
(1949) 01 BOM CK 0015

In the Bombay High Court

Case No : Miscellaneous Application No. 142 of 1948

Sayed Md. Abdullah Uraizee

APPELLANT

Vs

P.V. Rao

RESPONDENT

Date of Decision : 18-01-1949

Acts Referred:

Bombay Land Requisition Act, 1948 — Section 5

Citation : (1949) 51 BOMLR 993

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Judgement

Tendolkar, J.—These are a number of rules for writs of certiorari and prohibition and orders u/s 45 of the Specific Relief Act against the Provincial Government, and also against the Secretary of the Health and Local Government Department and the Minister concerned, in respect of orders passed u/s 5 of the Bombay Land Requisition Act, 1948. In a recent judgment of a division bench of this Court in P.V. Rao Vs. Khushaldas S. Advani, to which I was a party, we have held that no proceedings lie either by way of writs of certiorari or prohibition or u/s 45 of the Specific Relief Act against a Minister or against a Secretary of the appropriate department in respect of the acts of the Provincial Government, and that writs of certiorari and prohibition can only be issued against the Provincial Government. The rules, therefore, do not survive as against any parties other than the Provincial Government.

2. The question that has been raised as a preliminary issue for determination in these rules is whether a writ of certiorari lies in respect of an act of requisition u/s 5 of the Bombay Land Requisition Act, (Bom. XXXIII of 1948). In the judgment of the Division Bench, to which I have referred above, we held that an order of requisition u/s 3 of the Bombay Land Requisition Ordinance (Ord. V of 1947) was a quasi-judicial act, and was, therefore, subject to the prerogative writs of certiorari and prohibition. We came to that conclusion mainly on the ground that the power of requisition u/s 3 of the Ordinance was conditional upon the

existence of a public purpose and the question as to what is a public purpose was not left to the discretion of the Provincial Government but had to be objectively determined. The learned Chief Justice in his judgment stated (p. 387) :

It can only exercise its power to requisition provided the land is being requisitioned for any public purpose. What is public purpose is not left to the opinion of the Government. It is an objective fact which has to be determined by Government before it can exercise its power." Later on in his judgment the learned Chief Justice pointed out (p. 392):-

It would be perhaps interesting to note that Government have subsequently taken to themselves wider powers under a subsequent legislation that has been passed with regard to requisition of land. [This no doubt is the Bombay Land Requisition Act, 1948.] Now, it is no longer necessary that the land should be requisitioned for a public purpose. It can be requisitioned for any purpose. This means that before Government can requisition land they have no longer to determine as an objective fact the purpose for which land has got to be requisitioned. Not only the necessity and expediency is left to their discretion, but it seems even the purpose for which land is to be requisitioned.

In my judgement I stated (p. 408) :-

If it were not intended that a public purpose should exist before the power to requisition can be exercised, the words "for any public purpose" would be redundant, or in any event the words would have been, as they now are, in Section 5 of the Bombay Land Requisition Act, 1948, "for any purpose." Whether a public purpose exists is a matter to be determined and not a fact of mere physical observation, for quite obviously the existence or otherwise of a public purpose is a mixed question of fact and law. The act of requisition is, therefore, a quasi-judicial act unless the Ordinance indicates an intention to the contrary.

3. The section of the Ordinance which we had to interpret in the appeal was in the following terms :-

If in the opinion of the Provincial Government it is necessary or expedient to do so the Provincial Government may by an order in writing requisition any land for any public purpose.

Section 5 of the Act, which corresponds to this section, has two changes made in it. Instead of the words "to do so" in the Ordinance the words used in the Act are "so to do"; and instead of the words "any public purpose" the words used in the Act are "any purpose." The transformation of the words "to do so" into "so to do" does not to my mind make any difference to the meaning or effect of the section; but the substitution of the word "any" as qualifying "purpose" instead of "public purpose" surely makes a great deal of difference to the power of the Provincial Government. Whereas under the Ordinance the Provincial Government could not requisition any land at all until there was a public purpose, under the new Act the Provincial Government has power to requisition land for any purpose

which must of necessity imply an unlimited power. Had the section ended there, in view of the observations which I have cited in the judgments of the learned Chief Justice and myself, there would have been no doubt that the act of requisition u/s 5 of the Act was not a quasi-judicial act. But to Section 5 of the Act there is a proviso and there is also another sub-section; and it has been argued on behalf of the petitioners in these petitions that by virtue of this proviso and/or this sub-section the power to requisition is subject to a condition precedent which has got to be determined judicially. The proviso is in these terms :-

Provided that no building or part thereof wherein the owner, the landlord or the tenant, as the case may be, has actually resided for a continuous period of six months immediately preceding the date of the order shall be requisitioned under this section.

As observed by Lord Macmillan in *M. & S.M. Railway v. Bezwada Municipality* (1944) 47 Bom. L.R. 587 :

the proper function of a proviso is to except and deal with a case, which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.

Giving that effect to this proviso all that it does is to take away from the sphere of operation of the power of requisition the premises which have been actually resided in for a continuous period of six months. The proviso, in my opinion, does not constitute a condition precedent to the act of requisition; it is only a fetter on executive conscience. This becomes the more apparent when we consider Sub-section (2) of Section 5, which is in these terms :-

Where any building or part thereof has to be requisitioned under Sub-section (1) the Provincial Government shall make such inquiry as it deems fit and make a declaration in the order of requisition that the owner, the landlord or the tenant, as the case may be, has not actually resided therein for a continuous period of six months immediately preceding the date of the order and such declaration shall be conclusive evidence that the owner, the landlord or the tenant has not so resided.

