having a measurement of 1.22 acres belonging to or held by Sri.Kaliadath Pathakkalan Umer, is enemy property vested in the Custodian of Enemy Property for India, since the aforesaid person was a Pakistani national. The second part of Ext.P5 is an authorisation order under S.8 of the Act which again is dated 21.7.2008 authorising the

District Collector, Kannur District to take over the control and to manage the said property for the preservation and management of the said enemy property. Another part of Ext.P5 is a communication issued by the Custodian to the District Collector on 21.7.2008 stating that as per the report dated 19.06.2008 of the Principal Secretary, Thiruvananthapuram, it was ascertained that one of the owners of the above property having 1/3rd share was a Pakistani National during the date of vesting till his death about 6 years back and the said property is liable to be taken over as an enemy property by virtue of Government of India Notification dated 10.09.1965. It is further stated that in regard to another 1/3 share in the name of K.P.Kunjammed, enquiry should be expedited to find out whether he was a Pakistani National. The said letter directs the District Collector to take over the management of the 1/3 share of K.P.Umer and to expedite the enquiry in regard to the 1/3 share of K.P. Kunjammed.It is, inter alia, contended by the petitioner that a portion of the aforesaid property having an extent of 35 cents was purchased by the petitioner by way of registered assignment deed No. 1867AM. The said property was purchased from 17 persons who were co-owners of the property. Ext.Pl is the sale deed and Ext.P2 is the tax receipt. The petitioner has also constructed a multi-storied building in the property by investing huge amounts. Some rooms were already sold. At this stage it was noticed that the revenue authorities failed to accept property tax and on enquiry it was understood that tax was not received by the revenue authorities in view of the proceedings by way of Ext.P5. The petitioner submits that the late K.P. Kunjammed was not a Pakistani National as he was holding an Election Identity card Ext.P6 and his death certificate is produced as Ext.P7. On these facts, the petitioner contends that the authority has no right to invoke the proceedings under the Act as the vesting of property on the Government have to take place during the period when Defence of India Rules 1962 was in force. The Act being enacted only for management of the property so vested by the Custodian, the provisions of the Act cannot be invoked as the vesting had not taken place during the relevant time. It is also the contention of the petitioner that if there is a vesting of property necessarily, the owners of the property namely the Pakistani National ought to have been informed about such vesting and the same should be borne out by revenue records. Having not taken any action for intimating the vesting during the relevant time, and having not heard them before such vesting, when the property has already been transferred and subsequent interest had been created in the property, the action of the respondents in issuing Ext.P5 after several years is arbitrary, unreasonable and in gross violation of Art. 14 of the Constitution of India.

2. Hence the petitioner seeks to quash Ext.P5 and to direct the 3rd respondent to release the property of the petitioner from the proceedings under the Act and to direct respondents 5 and 7 to accept land tax and building tax.

3. Counter affidavit is filed by respondents 2 and 3.2nd respondent the Custodian of Enemy Property For India contends that property of Pakistani national has been vested during the period 10.09.1965 and 26.09.1977 and there after it

continued to remain vested under the Act. It is further contended that since the property has been automatically vested with the Government any subsequent transfer is bad in law and it is open for the Custodian to take possession of the property at any time. The contention that late K.P.Kunjammed was not a Pakistani national is denied. It is stated on the basis of Ext.R2(e) that K.P.Kunjammed was a relative of K.P.Umer.

4. The 3rd respondent District Collector in his counter affidavit contended that steps had been taken as per directions issued by the 2nd respondent. He also disputed the veracity and genuineness of the Election I.D. card. He referred to the report of the Superintendent of Police, Kannur which indicated that the aforesaid person was a Pakistani national and in that view of the matter, the direction issued by the Custodian was valid under law. The petitioner had also produced certain additional documents as per I.A.No. 11414/2010.

