

(1971) 06 AP CK 0002

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 536 of 1969

Regional Settlement Commissioner Evacuee Property,
Bombay and Another

APPELLANT

Vs

Golla Pentiah and Others

RESPONDENT

Date of Decision : 24-06-1971

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 8(2), 8(2)

Constitution of India, 1950 — Article 226

Hyderabad Administration of Evacuee Property Regulations, 1359 — Section 5

Citation : AIR 1972 AP 370

Hon'ble Judges : Lakshmaiah, J;Gopalrao Ekbote, J

Bench : Division Bench

Advocate : K. Subrahmanya Reddy, for the Appellant; K. Pratap Reddy and N.V.B. Sankar Rao, for the Respondent

Judgement

Gopal Rao Ekbote, J.—This is an appeal preferred against the order of a learned Single Judge made in W. P. No. 2763 of 1967 on 23-7-1969 whereby the learned Judge allowed the Writ Petition and declared the notification dated 29-4-1950 as invalid.

2. The material facts which gave rise to the said writ petition are that the respondent herein (Golla Pentiah) filed an application under Article 226 of the Constitution of India for issue of a Writ of Mandamus restraining respondents 1 to 4 from interfering with his right, title and interest in the lands bearing survey Nos. 29 and 72 admeasuring acres 4-14 guntas and from evicting him from the said lands and delivering the said lands to the 5th respondent.

3. The material averments made in the writ petition are that the petitioner claimed himself to be a protected tenant of the lands bearing Survey Nos. 29 and 72 situate at Lingoiguda village, Hyderabad East Taluk. Hyderabad District. It is alleged that the pattadar of the said lands was Aminuddin Khan who migrated to was Aminuddin Khan who migrated to Pakistan. The petitioner states that he has

been in possession, occupation and enjoyment of the said lands for the last 40 years as tenant. He acquired rights under the Andhra Pradesh (Telegram Area) Tenancy and Agricultural Lands Act 1950 as protected tenant. A Certificate of protected tenancy also was granted to him.,

4. It is further alleged that in 1950 and Civil Administrator, Hyderabad District called upon the petitioners to file all papers relating to his right, title and interest in the said lands and to disclose the nature of his possession. Accordingly the petitioner filed before the civil Administrator certain papers. On being satisfied, the Civil Administrator directed issue of protected tenancy certificate to the ;petitioner and accordingly the Tahsildar, Hyderabad issued the certificate bearing serial No. 3 dated 24-11-1951 declaring the petitioner as protected tenant in respect of the said lands and one other piece of land. It is further averred that the petitioner filed an application u/s 38 of the Tenancy Act for the purchase of the said land. But that petition has not so far been disposed of.

5. While matters stood thus, it is said that the petitioners learnt that in the year 1959 the respondent 1 made an order declaring the said lands as evacuee property as a result of the migration to Pakistan of Aminuddin Khan, the landlord. The petitioner contended, that the said declaration is ex facie without jurisdiction and illegal because Section 7(a) of the Administration of Evacuee Property Act 1950 does not permit any such declaration after 7th May, 1954. The said order, it is contended, is without any jurisdiction.

6. It is further stated that the 1st respondent made an allotment of the said lands to the 5th respondent. The said allotment also is characterised as being made without any jurisdiction.

7. It is also averred that even if any declaration or allotment is made it cannot be effective against the right, title and interest of petitioner as he is a protected tenant. "At the most, the 1st respondent interest of said Sri Aminuddin in the said lands which extend only to 40% of the interest in the said lands and not beyond. Consequently, the 5th respondent also must be deemed to have acquired the rights, if any, to the extent of said 40% of the rights. In no case, can the respondents 1 to 5 proceed against my right, title and interest as protected tenant in the said lands."

8. The petitioner further learnt that the 1st respondent gave directions to respondents 2, 3 and 4 to put the 5th respondent in possession of the said lands. On 28-10-1967 an attempt to dispossess the petitioner was made; but the petitioner successfully resisted it. It is upon the basis of these facts that the Writ Petition was filed.

9. From the counter it is apparent that one Aminuddin Ali Khan was the owner of the land S. Nos. 29 and 72 situate at Linojiguda and certain other property. He migrated to Pakistan. His properties, therefore, were declared u/s 5 of the Hyderabad Administration of Evacuee Property Regulations Evacuee property under Notification No. 34 dated 29th April, 1950. It is averred that the lands S.

