

(1989) 08 PAT CK 0058
In the Patna High Court
Case No : C.W.J.C. No. 1382/82 (R) .

Khawaja Nasiruddin and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-08-1989

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 20, 25, 26, 27, 28
Constitution of India, 1950 — Article 226

Citation : (1990) 2 PLJR 367

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Vijoy Pratap Singh, M.Y. Eqbal, Ashok Kumar Sinha and B.K. Nag, for the Appellant; N.K. Prasad, M. Sahu, M/s. N. Roy and I.D. Sinha For the State, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This writ application is directed against an order dated 25.7.1952 as contained in Annexure-2 to the writ application and a sale certificate dated 20.9.1965, as contained in Annexure 6 to the writ application. The impugned order as contained in Annexure-2 to the writ application was passed by the respondent no. 2 declaring one Khawaja Nassiruddin as an evacuee, and thereby declaring his properties as evacuee properties.

2. The facts of the case lie in a very narrow compass. On or about 24.4.1951, the Tehshildar of the area in question reported that the aforementioned Khawaja Basiruddin, the father the petitioner no. 1 and husband of the petitioner no. 2 had left India, a copy whereof is contained in Annexure-1 to the writ application. Upon receipt of the aforementioned report, the matter was inquired into by the Inspector of Evacuee Property, who also submitted a report to the same effect.

3. On or about 18.2.1952, the Sub-divisional Officer directed issuance of notice in the name of Khawaja Basiruddin but it appears that in the matter of service, thereof (sic) by the peon concerned that the said notice could not be served and

as such he requested for an extension of time.

4. By an order dated 6.6.1952, the Respondent no. 2 directed that all the formalities for service of notice as also by beat of drum at the spot should be taken. The said order dated 6.6.1952 is contained in Annexure-4 to the writ application.

5. It appears from the order sheet that by an order dated 28.6.1952, the respondent no. 2 accepted the service of notice upon the aforementioned Khawaja Basiruddin as valid and on 3.7.1952, the respondent no. 2 directed issuance of summons upon the witnesses. From the ordersheet dated 19.7.1952, it appears that no body appeared on behalf of the proceedee and on that date the Evacuee Inspector was examined.

6. By the impugned order dated 25.7.1952 as contained in Annexure-2 to the writ application, the property in question being holding no. 5, comprising of plot nos. 822, 831 and 832 measuring 5.20 decimals was declared to be evacuee property.

7. Thereafter, on 21.4.1960, an auction in respect of aforementioned property purported to be under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, was held wherein the said properties were purchased by one Shri Chambalal, father of the newly added respondent, Shri Kesar Lal Gera.

8. By a sale certificate dated 20th February, 1965, the auction purchaser, namely Sri Chambalal was declared to be the purchaser in respect of the property in question with effect from 20th June. From the aforementioned sale certificate as contained in Annexure to the writ application, it appears that certain compensation payable to the aforementioned Sri Chamba Lal due to him and his associates were adjusted from the sale price.

9. It further appears that the petitioners executed an agreement for sale in favour of one Adarsh Grih Nirman Samiti and members of the said Samiti started disturbing the possession of heirs of Chamba La), and as such on 21.10.1982, Kesar Lal Gera, one the heirs of the aforementioned Chamba Lal, who was impleaded as respondent in the writ application, filed a suit in the court of Special Subordinate Judge, Ranchi, which was registered as Title suit No. 257 of 1982. A copy of the plaint in the aforementioned Title Suit No. 257 of 1982 is contained in Annexure-A to the counter affidavit filed on behalf of the respondent no. 6.

10. In the aforementioned suit, the petitioner nos. 1 and 2 filed a written statement alleging inter alia, therein that the properties of the aforementioned Khwaja Basiruddin were wrongly declared as evacuee properties and the plaintiffs-predecessor in interest namely Sri Chamba Lal did not acquire any right, title and interest in relation thereto. The petitioners further contended in the said written statement that they have all along been in possession of the lands in question by getting their names mutuated in the office of the State of

Bihar and by payment of rent etc.

11. In the aforementioned written statement the petitioners however, did not dispute the fact that they had entered into agreement for sale with the aforementioned Adarsh Grih Nirman Samiti, who was impleaded in the said suit as defendant no. 3.