5. The learned Senior counsel appearing for the petitioner Sri.M.K.Damodaran inter alia contended that the Act has been promulgated only for the purpose of managing the estate of Pakistani nationals which had already vested in the Government by virtue of Defence of India Rules 1962 or 1971. It is contended that when the Defence of India Rules 1962 was in force, it was open for the authorities to verify the properties that are vested and then make necessary entries in the revenue records or prepare a list of the property so vested and in fact, it has been done which is clear from the statement of objects and reasons of the Act which reads as follows:

(i) Consequent on Chinese aggression in 1962, immovable properties, cash balances and firms belonging to the Chinese nationals in India valued approximately at Rs. 28.85 lakhs were vested in the Custodian of Enemy Property for India appointed under the Defence of India Rules, 1962. Similarly, consequent on the aggression by Pakistan in 1965 immovable and some specified movable Pakistani properties in India, the total value of which has been approximately estimated at Rs. 27 crores, were vested in the said Custodian of Enemy Property. These vestments were made under the powers derived from the Defence of India Rules, 1962. These properties were being administered by the Custodian of Enemy Property for India in accordance with the provisions of the Defence of India Rules, 1962 and Orders made thereunder. The Proclamation of Emergency was revoked with effect from the 10th January, 1968 and consequently the powers under the Defence of India Act, 1962 and the rules made thereunder were to remain in force only for a period of six months thereafter up to 10th July, 1968. It was therefore, thought necessary to have fresh legal authority with effect from that date (10th July, 1968) for the administration of the Chinese and Pakistani properties referred to above which are already vested in the Custodian of Enemy Property for India. The management of the said properties by the Custodian of Enemy Property for India has to continue, as it has not been possible for the Government of India so far to arrive at a settlement with the Governments of those countries."

6. It is further contended that when the properties which are vested is already listed and valued, it is not open for the Custodian under the Act to find out other properties of the Pakistani Nationals and then make an order stating that it has already been vested. In other words, when a property list is already prepared at the time when the Defence of India Rules were in force it was not open for the Custodian under the Act to further notify the lands as enemy property as defined under the Act.

7. The Counsel also referred to the judgment of the Supreme Court of India in Union of India v. Raja Mohd.Amir Mohd.Khan ((2005) 8 SCC 696) in order to narrate the scheme of the Act and/to contend for the above proposition.

8. On the other hand, on behalf of the Union of India, it was contended that there was an automatic vesting of the land at the time when Defence of India Rules came into force and irrespective of the fact that a list had been prepared in respect of those lands, the Custodian is entitled to prepare such a list at any point of time even after expiry of more than 30 years and therefore the contentions raised by the petitioner has no basis. It is also contended that there is evidence to show that the aforesaid K.P.Kunjammed was a Pakistani national and therefore since the vesting is automatic subsequent assignments are also bad and in that view of the matter, the petitioner is not entitled for any relief as prayed for. They also relied upon the judgment in Sewa Ram v. Union of India and Others (JT 1997(4) SC 692) to contend for the position that when the property is vested under the Enemy Property Act 1968, the purchasers will not have a better title. It is therefore their contention that the petitioners herein being subsequent purchasers of property from a Pakistani National who had fractional interest in the property cannot have a better title since the property had already vested with the Government under the aforesaid Act.

9. The point which arises for consideration is whether it is open for the Custodian under the Act to direct taking over management of the property of a Pakistani National, by resorting to the provisions of the Act, or whether all the properties of the Pakistani Nationals vest in the custodian/Government under the provisions of the Act or Defence 0f India Rules l962 or l971.

10. Preamble to the Act reads as follows:-

An Act to provide for the continued vesting of enemy property vested in the Custodian of Enemy Property for India under the Defence of India Rules 1962 and the Defence of India Rules 1971 and for matters connected therewith.

11. From the preamble itself it is clear that the above Act has been enacted for the purpose of "continued vesting of enemy property vested in the Custodian." Enemy property is defined under S.2(c) as any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm. The proviso further indicates that whether an individual enemy dies in the territories to which the Act extends any property which immediately before his death belong to or was held by him or was managed on his behalf may not

with standing his death continued to be recorded as enemy property for the purpose of the Act.

12. The above definition by itself indicates that for a property to become enemy property it should be belonging to or held or managed on behalf of an enemy. Enemy is defined under S.2(b) as a person or country who or which was an enemy under the Defence of India Act 1962 and the Defence of India Rules 1962 or to the Defence of India Act 1971 and the Defence of India Rules 1971 and excludes a citizen of India. At this point of time, it is relevant to note the objects and reasons as well which clearly indicates that after the Defence of India Rules 1962 the valuation of immovable property has been taken to be Rs. 28.85 lakhs which vested in the Custodian of Enemy Property for India. Similarly, consequent to the aggression by Pakistan in 1965 the Enemy Property value has been estimated as Rs. 27 Crores which vested in the Custodian of Enemy Property. The Act was enacted on 28.8.1968 to provide for the "continued vesting of enemy property vested in the Custodian of Enemy Property for India under the Defence Rules 1962............"

