

(1953) 02 RAJ CK 0015
In the Rajasthan High Court
Case No : Civil Writ Application No. 83 of 1951

Manohar Lal

APPELLANT

Vs

Custodian, Rajasthan, Jodhpur and Others

RESPONDENT

Date of Decision : 11-02-1953

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10(2), 13, 2, 48, 7
Constitution of India, 1950 — Article 226
Matsya Evacuee (Administration of Property) Ordinance, 1948 — Section 2, 20, 4, 9(2)
Revenue Recovery Act, 1899 — Section 4

Citation : AIR 1953 Raj 185 : (1953) RLW 561

Hon'ble Judges : Sharma, J;Ranawat, J

Bench : Division Bench

Advocate : B.B. Sharma, for the Appellant; R.A. Gupta, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ranawat, J.—This is an application by Mano-har Lal Vaishya of Fahari, District Bharatpur, against the Custodian Rajasthan, Naib Deputy Custodian, Bharatpur, and Tehsildar, Pahari, under Article 226 of the Constitution of India.

2. The facts alleged by the petitioner are that he purchased 46 maunds and 8 seers of "sarson" from one Sheo Singh Meo on the 14th day of the dark half of the month of Asarh in Samwat year 2004, and paid Rs. 800/- to him on the same day. Rs. 5/- were paid at the time of settling the transaction, while the balance, it is said, was paid two or three days later Sheo Singh left India, and went to Pakistan. The then custodian of Evacuee Property, Bharatpur, by his order dated 1-3-1949, acting on a report of the Naib Tehsildar, Pahari, ordered the petitioner to deposit with him Rs. 831/9/- being the price of the aforesaid "saron", which had been purchased by the petitioner from Sheo Singh, who was an evacuee, without allowing any opportunity to the petitioner of being heard. The petitioner came to know about this order when a demand for the payment was made from him by the Collector as arrears of land revenue.

After the petitioner came to know about the order, he moved a review application before the Custodian, but it was rejected. The petitioner approached the Custodian General of Evacuee Property in exercise of his revisional powers against the orders of the Custodian, Rajasthan, but unsuccessfully. The Custodian General confirmed the order of the Custodian on 21-7-1951. The petitioner -challenges the jurisdiction of the Custodian in ordering a recovery of the price of "sarson" purchased by him from an evacuee under the provisions of the Matsya Evacuee (Administration of Property) Ordinance, 1948 (Ordinance No. 11 of 1948), (hereinafter to be referred to as the Ordinance), specially because no enquiry was made by the Custodian himself before making the order, and because the Custodian proceeded to act on the report made by the Naib Tehsildar of Pahari. It is further alleged that if the Custodian was of the opinion that the petitioner was liable to pay the amount of the price of sarson purchased by him, his remedy lay by way of filing a suit against the petitioner rather than by proceeding to recover the aforesaid amount as arrears of land revenue.

The fundamental rights of the petitioner under Article 19 of the Constitution of India are, it is alleged, infringed by the action of the respondents. The cause of action, it is stated, arose on 14-10-1950, when respondent 1 asked the Deputy Custodian, Bharatpur, to proceed against the petitioner in accordance with law, and when respondent 2 ordered respondent 3 to recover the aforesaid amount as arrears of land revenue, or, in the alternative, on 21-7-1950, when the Custodian General of India rejected the revision application of the petitioner. The prayer of the petitioner is

1. That a writ of certiorari be issued quashing the orders of the Deputy Custodian, Bharatpur, dated 1-3-1949, 14-10-1950, and 19-12-1950;
2. that a writ of prohibition be issued against the respondents restraining them from realising the amount of Rs. 831/9/- from the petitioner; and
3. that the costs of this petition be allowed to the petitioner from the respondents.

3. A written, statement was filed on behalf of respondents 1 to 3 by the Deputy Custodian Evacuee Property, Jaipur, and it was denied that the petitioner had ever paid the price of the sarson purchased by him from Sheo Singh who was an evacuee. It was also stated that the order of the Custodian of 1-3-1949, was not without jurisdiction. The amount being due to the Custodian could be realised, it was asserted, in accordance with the provisions of the Rajasthan Administration of Evacuee Property Ordinance, 1949. It was, however, admitted that the amount of Rs. 800/- and odd was being recovered from the petitioner as arrears of land revenue on account of the price of the goods purchased by him from an evacuee and not having been paid for. The order of recovery of the aforesaid amount having been passed long before the coming into force of the Constitution of India, it was not open to the petitioner to challenge its validity now under Article 226 of the Constitution of India, because the provisions of the Constitution are

not retrospective. It was denied that the petitioner was not allowed an opportunity of being heard before an order was made against him. Another alternative remedy was open to the petitioner by way of filing a regular civil suit under the provisions of Section 4, Revenue Recovery Act, 1899.