12. However, this writ petition was filed by the petitioners, inter alia, challenging the aforementioned order dated 25.7.1952 and the certificate of sale dated 20th February, 1965 prior to filing of the aforementioned written statement i.e on. 21.12.1982.

Originally, the plaintiff of the aforementioned suit, namely Sri Kesar Lal Gera was not impleaded as party in the application. However, the petitioners filed an application for impleading the aforementioned Chamba Lal as party-respondent.

By an order dated 4.7.1989, this Court allowed the application.

13. Pursuant to the said order dated 4.7.1989, the said Kesar Lal Gera, appeared in this case and filed a separate counter affidavit.

14. In the said counter affidavit, it was contended that after purchasing the property in the auction sale, in the manner as stated hereinbefore, Chamba Lal came in possession of the property in question, got his name mutated and had been paying rent to the State of Bihar. It was further contended by the said respondent, that in the year 1979, the petitioners fraudulently got their names mutated behind the back of the aforementioned Chamba Lal.

15. It was further contended that a portion of the properties in question was acquired in a land acquisition proceeding and in the said proceeding also the aforementioned Chamba Lal was paid compensation.

16. Mr. V.P. Singh, the learned counsel appearing on behalf of the petitioner, firstly submitted that the impugned orders as contained in Annexures 2 and 6 to the writ application are wholly illegal and without jurisdiction, inasmuch as no notice was served upon the persons interested in the said property and as contemplated u/s 7 of the Administration of the Evacuee Property Act (hereinafter called and referred for the sake of brevity as the said Act)

17. The learned counsel further submitted that despite the aforementioned order dated 6.6.1952, as contained in Annexure-4 to the writ application, whereby and whereunder the concerned authority under the said Act directed the Nazir to serve notices upon the aforementioned Khawaja Basiruddin by taking recourse to all formalities, the notices were purported to have been served by affixing a copy thereof in a conspicuous place and by beating of drums only.

18. According to the learned counsel, Rule 6 of the Administration of Evacuee Property Central Rules contemplate service of notices by various modes including personal services, services by registered post, by beat of drum etc. The learned counsel contended that as the aforementioned order dated 6.6.1952 was not

complied with, the proceeding subsequent to passing of the said order must be held to be wholly illegal and without jurisdiction, and the impugned orders have also been passed in violation of the principles of natural justice.

19. The learned counsel further submitted that the instant case, no delay has been caused by the petitioner in filing this writ application, inasmuch as they had no prior knowledge about the proceedings under the said Act. In this connection, my attention has been drawn to Paragraph-20 of the writ application as well as Paras 17, 18 and 19 of the reply filed by the petitioner to the counter affidavit filed on behalf of the respondent no. 6.

20. The learned counsel further submitted that in view of Sections 28 and 46A of the Administration of Evacuee Property Act, and Sections 27 and 36 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, the petitioner may not be permitted to raise the defence with regard to the legality of the aforementioned auction sale held under the said Acts, in the aforementioned Title Suit No. 257/ 82 and, in this view of the matter, necessary reliefs should be granted to the petitioner in this writ application.

21. In support of his aforementioned contention, the learned counsel relied upon a decision of the Supreme Court in *State of Assam and Another Vs. Mahendra Kumar Das and Others*, , *Dr. Zafar Ali Shah & ors v. The Asstt. Custodian of Evacuee Property, Jahuasi & ors* (A.I. R. 1967 S.C. 06), and *Managing Officer, Evacuee Property, Gaya & Anr. v. Mt. Nasiban & ors*. (A.I. R. 1969 Patna, 272).

22 Mr. N.K. Prasad, the learned counsel appearing on behalf of the respondents, on the other hand, submitted that this writ application should be thrown out on the ground of delay alone, inasmuch as in this writ petition, the petitioner has questioned the order dated 25.7.1952 as also the auction held on 21.4.1960. The learned counsel further submitted that in paragraph-20 of the writ application, the petitioners admitted that they came to learn about the alleged auction sale in the proceeding of Land Acquisition Case No. 1972-73, but deliberately or intentionally has not mentioned the date when the said proceeding was initiated or when he took part therein.

