
(1951) 04 BOM CK 0004

In the Bombay High Court

Case No : O.C.J. Appeal No. 101 of 1950

P.R. Nayak

APPELLANT

Vs

Ebrahim Aboobaker and Another

RESPONDENT

Date of Decision : 13-04-1951

Acts Referred:

Administration of Evacuee Property (Central) Rules, 1950 — Rule 9
Administration of Evacuee Property Act, 1950 — Section 56

Citation : AIR 1951 Bom 418 : (1951) 53 BOMLR 663 : (1952) ILR (Bom) 606

Hon'ble Judges : Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Advocate : H.M. Seervai, for the Appellant; Jamshedji Kanga and P.N. Bhagwati, for the Respondent

Final Decision : Dismissed

Judgement

Chagla, C.J.—Although various points were urged before Mr. Justice Shah when this petition, out of which this appeal arises, was argued before him, only one narrow point survives so far as this appeal is concerned and which has been argued by Mr. Seervai on behalf of the Custodian of Evacuee Property. The point briefly put is this:

2. One Aboobaker died on 14th May 1950, and four-seventh share in a property known as the Imperial Cinema vested in his two sons, Husein and Alimahomed as his heirs. Now both these sons have been declared evacuees and their property has been vested in the Custodian. The question which we have to consider is whether it is competent to the Custodian under the Act or under the rules framed thereunder to take possession not only of the four-seventh share vested in him but also the three-seventh share which is not evacuee property ; or, in other words, whether it is open to the Custodian to take possession of the building known as the Imperial Cinema although what is vested in him is only the four-seventh share in the same. Now, prima facie, it would seem a starting proposition indeed that the Custodian should have any power to take possession

of property which belongs to strangers and who are not evacuee at all under the Act. We have already had an occasion to consider the scope and the intent of the Administration of Evacuee Property Act and that scope and intent is the custody, management and possession of evacuee property. It cannot be disputed that so far as legislative competence is concerned, it would have been open to Parliament to have enacted a piece of legislation which might have permitted the Custodian to encroach upon the rights of strangers. But before one attributes such an extraordinary intention to Parliament one must scrupulously and carefully scrutinise the provisions of the Act. And when we turn to the provisions of the Act it is clear that there is no indication whatever in any provision enacted by our Parliament that any property was intended to be affected except the property of persons who were declared as evacuees and whose property was liable to be vested in the Custodian as evacuee property. Now, turning first to the definition of evacuee property in Section 2(f) evacuee property means any property in which an evacuee has any right or interest whether personally or as a trustee or as a beneficiary or in any other capacity and it excludes two kinds of property. Now, it cannot be suggested that by this definition the Legislature intended that the whole of a property in which an evacuee has only a right or interest was to be evacuee property. This definition can only mean that evacuee property is the property in which the evacuee has any right or interest to the extent of his right and or interest. The object of this definition obviously was not to extend the definition of evacuee property to the whole of the property in which there was some right or interest of an evacuee but confine it to the right or interest in that property. Therefore, although an evacuee may not be the owner of the whole of some property even if he had some right or interest in it to the extent he had the right or interest, that right or interest would be evacuee property. Then our attention has been drawn to Section 10(1) which gives wide powers to the Custodian to take such measures as he considers necessary or expedient for the purposes of securing, administering, preserving and managing any evacuee property. Now, here also powers given to him are not in relation to any property other than evacuee property. He has no power to take any measures with regard to securing, administering, preserving and managing any other property. Mr. Seervai says that it may be necessary in order to secure, administer, preserve and manage any evacuee property to take possession of some other property, but before we can permit such an interpretation to be placed upon this sub-section and before we could come to the view which would empower the Custodian to take possession of property other than evacuee property we must be satisfied that the Legislature clearly intended such result to follow. Then when we come to the specific powers enumerated in Sub-section (2) of that section our attention is drawn to Clause (a) and (d). Clause (a) deals with carrying on of the business of the evacuee and Clause (d) empowers the Custodian to take such measures as may be necessary to keep any evacuee property in good repair. Here again emphasis is on the business of the evacuee and the property of the evacuee. He can only take measures to keep the property of the evacuee in good repair, and not the property of any one else. It is