4. The first question that arises in this case is whether it was competent for the Custodian or Deputy Custodian under the Ordinance to order recovery of the price of the goods purchased by the petitioner from an evacuee as arrears of land revenue. Section 4 of the Ordinance lays down that

"Subject to such orders as may be passed by the Government of the United State of Matsya from time to time all evacuee property situated within the United State of Matsya shall vest in the Custodians for the purposes of this Ordinance and shall continue to be so vested until the Government of the United State of Matsya by notification otherwise directs."

According to this provision of law, all evacuee property situated within the United State of Matsya vested in the Custodian of that State from the date of the coming into force of the Ordinance. The debts, which were due to the evacuees, were also evacuee property within the meaning of the definitions of "evacuee" and "property" u/s 2(b) and (e) of the Ordinance. By Section 2(b), "evacuee" has been defined as follows:

""Evacuee" means a person ordinarily resident in or owning property or carrying on business within the territories comprised in the United State of Matsya, who on account of civil disturbances or the fear of such disturbances or the partition of the country:

(i) leaves, or has since the 1st day of March 1947, left the said territories for a place outside India, or,

(ii) cannot personally occupy or supervise his property or business."

and by Section 2(e) "property" has been described as follows:

""Property includes any right or interest in moveable and immovable property, in any shop or business establishment or any factory or workshop or undertaking or in any debt or action able claims other than a mere right to sue but does not include cash deposits in Bank."

In view of the aforesaid definition of the term "property", a debt is a property and by virtue of Section 4 of the Ordinance the debt, if any, which the petitioner owed to the evacuee vested in the Custodian from the date of the coming into force of the aforesaid Ordinance.

5. By Section 5, Sub-section (1) of the Ordinance it is provided that

"Any sum payable to an evacuee in respect of any contract or loan or otherwise however shall be paid to the Custodian by the person liable to pay such sum."

Further in Sub-section (2) of Section 5, it has been laid down that any payment

made otherwise than in accordance with Sub-section (1) of Section 5 should not be deemed to discharge the obligation and should not affect the right of the Custodian to enforce such obligation. It is argued on behalf of the respondents on the strength of the provisions of Section 5 of the Ordinance that the Custodian is authorised to realise the debts due to the evacuees, firstly, because such debts vested in him by operation of Section 4 of the Ordinance, and secondly, because Section 5 makes such sums payable to the Custodian which were so payable to an evacuee in respect of any contract or loan etc. The amount which is being recovered from the petitioner, it is contended, relates to the price of the goods sold by an evacuee to the petitioner, which, the petitioner had not paid to the evacuee, and which was still due. The plea of payment of the petitioner had been enquired into by the Custodian, and it had been decided by him that the allegation of the payment of the aforesaid amount of price to the evacuee was incorrect.

In reply to this argument it was stressed by the learned counsel of the petitioner that even though debts due to an evacuee were evacuee property in the meaning of Section 2 of the Ordinance, and even though all evacuee property had vested in the Custodian from the date of the coming into force of the Ordinance, yet the Custodian or Deputy Custodian had no power to recover such debts as arrears of land revenue. Section 5 of the Ordinance, it was urged, only made such debts payable to the Custodian and it did not give any authority, to the Custodian to collect them as arrears of land revenue. Section 20 of the Ordinance, which lays down that

"any arrear due from or sum payable by any person to the Custodian may on application to the Collector be realized as an arrear of land revenue,"

it is asserted, relates to arrears due from or sums payable by any person to the Custodian, and it does not cover the cases of debts due from or payable by any person to an evacuee. The learned counsel of the petitioner has cited the decision of Weston C. J. and Harnam Singh J. in -- Firm Sahib Dayal Bakshi Ram Vs. Assistant Custodian of Evacuees" Property, Amritsar and Another, in which the following observations are relevant for our purposes:

"Indisputably a debt due from a non-evacuee to an evacuee is evacuee property u/s 2(f), Administration of Evacuee Property Act, 1950, and the Custodian is authorised to hold an enquiry into the matter and pass an order declaring any such debt to be evacuee property, whether the debt be time-barred or not.....