23. The learned counsel further drew my attention to the fact that admittedly, even compensation has been paid in favour of the aforementioned Chamba Lal in a land acquisition proceedings. The learned counsel further submitted that even if it be assumed that the petitioner came to learn about the aforementioned Land Acquisition in the year 1972, there cannot be any justification for filing the writ application after a lapse of 10 years.

24. The learned counsel further submitted that the notices in the prescribed form and as contained in Annexure-5 to the writ application was served upon Khawaja Basiruddin.

It was further submitted that as the petitioner no. 1 was born in 1953, and thus the question of service of any notice upon him in 1952 did not arise.

25. it was further submitted that from the report of the Tehshildar, as also from the impugned order, it is evident that all enquiries have been made for the purpose of finding out as to whether the said Khawaja Basiruddin was an evacuee or not, and further all attempts have been made to serve notices upon him, and in this view of the matter, the petitioner can not challenge the validity or legality of the said proceedings.

26. The learned counsel further contended that in any event, disputed questions of fact arise in the application with regard to the service of notice in respect whereof no contemporaneous evidence is available, and in this view of the matter, the writ petition should not be entertained.

The learned counsel also submitted that there is also a serious and bonafide dispute as to whether the petitioner or the aforementioned Chamba Lal, and after his death his son Kesar Lal Gera and other heirs of Chamba Lal had been possessing the property or not, and the said question also can be decided only in the suit filed by the aforementioned Kesar Lal Gera, being Title Suit No. 257 of 1982 and not in this writ application.

27. It was further submitted that in the counter affidavit filed on 17.7.1989 on behalf of the respondent no. 11 (Kesar Lal Gera) it has been stated that Sri Chamba Lal left behind various persons as his heirs and legal representatives whose names appeared in paragraph-4 of the counter affidavit, but despite the same, the petitioner has impleaded only the respondent no. 11 without impleading the other heirs and legal representatives of the aforementioned Chamba Lal as parties in the petition and on this ground too, this writ petition must fail.

28. The learned counsel submitted that in view of the provisions contained in Sections 25, 26 and 27 of the said Act, this writ petition should not be entertained. The learned counsel, in this connection, relied upon decision of the Supreme Court in *The Custodian of Evacuee Property, Bangalore Vs. Khan Saheb Abdul Shukoor, etc.*, .

29. It was further submitted by the learned counsel that existence of sufficiency of material is not justiciable in a proceeding under Article 226 of the Constitution.

In this connection, the learned counsel has relied upon the case of *Inayat Ullah Vs. The Custodian, Evacuee Property*, .

30. Section 7 of the Administration of Evacuee Property Act reads as follows :--

Notification of evacuee property,--(1) Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may after causing notice thereof to be given in such manner as may be prescribed to the person interested and after holding such enquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property."

31. From perusal of the aforementioned provision, it would be evident that a notice is required to be served upon the persons interested.

The petitioners being governed by Mohhamedan Law, there can not be any doubt whatsoever that during the life time of the aforementioned Khawaja Basiruddin, the petitioners had no interest in the property in question, and as such they were not interested persons within the meaning of the provisions of the said Act.

32. In this writ application, the petitioners themselves have placed on record various documents which formed the basis for initiating the proceedings against the aforementioned Khwaja Basiruddin under the said Act, and passing of the impugned orders.

33. From a perusal of the report of the Tehshildar, it is evident that various persons were reported to have left for Pakistan. The statement made in the said report (Annexure-1) was admittedly verified by the Evacuee Inspector.

Only upon receipt of the report submitted by the said Evacuee Inspector, the proceeding in question was started.

34. True it is, that in the said proceeding, the notice could not be served at the first instance and the peon prayed for an extension of time. It is also true that by an order dated 6.6.1952 the Nazir was given a special direction that the notices should be served complying with all formalities and also by beat of drums at the spot.

35. In this connection, it is necessary to notice Rule 28 of the Administration of Evacuee Properties (Central) Rules which reads as follows :--

Service or publication of any notice, summons or order under the Act or under these rules shall be effected in one or more of the following modes, namely :

(1) By giving or tendering it to the person concerned or his manager or agent, if any.