4. Now, it is submitted that this sub-section in itself constitutes a condition precedent to the power of requisition u/s 5. This sub-section makes it imperative for the Provincial Government to make such inquiry as it deems fit and to make a declaration. But this imperative provision does not appear to me to be in the nature of a condition precedent. It is a procedure which the Provincial Government must adopt before passing an order of requisition. That it is intended to be somewhat in the nature of a formality, and no more, becomes the more apparent from the fact that the sub-section itself provides that the inquiry to be made is such as the Provincial Government deems fit, and further provides that the declaration made under the section in consequence of such inquiry shall be conclusive evidence that the owner, landlord or tenant has not actually

resided for a continuous period of six months. I am therefore not prepared to hold that either the proviso to Sub-section (1) or Sub-section (2) of Section 5 constitutes a condition precedent to the act of requisition under the Bombay Land Requisition Act. The act of requisition u/s 5, therefore, is not, in my opinion, a quasi-judicial act and no writs of certiorari or prohibition can lie in respect of an order made u/s 5 of that Act.

5. Before parting with these petitions, however, I cannot but observe that the power to requisition for any purpose, with which the legislature has thought fit to clothe the Provincial Government, is a power for which I know no parallel in the statutes of any democratic country; and the learned Advocate General has not been able to point out any. In India itself, under Rule 75A of the Defence of India Rules, the power to requisition was for the purpose of "securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community." One has to remember that this was legislation passed during the emergency created by the Great War; and yet the powers of requisition were there circumscribed to specified purposes. We then have Ordinance V of 1947 in which the power to requisition was extended to all public purposes generally, instead of being restricted to specific public purposes as in the Defence of India Rules; and we now have in Section 5 of the Act the farthest possible extension of the power of requisition for any purpose. This progressive curtailment of the rights of the subject in matters of requisition and the progressive enlargement of executive power under democratic rule is a fact deeply to be deplored.

6. The exceptional nature of this power renders it the more necessary that it should be exercised by the Provincial Government with dignity, restraint and discretion, and so as to cause the minimum amount of hardship and inconvenience to those whose premises are requisitioned, for if it is not, the subject is without any adequate and speedy remedy. I have no reason to suppose that the Provincial Government desires to exercise this power in any other manner. The facts disclosed on affidavits in the numerous petitions that have been filed in this Court, and which I will have to dismiss as a result of my present decision, reveal that those entrusted by Government with the execution of this power have not kept these principles before them. First and foremost, the department has, in recent cases, begun to take possession of premises at late hours of the night. This appears to me to be wholly undignified. The dark hours of the night are usually associated in the public mind with the commission of dark deeds and the activities of undesirable elements of society; and it is difficult to see why the legitimate activities of a Government department should not be carried out in broad daylight. Then again, service of a notice of requisition and taking possession are becoming in many cases almost simultaneous acts. Indeed, in some cases possession appears to have been taken even before service of notice, as the notice sent by post was still in the post office when possession was taken. Surely, considerations of humanity, if nothing else, should

induce the authorities to allow a reasonable time to the occupant to vacate the premises or to seek redress, if redress be available to him. Then again, there have been cases where, after the death of a male member of a family, in whose name the tenancy stood, his mother, brothers or other dependents had been dispossessed by an order of requisition. Surely it cannot be-and it is certainly not the position in law-that the tenancy is terminated by the death of a tenant and that the other members of his family cease to have any right to continue in the premises.

7. I have thought it right to draw the attention of the Provincial Government to these incidents, none of which the Advocate General has attempted to defend, in order to press upon them the urgent necessity to restrain the acts of their subordinates, which, I do not believe, have their approval, but which, none the less, tend to bring the Government into disrepute; and also to provide some machinery, at least in the ministerial sphere, for speedy redress of injustice or hardship.

8. When asked why Government did not grant any time to the dispossessed tenant to vacate, the learned Advocate General made a grievance of the fact that this Court had in every case in which such time was given issued an interim injunction restraining Government from giving effect to that order with the result that the working of the requisition department became very difficult. I do not think the grievance is justified. I wish to make it clear that I consider the high prerogative writs of certiorari and prohibition as exceptional remedies; and I wish to remove any impression if it exists in any quarters that interim orders will be made on petitions for the issue of such writs as a matter of course. A strong prima facie case has to be made out before that can be done. The Provincial Government in their turn can, if they give sufficient time to the person whose premises are requisitioned and give a sufficient assurance that possession shall not be taken for a stated period of time expect that notice should be given to them if any application is made for interim relief. But if tenants are liable to be dispossessed even before they have a chance to put in an application and obtain an order even at record speed, then the Provincial Government cannot expect that they should be given an opportunity of being heard before interim orders are made in proper cases. I am happy to say that in some of the graver cases of hardship and inconvenience, the learned Advocate General has, without raising the question that a writ of certiorari does not lie because the act complained of is not quasi-judicial, agreed to take consent orders which are reasonable and fair.

9. The result, therefore, is that these rules will be dismissed.