Sections 7 and 46 of the Act do not empower the Custodian to decide the further question whether a debt due from a non-evacuee to an evacuee is or is not time-barred."

"Section 48 deals with the recovery of sums due to the State Government or the Custodian while Section 10(2)(i) and (j) deal with the recovery of debts due to the evacuee. Again, Sections 7 and 48 do not empower the Custodian to revive remedies barred by limitation or to create new remedies. Indeed, Section 4 of

the Act preserves all laws for the time being in force unless they conflict with the provisions of the Act and the provisions contained in Section 10(2)(i) and (j) of the Act show that in such cases the Custodian should go to a civil Court for the determination of the dispute. Provisions of the Limitation Act are not inconsistent with those of the Administration of Evacuee Property Act. The Custodian has, therefore, no power to proceed against a non-evacuee u/s 48 of the Act for the recovery of the debts when the non-evacuee objects to the recovery of those debts inter alia on the ground that the debts are barred by time."

The foregoing observations have been made with reference to the provisions of the Administration of Evacuee Property Act, as amended by Act 22 of 1951; but the corresponding provisions of the Matsya Ordinance also are similar, and these observations would apply to this case also. Under the Administration of Evacuee Property Act, evacuee property vests in the Custodian after it has been declared to be so by him upon an enquiry under the provisions of 7 of that Act whereas under the Matsya Evacuees (Administration of Property) Ordinance, all evacuee property automatically vested in the Custodian from the date of the coming into force of that ordinance, unless it is provided otherwise by the Government by a notification in the Gazette. No notification was otherwise published by the Government and consequently all evacuee property, as defined by the Ordinance, vested in the Custodian.

In the present case, the debt, if any, that was due from or payable by the petitioner to an evacuee had vested in the Custodian from the date of the coming into force of the Ordinance. Sections 10(2)(j), 13 and 48, Administration of Evacuee Property Act, correspond to Sections 9(2)(iv), 5 and 20 respectively of the Ordinance. Under the provisions of the Ordinance, the Custodian had to take possession of all evacuee property vested in him under the Ordinance. Section 6(2) of the Ordinance lays down the procedure for taking possession of immovable property of evacuee, and Section 6(3) for taking possession of movable property. No mention is made in Section 6 regarding taking possession of actionable claims or debts, which cannot be regarded as movables within the meaning of Section 6(3) of the Ordinance.

6. There is no doubt that a debt due from or payable to an evacuee vested in the Custodian under the provisions of the Matsya Ordinance, and also that it was made payable to the Custodian by Section 5 of the Ordinance. The intention of Section 5, however, is that in such cases the Custodian alone could give a valid discharge of such debts, and such debts could only be paid to the Custodian. Section 5 does not authorise the Custodian to adjudicate in matters of disputed debts, and to recover them as arrears of land revenue. Had it been the intention of the framers of the Ordinance to authorise the Custodian to adjudicate in such matters, some provision relating to recovery of the debts due to evacuees would have been put in the Ordinance like the one for taking possession of the movable and immovable property. Since unlike movable and immovable property there is no provision for the recovery of such debts, the intention of the Ordinance

becomes evident that the Custodian was not empowered to enforce payments of such" disputed debts by himself, without going to a Court of law.

Section 20 of the Ordinance deals with arrears due from or sums payable by any person to the Custodian, and makes the recovery of such sums as arrears of land revenue. But Section 20 does not cover the case of debts due to an evacuee. The observations in -- "Firm Sahib Dayal Bakshi Ram v. Assistant Custodian of Evacuees" Property, Amritsar", (A), referred to above, relating to Section 48, Administration of Evacuee Property Act support this view with reference to Section 20 of the Ordinance. Section 48, Administration of Evacuee Property Act & Section 20 of the Ordinance are in the same language in at least as much as this point is concerned. The proper course in such cases for the Custodian was to institute legal proceedings against the petitioner in a civil Court u/s 9(2)(iv) of the Ordinance. Under these circumstances, the Custodian had no jurisdiction to adjudicate the claim of an evacuee against the petitioner relating to the price of the goods sold under the provisions of the Ordinance. The action taken by the Custodian in this case, therefore, cannot be justified under the Ordinance, and it cannot be held to be otherwise than being contrary to the provisions of law.