(2) By leaving it at the last known place of business of the person concerned or by giving or tendering it to some adult member of the family.

(3) By sending the notice, summons or order by registered post.

(4) By affixing the notice, summons or order on some conspicuous part of the premises concerned or at the last known place of business or residence of the person concerned or by publication in a daily or weekly newspaper or by proclamation by beat of drum in the locality.

36. From a plain reading of the aforementioned provision, it would be clear that in law it was not necessary to take steps for service of notice upon an evacuee, by taking recourse to all the formalities laid down therein. Service by any mode as referred to in the aforementioned Rule meets the requirement of law. As in the proceeding in question notices were served by beat of drum at the spot as well as by affixing a notice in a conspicuous place near the residence of the

aforementioned Khawaja Basiruddin, in my opinion, there has been a substantial compliance of the requirement of law. Further, the very fact that the concerned authorities, who passed the aforementioned order on 6.6.1952, accepted the service of notice as valid service by an order dated 28.6.1952, it can not be said that as all the modes of service of notice as contemplated under Rule 28 of the aforementioned Rules were not taken in terms of the aforementioned order dated 6.6.1952, the purported service of notice upon the afore mentioned Khawaja Basiruddin was vitiated in law.

37. In the instant case the proceeding under the said Act has been initiated against Khawaja Basiruddin, and the said properties were sold on auction and a certificate of sale in respect thereof has also been granted.

38. Further, admittedly, a portion of the land in question was acquired in the land acquisition proceeding. The petitioners in the written statement filed in the aforementioned Title Suit No. 257/82 admitted that they appeared in the aforementioned case and preferred their claim.

39. Mr. V.P. Singh, however, when questioned, very fairly stated that no compensation was paid to the petitioners in the said land acquisition proceedings. The petitioners thus admitted that notices were served upon the petitioners as also the respondent no. 6 in the aforementioned Land Acquisition Proceedings.

40. Annexure-3 (C) which is a notice dated 30.12.75 in the name of Khawaja Basiruddin and respondent no. 6, and the notice issued in the name of petitioner no. 1 and the respondent no. 6 is dated 18.2.1978. the petitioners have admitted that in the aforementioned land acquisition proceeding, they came to learn about the basis of claim of the aforementioned Chamba Lal in the properties in question.

41. In the premises aforementioned it must be held that there was no reason for the petitioners to approach this Court after an inordinate delay. Evidently, the petitioners got their names mutated in the office of the State of Bihar which according to respondent no. 11 was done behind the back of the aforementioned Chamba Lal and/or said respondent, after having come to learn that the property in question had been sold in auction.

42. In paragraph 17, 18 and 19 of the rejoinder the petitioners in reply to the counter affidavit filed by the respondent no. 6, merely stated that they have all along been in possession of the property in question, but have not given any explanation with regard to the delay caused in filing the writ application.

43. In this view of the matter, there can not be any doubt that the petitioners are guilty of serious laches and delay on their part and are thus not entitled to invoke the writ jurisdiction of this Court.

44. Moreover, the question as to whether notices have been duly served or not is a disputed question of fact. From the material on record, it appears that prima facie the Authorities under the said Act were satisfied that the aforementioned

Khawaja Basiruridin was an evacuee. It, further appears from the record that the properties in question were declared to be an evacuee property, after alleged service of notice upon him in accordance with the said Act and the rules framed therein.

45. " Evacuee" has been defined in Section 20 of the said Act, which reads as follows :

Evacuee" means any person :--

(i) who, on account of the setting up of the Dominions of India and Pakistan or on account of Civil disturbance or the fear of such disturbances, leaves or has. on or after the first 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 properties in any part of the territories to which this Act extends or whose property in any part of the said territory ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorized 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 extends, or if acquisition has been made by or through a member of his family, in any manner, whatsoever, any right to, interest in, or benefit, any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan.

46. From a plain reading of the aforementioned provisions, it is thus clear that a person who migrated to Pakistan during the years 1947 to 1949 comes within the purview of the definition of "evacuee". It, therefore, was required to be adjudicated whether the aforementioned Khawaja Basiruddin left India during the aforementioned period or not.