Nos. 29 and 72 at Lingoliguda are the same as the lands described in the notification as agricultural lands situated at Saroornagar. It is said "It is a fact that the petitioner was a protected tenant of these lands at the time of taking over the same as evacuee property". It is stated that possession of the lands was taken over by the Tahsildar, Hyderabad in 1953 and since then the lands were leased out by him on Kast Ekasala Basis. Having regard to the protected tenancy certificate referred to by the petitioner it is averred that as the lands vested in the Custodian in April 1950, the petitioner could not have got any protected tenancy rights under the Tenancy Act which came into force subsequently in June, 1950. The lands were permanently transferred to Sri Dhanji Valji on 12-3-1956 by issue of a and. Although the petitioner had filed an application for purchase of those lands on 30-12-1966 he was informed on 12-1-1967 that these lands were allotted to the 12-3-1956. It is therefore contended that the declaration of the evacuee property and its allotment were properly made. The petitioner therefore cannot resist the eviction.

10. The petitioner did not file any reply affidavit nor any attempt was made on his behalf to amend the writ petition. When the matter came up before the learned Single Judge for arguments, the learned Advocate appearing for the petitioner stated that in view of the counter he would question the validity of the notification issued u/s 5 of the Regulation on 29-4-1950 declaring the lands to be evacuee property. He raised two questions before the learned Judge. It was firstly contended that prior to the issue of that notification no notice was issued and therefore the notification is void. Secondly it was contended that the description of the property given in the notification was vague. The learned Judge accepted both these contentions and declared the notification dated 29-4-1950, as void. It is in view of the learned Judge that is now assailed in this writ petition. From the facts narrated above, it would be evident that the petitioner had not challenged the validity of the notification issued on 29-4-1950 in his writ petition, on any of the grounds. In fact that notification was not referred to at all. He thought that the notification was issued in 1959. It is only on that assumption the notification of 1959 was challenged on certain grounds. When it was realised that no notification was in fact issued in 1959 but a notification was issued in April 1950 then the petitioner should have either filed a separate writ petition challenging the said notification. If he could do so, or at least amended the Writ Petition with the permission of the Court. He merely chose to raise points in the arguments allowing the writ petition to advanced before the learned Single Judge were not founded at all in the writ petition. The respondent did not have any opportunity to meet the case which was sought to be set up for the first time in the arguments by the petitioner giving a complete go-by to the averments made in the Writ Petition. The record relating to the 1950 notification also was not before the Court. In those circumstances the petitioner ought not to have been permitted to set up altogether a new case, foundation regarding which was not laid in the Writ Petition at all, and no opportunity was provided to the either side to say what they have to say. No inquiry in fact was made in regard to both the

arguments raised by the petitioner. It cannot be in doubt that both the questions raised were not pure questions of law, but were mixed questions of law and fact. Whether, a notice prior to the notification was given or not was the question in dispute. That question of fact therefore had to be gone into before any fault can be found with the notification.

11. Likewise whether there was any mistake in the notification or incorrect description of the property is also a mixed question of law and fact. The notification itself was not before the Court. In fact it is not even before this Court. The record pertaining to that notification was not sent for by this Court at any stage. Unless therefore any inquiry in regard to that is made, it is not possible to determine that question. The counter in a way explains the misdescription.

12. For these reasons we are satisfied that the validity of the notification which was gone into was not quite appropriate and we do not feel any hesitation in setting aside the judgment in that behalf.

13. The contention of the learned Advocate for the petitioner challenging the validity of the notification of April, 1950 was also not tenable u/s 8(2) of the Evacuee Property Act. Section 8(2) of the Administration of Evacuee Property Act reads:-----

"8. (2) Where immediately before the commencement of this Act any property in a State had vested as evacuee property in any person exercising the powers of a Custodian under any law repealed hereby, the property shall, on the commencement of this Act, be deemed to be evacuee property declared as such within the meaning of this Act. and shall be deemed to have vested in the Custodian appointed or deemed to have been appointed for the State under this Act, and shall continue to so vest."