7. The next point which has been raised by the opposite side in this case is that the order of the Custodian in these proceedings had been passed much before the Constitution of India came into force, and as the provisions of the Constitution are not retrospective, no relief should be granted to the petitioner under Article 226 of the Constitution of India. In support of this contention, observations of their Lordships of the Supreme Court in -- Janardan Reddy and Others Vs. The State of Hyderabad and Others, had been cited. Commenting on the provisions of Article 32(2) of the Constitution, their Lordships observed that the provisions of the aforesaid Article were not intended to operate retrospectively, and, therefore, something which was legally good on 25-1-1950, could not be held to have become bad on 26-1-1950. In view of the observations of their Lordships, referred to above, anything which was legal before the coming into force of the Constitution cannot now be considered to be illegal because the provisions of the Constitution are not retrospective. In other words, any action taken by the Custodian before the coming into force of the Constitution of India, if it had been legal and in accordance with law then in force, could not have been regarded as illegal now, simply because it is contrary to the provisions of the Constitution. As has been discussed above, the action of the Custodian in the present case was not in accordance with law as it stood at that time, and Janardhan Reddy's case cannot, therefore, help the case of the opposite party. Anything which was illegal before the coming into force of the Constitution remains illegal, and a person, who is aggrieved against such an illegal act, cannot be deprived of his remedy under Article 226 of the Constitution. Illegalities committed before the coming into force of the Constitution cannot be allowed to continue because of the coming into force of the Constitution. The argument of the opposite side could have had weight only if they had been able to show that the action taken by the Custodian before the coming into force of

the Constitution was in accordance with law, as it stood at that time. But the fact is otherwise. The action of recovery of debt due to an evacuee as arrears of land revenue was not in accordance with the provisions of the Matsya Law under which that action had been taken. This argument is, therefore, of no avail to the opposite, side.

8. The learned counsel of the opposite side has also referred to Section 4, Revenue Recovery Act. 1899, and it has been argued that the petitioner has a right to sue in a Court of law, if he claims the recovery to be not in accordance with law. It may be pointed out in this connection that as the Custodian had no jurisdiction in the present case to recover the aforesaid amount as arrears of land revenue, it would not be proper to dismiss the application of the petitioner simply because an alternative remedy is open to him. In -- Gangadhar Vs. State of Rajasthan and Others, it has been observed by his Lordship the Chief Justice that

"There is no doubt that generally speaking when there is an alternative remedy open to a party, this Court will not interfere under its extraordinary jurisdiction, but the case of writ of prohibition stands on a somewhat different footing from other writs. It has been held in a number of cases that where the superior Court comes to the conclusion that an inferior tribunal is exercising Jurisdiction which is not vested in it, the superior Court will issue a writ of prohibition, even though there may be an alternative remedy. Reference may be made to Halsbury's Laws of England, Second Edition, Volume IX, paragraph 1397, where the following passage occurs:

"The Court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of Jurisdiction, or an appeal lies against such absence or excess".

Reference may also be made to -- Devilal Vs. Ganpat, -- Jeewan Ram Vs. United State of Rajasthan and Another, and -- Rangraj and Others Vs. Gram Panchayat, Khinwel, We, therefore, overrule the preliminary objection."

The action of the Custodian being without jurisdiction regarding the recovery of the amount from the petitioner as arrears of land revenue, the mere fact that the petitioner has a remedy by way of a regular suit u/s 4, Revenue Recovery Act, 1899, is not sufficient to disentitle him to an order or direction in the nature of a writ of prohibition under Article 228 of the Constitution of India.

9. Though it has been agitated in these proceedings that the petitioner had failed to make a payment of the price of the goods to the evacuee from whom he had purchased the goods and the petitioner had refuted this fact, it is not necessary for us to go into this question of fact, which might be agitated in the proceedings hereafter to be taken by the respondents.

10. A further argument has been advanced by the respondents that the petitioner had come to this Court with delay, and on this account his petition

should fail. We may point out in this connection that the petitioner was not sitting silent all this time. He had been making representations to the Custodian Department and ultimately when his application had been dismissed by the Custodian General of India, he lost no time in coming to this Court. There is, therefore, no delay on the part of the petitioner and his application cannot fail on this account.

11. This application is allowed with costs, and the opposite parties are prohibited from proceeding against the petitioner to recover Rs. 831/9/- as arrears of land revenue. It would, however, be open to the opposite parties to take such steps for the recovery of the aforesaid amount as may be available to them under the law, viz., by institution of a regular suit.