47. The petitioner has asserted that no notice was served in the proceeding under the said Act. The petitioner no. 1, who has verified the relevant statements made in the writ application, having been born in the year 1953, as is evident from Annexure-1 to the reply filed on behalf of the respondent nos. 6 to 9 was not competent to make any statement with regard to the said fact. The other competent person i. e. petitioner no. 2 has not verified the statements made in the writ application.

48. In such a situation, it is not possible for this court, while exercising its writ jurisdiction to determine the disputed questions of fact as to whether there has been a valid service of notice upon the aforementioned evacuee or not.

The Supreme Court in *Inayat Ullah v. Custodian Evacuee Property* (A.I. R. 1958 S.C. 162), *inter alia*, held as follows :--

It is for the Custodian to form his opinion on such material, as was before him, and on such information which he possessed. The notice which he issued was in Form I of the Rules framed under the Act and it stated clearly that there was credible information in possession of the respondent that Iqbal and Kamrunnissa were evacuees and that the property specified in the notice was, evacuee property. It was for the respondent to decide whether, on the information in his possession, he should issue a notice under S. 7 of the Act. It is not for this Court or any other Court to determine whether the information in possession of the respondent was adequate to justify the issuing of the notice.

49. In view of the aforementioned authoritative pronouncement, it is thus clear that this Court can not go into the question with regard to the sufficiency of materials as to whether there was sufficient material for the Custodian to come to the conclusion as to whether Khawaja Basiruddin was rightly held to be an (sic) evacuee within the meaning of the said Act or not.

50. In the *The Custodian of Evacuee Property, Bangalore Vs. Khan Saheb Abdul Shukoor, etc.*, , it was held by the Supreme Court that a writ of certiorari can not be issued by High Court in exercise of its writ jurisdiction, unless the order passed by the Custodian under Use said Act was wholly without jurisdiction. As noticed hereinbefore in the instant case, the jurisdictional fact has to be decided upon adjudication of serious and bonafide disputed question of facts, which is not possible to be done by this Court in exercise of its writ jurisdiction. This Court can not sit in appeal, over the orders passed by the competent authorities under the said Act.

51. In this view of the matter, in my opinion, this writ petition is not maintainable, as it is not possible for this Court to determine as to whether there has been a valid service of notice or not.

52. The contention of the learned counsel for the petitioner that there had been a violation of principles of natural justice is merely academic and as such the decision cited by him in *State of Assam and Another Vs. Mahendra Kumar Das and Others*, cannot be said to have any application whatsoever, in the facts and circumstances.

53. Mr. Singh has contended that the Civil Court would have no jurisdiction to decide any question which fell for decision before the authorities under the said Act, and for this purpose, the learned counsel has relied upon *Dr. Zafar Ali San & ors. v. the Asstt. Custodian of Evacuee Property, Jhansi & ors.* (A.I.R. 1977 S.C. 106), *Managing Officer, Evacuee Property Gaya & Anr. v. Mt. Nasiban and ors.*

(A.I.R. 1969, Patna 2/2).

54. On the other hand, Mr. N.K. Prasad, relying upon a decision of Division Bench of this Court in *Md. Zakiuddin v. District Assistant Custodian of Evacuee Property, Patna Collectorate, Patna and others* (A.I.R. 1963 Patna 11), submitted that if the action on the part of the custodian under the said Act was beyond the scope of the Act, the Civil Court would have jurisdiction to decide the said issue.

55. In this writ application, in my opinion, it is not necessary to dwell upon the rival contentions with regard to the jurisdiction of the civil court, inasmuch as noticed hereinbefore, this court is not in a position to grant relief for the reasons stated hereinbefore, and as such any discussion on the question as to whether the civil court's jurisdiction is completely ousted or not would be merely academic.

56. So far as the contention raised by Sri Prasad, relating to the defect in the writ petition, as the petitioner did not implead all the heirs of Chamba Lal as parties therein, in my opinion, the said question also does not require any consideration in this writ application. For the reasons stated hereinbefore it must be held that the writ application is not maintainable and accordingly, it is dismissed.

However, in the facts and circumstances of the case, there will be no order as to costs.