therefore clear that so far as the statute itself is concerned it does not empower the Custodian to take possession of any property other than the property of an evacuee. Before turning to the rules, we must consider the terms of Section 56 under which these rules are enacted. Section 58(1) provides that the Central Government may by notification in the Official Gazette make rules to carry out the purposes of the Act. Therefore so far as that sub-section is concerned, the power of the Central Government to make rules is circumscribed by this important condition that these rules must be only for the purpose of carrying out the purposes of the Act. To the extent that any rule goes beyond the purpose of the Act that rule would be outside the scope and ambit of the Act. When we turn to Sub-section (2), which deals with particular matters with regard to which rules may be framed, it is true that that sub-section does not affect or prejudice the generality of the power given to the Central Government under Sub-section (1) ; but Sub-section (2) undoubtedly contains an indication of what rules were intended to be framed u/s 56. Clause (d) of Sub-section (2) provides that rules may be framed with regard to the manner in which possession of any evacuee property may be taken by the Custodian. Now, this is very significant. The Legislature has expressly limited under this clause the power of the Custodian of taking possession only of evacuee property. It is difficult to believe that if the intention of the Legislature was that the Custodian should take possession not only of evacuee property but also of other property, why in this sub-clause when the Legislature was dealing with the power of the Custodian to take possession of property it did not provide that possession may be taken not only of evacuee property but also the property of strangers.

3. Now, with this background when we turn to the rules Rule 9 provides for the mode of taking possession of Immovable property. Sub-rule (1) deals with cases when trespassers are in possession of the property; Sub-rule (2) deals with cases when tenants, lessees and licensees are in possession, and it provides the mode in which possession can be obtained, or, if the Custodian so chooses, for the payment to him of rents, lease-money or license fees. It is then provided :

Where such property is an undivided share in joint property :

(a) If under some arrangement inter se the co-sharers, the evacuee was in separate possession of any part of the joint property, possession may be taken of such part in accordance with the manner provided in Sub-rule (i) or Sub-rule (ii) whichever is applicable.

Therefore this part deals with the Custodian taking separate possession of the share of the evacuee in joint property.

(b) In other cases, constructive possession may be taken by affixing a copy of the warrant for possession on a conspicuous part of the property, and if considered necessary by proclamation by beat of drum in the locality in which the property is situated. Therefore, this part deals with taking constructive possession, again, of property which is the undivided share of the evacuee in

joint property. Then we come to the proviso which really creates the difficulty. The proviso is :

Provided that where the share of the evacuee in such property exceeds one-half of the whole property, the possession of the whole property may be taken in the manner provided in Sub-rule (i) or Sub-rule (ii) whichever is applicable.

Therefore, this proviso clearly gives the power to the Custodian to take possession of the undivided share of the strangers if that undivided share is less than one-half of the whole property. We agree with Mr. Seervai that on a proper interpretation of this proviso if this power is good in law, then undoubtedly the Custodian has the power to take possession not only of the four-seventh share in the Imperial Cinema which is vested in him but also the three-seventh share which is not evacuee property. But the question is whether this power is within the ambit and scope of the Act, and whether the Central Government were empowered to frame such a proviso looking to the rule-making power conferred upon the Legislature u/s 56. Now, if we are right in what we have held with regard to the extent and scope of the Act; then clearly any rule which confers a power upon the Custodian to take possession of the property which does not belong to the evacuee but belongs to a stranger would be beyond the scope of the Act. Mr. Seervai points out the difficulties that may arise in cases where it may be difficult to manage the undivided share of an evacuee without taking possession of the other share. But surely ordinary law makes proper provision for difficulties like this. Joint tenancy can be severed and difficulties in managing a property which is joint property can be obviated by having recourse to the procedure provided by law. But even if the difficulties were insurmountable, that cannot lead us to the conclusion which would be so startling in its nature and extent that we should pause and hesitate before arriving at such a conclusion unless we were driven by clear and express language of the statute. But as we have already stated, the Act, far from using any language that would compel us to hold that such a power was contemplated to be given to the Custodian, on the contrary makes, it clear that the scope of the Act is only with regard to the securing, administering, preserving and managing the evacuee property, and that no power is conferred upon the Custodian to take possession of the property which does not belong to the evacuee. That was the view taken by the learned Judge in the Court below. In our view that view was correct. The appeal, therefore, fails and is dismissed with costs.