13. It was consequent to the aggression by Pakistan in 1971 and proclamation of emergency, Defence of India Act 1971 and Rules were framed and immovable and movable properties of Pakistani citizens in India were vested in the Custodian of Enemy Property under the said Rules.

14. Thereafter when the emergency was lifted, the Act was amended by the Enemy Property Amended Ordinance 1977 and subsequently to replace the said Ordinance, Enemy Property (Amendment) Act (40 of 1977) was enacted thereby amending the Act of 1968. It could therefore be seen that the whole concept of the Enemy Property Act is the continued vesting of enemy property which is already vested in the Custodian of Enemy Property for India under the Defence of India Rules 1962 and 1971.

Section 5 of the Act reads as follows:

5. Property vested in the Custodian of Enemy Property for India under the Defence of India Rules 1962 to continue to vest in Custodian.-- (1) Notwithstanding the expiration of the Defence of India Act, 1962 and the Defence of India Rules, 1962, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of this Act, shall, as from such commencement, vest in the Custodian.

(2) Notwithstanding the expiration of the Defence of India Act, 1971 and the Defence of India Rules, 1971, all enemy property vested before such expiration of the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Enemy Property (Amendment) Act, 1977 shall, as from such commencement, vest in the custodian."

The provisions of S.5 clearly indicates that the vesting of Enemy Property "vested before such expiration in the Custodian of Enemy Property for India". Same is the position as far as S.5(2) is also concerned.

15. At this juncture it is relevant to note the provisions under which Ext.P5 has been passed. In Ext.P5 the first part of the Order is under S.12 of the Act which vests a power on the Custodian to inform any person regarding vesting of any money or property in the Custodian by way of a certificate, the same shall be evidenced to the facts stated therein and that person is bound to comply such orders of the Custodian. The second part of the order refers to S.8 which relates to powers of the Custodian in respect of enemy property vested. Section 8 reads as follows:

8. Powers of Custodian in respect of enemy property vested in him.-- (1) 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 and where such property belongs to an individual enemy subject, may incur such expenditure out of the property as he considers necessary or expedient for the maintenance of that individual or of his family in India.

(2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as may be specifically authorised by him in this behalf, may, for the said purpose,-

(i) carry on the business of the enemy;

(ii) take action for recovering any money due to the enemy;

(iii) make any contract and execute any document in the name and on behalf of the enemy;

(iv) institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities;

(v) raise on the security of the property such loans as may be necessary;

(vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;

(vii) transfer by way of sale, mortgages or lease or otherwise dispose of any of the properties.

(viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose.

(ix) make payments to the enemy and his dependents;

(x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on the 25th October 1962 [or on the 3rd December, 1971]; and

(xi) make such other payments out of the funds of the enemy as may be directed by the Central Government.

This provision enables the Custodian to take necessary steps in regard to property "vested" in the Custodian under the Act.

16. The argument of learned Senior Counsel Sri.M.K.Damodaran on the basis of the judgment in Raja Mohd.Amir Mohd.Khan''s case (supra) is that once Defence of India Act and Rules have come into force and by virtue of the provisions therein enemy properties had vested in the Government, the Act enables the Custodian only to manage the said properties which are already vested in the Custodian and not the properties which have not been so vested. The argument is that on a perusal of the objects and reasons of the Act it will indicate that after the Defence of India Act, 1962 and Rules had been passed, the properties of enemies had been notified, valued and fixed. Same is the situation after the Defence of India Act 1971 and the Rules were published.

17. Therefore there is substance in the argument that unless the authorities under the Defence of India Act and Rules have identified the lands of enemy, enemy subject or enemy firm, there cannot be an automatic vesting, merely on account of the fact that the land was held by an enemy subject. The Custodian under the Act can only manage properties which are already vested. The Act does not contemplate a further vesting of property of "enemy or enemy subject or enemy firm". What is already vested can be managed by the Custodian under the provisions of the Act.

18. A reference to Part XIVB of the Defence of India Rules 1962 would further clarify the above. Rule 133V specifically refers to collection of debts of any enemy firm and custody of property. The relevant portion reads as follows:

133V. Collection of debts of enemy firm and custody of property.-- (1) With a view to preventing the payment of moneys to an enemy firm and preserving enemy property, the Central Government may appoint a Custodian of Enemy Property for India and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local area as may be prescribed and may by order-

(a)...