Sub-section (2-A) also is relevant and it reads:

"Without prejudice to the generality of the provisions in sub-section (2), all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising powers of Custodian in any State shall notwithstanding any defect in or the invalidity of, such law or any judgment or order of any Court be deemed for all purposes to have validly vested in that person "as if the provisions of such law had been enacted by Parliament and such property shall on the commencement of the Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly , any order made or any other action taken by the custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken."

14. In the face of these provisions, it is patent that the Civil Court cannot question the validity of notification issued by a Custodian u/s 5 of the above said Regulation. That Regulation has been repealed by another Act and that Act was subsequently repealed by the present

Act. The effect of the above said provision is that the notification would be deemed to have been issued under the present Act, the validity of which cannot be challenged. We are fortified in our view by a decision of the Supreme Court in *Azimunissa and Others Vs. The Deputy Custodian, Evacuee Properties, District Deoria and Others*, On this ground also the judgment of the learned Single Judge cannot stand.

15. The real question in the case was whether the order directing the eviction of the petitioner because of the declaration of the property as evacuee property and passed in pursuance of its allotment to the respondent 5 can be allowed to be give perfect to. The petitioner has made averments in the petition that he is the protected tenant and therefore enjoys 60% of the rights u/s 40 (4) of the Tenancy Act in these lands. The respondents, although admitted the possession of the petitioner, have not expressly admitted the tenancy or the subsequent protected tenancy claimed by the petitioner. The question, therefore, was whether the petitioner has got protected tenancy rights in the lands.

16. It must be remembered that although on the date when the notification u/s 5 of the Regulation was issued, the Hyderabad tenancy Act was not in force as it came into force only in June, 1950, the Hyderabad Asami Shikmi Act was in force. Under the provisions of the Asami Shikmi Act the tenants are conferred with certain rights. very much similar to those recognised by the subsequent Tenancy Act of 1950. Merely because the Tenancy Act was not in force in the date when the notification was issued, it cannot be contended that the petitioner had not acquired any rights under Asami Shikmi Act. although reference was made in the petition to the protected tenancy certificate granted in 1951, the tenancy certificate was not filed before the learned Single Judge. Even if it had been filed this Court could not have made any inquiry in regard to the tenants right, title or interest in the property. the fact, however, remains that the petitioner is claiming 60% of the right in the property declared as evacuee property. It that contention is correct then 40% of the interest in the property might belong to the one and it is to that extent that the property would vest in the Custodian on the ground that the owner has migrated to Pakistan. It is therefore necessary for the Custodian to decide as to what extent these lands have been vested in the Custodian and while deciding that the claim set up by the petitioner would have to be gone into. It is found that the petitioner had protected tenancy rights under the Asami Shikmi Act and further if it is found that under the provisions of the Tenancy Act a protected tenancy certificate has in fact been issued to the petitioner, then there may not be any difficulty in determining the rights of the tenant. The inquiry to the limited extent permitted by the Tenancy Act would have, of course, to be gone into by the Custodian. That has not been done. It may be that a declaration is made in regard to evacuee property. But the question as to evacuee which is said to be vested in the Custodian has always to be determined. It is conceded before us by the learned Advocate for the respondents that such inquiry can be made by the Custodian and a proper decision given in that behalf. Till such decision is given it is not

possible to allow the petitioner to be evicted from his land. It is not possible for this Court to make such inquiry in a proceeding under Art. 226 of the Constitution. The learned Advocates appearing for the respondents in our view, suggested rightly the course that the Custodian should take cognizance of the claim filed by the petitioner and if not filed he would file the same within one month from today. After making proper inquiry by providing the parties necessary opportunity in that behalf, the Custodian should decide as to what extent of the lands are vested in the Custodian and to what extent the protected tenant's rights if any are not hit by the notification as claimed by the petitioner and in the light of the result of such inquiry decide the questions of law relating thereto. Till then it is obvious that the petitioner cannot be evicted. We would, therefore, allow the appeal, set aside the judgment of the learned Single Judge and allow the writ petition partly. We would issue a direction prohibiting the respondents from interfering with the possession of the petitioner till his claim, if filed and if not, he should file it within one month from today, is disposed of in the light of what has been stated above. In view of the circumstances of the case, we make no order as to costs.

17. Appeal allowed.