(b) vest, or provide for and regulate the vesting, in the prescribed Custodian such enemy property as may be prescribed;

19. There is a similar provision in the Defence of India Rules 1971 as well and the relevant Rule 151(l)(b) which forms part of Chapter XVII relating to control of enemy firms reads as follows:

151. Collection of debts of enemy firm and custody of property-

(1) With a view to preventing the payment of monies to an enemy firm and preserving enemy property, the Central Government may appoint a Custodian of Enemy Property for India and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local areas as may be prescribed and may by order-(a)..

(b) vest, or provide for and regulate the vesting, in the prescribed custodian such enemy property as may be prescribed;

20. It is therefore clear from the above provisions that the property that should be vested in the Custodian is required to be prescribed by the Government. Unless the property is identified and prescribed by way of notification or order passed by the Government, the vesting does not take place. In other words, all the properties of all the Pakistani Nationals during the relevant time shall not vest unless the provisions of Rule 133 (Defence of India Rules 1962) or 151 (Defence of India Rules 1971) is complied. No materials have been produced to show that the property covered by Ext.P5 has been notified during the relevant time or subsequently thereafter while the Rules were in force. Hence it cannot be stated for a moment that the property of K.P.Umer and K.P.Kunjammed had vested in the Custodian by virtue of the Defence of India Rules.

21. It is still hard to believe that when a specified period had been stipulated under the Defence of India Act and Rules framed there under in 1962 and 1971 which enabled vesting of enemy property, no action is seen taken by the authorities under the aforesaid provisions to identify the land so vested. The Act has been published only for the purpose of managing such property which are already vested. The Senior Counsel also pointed out that under the Act, the title of the property of an enemy does not vest in the Custodian. The Custodian takes over the enemy property only for the purpose of possession, control and management. The point therefore for consideration is whether the said property was vested in the Government under the Defence of India Act or Rules framed thereunder. Going by Ext.P5, there is no indication of a vesting which had taken place at the relevant time when the Defence of India Act or Rules were in force. Whereas the Custodian had, on enquiry, come to a conclusion that the property which originally belonged to the share of late K.P.Umer and K.P.Kunjammed vested in the Custodian under the provisions of the Act. This conclusion is apparently wrong since the Act is not concerned with vesting of property in the Custodian whereas it is only concerned with the continued management of enemy property. The Act does not create any specific provision to enable the Custodian to take over any property as vested in him. He is only entitled to manage the property which was "vested in the Custodian" under the Defence of India Act or Rules framed thereunder.

22. It is also seen that Ext.P5 had been issued after more than 30 years. It is seen from the objects and reasons to the Act that as per the provisions of the Defence of India Act and Rules framed thereunder, the Enemy properties have been tabulated and valued by the Government of India. The said property alone

can be treated as being in the custody of the Custodian for proper management under the Act. In other words, if this property has been considered as vested in the Government and necessary documents had not been prepared and the property valued under the provisions of Defence of India Act and the Rules framed thereunder it is not open for the Custodian to make further enquiries and then identify lands of Pakistani nationals and then take over management of such property 2. It is also relevant to note that no official records have been communicated either to the so called Pakistani nationals or the co-owners of the property and no official communication have been given to the Sub Registrar officer or the revenue authorities in regard to vesting of property at the time when the Defence of India Act 1962 and the Defence of India Act 1971 were in force or immediately thereafter. Persons like the petitioner who have already acquired interest in the property without knowing about such so called "vesting''", cannot be found fault with. They have invested their hard earned money for purchasing certain item of property which was free from all encumbrances. In the absence of any intimation either to the Sub Registrar Office or to the revenue authorities it is not known how a person will be able to know that a particular property is enemy property or not. Therefore the whole intention of the Legislature was only to hand over management of the properties vested in the Government under the Defence of India Act or Rules framed thereunder which had been prescribed and thereby vested. The Act does not contemplate a further enquiry and tabulation or identification of enemy property. If that be so, persons who had without knowledge of such vesting, will be deprived of their hard earned money. This will amount to highly arbitrary and unreasonable action on the part of the Custodian under the Act. Ext.P5 is therefore without jurisdiction and is liable to be set aside. This being the situation and purport of the Act, I am of the view that the above Writ Petition is only to be allowed as follows:

In the result,

i) Ext.P5 shall stand quashed.

ii) Respondents 6 and 7 are directed to collect land tax from the petitioner.

