

(1953) 11 PAT CK 0006

In the Patna High Court

Case No : Misc. Judicial Case No. 357 of 1953

Sm. Kusum Kumari Devi

APPELLANT

Vs

Custodian of Evacuee Property and Another

RESPONDENT

Date of Decision : 09-11-1953

Acts Referred:

Administration of Evacuee Property Ordinance, 1949 — Section 38, 40, 41
Constitution of India, 1950 — Article 226

Citation : AIR 1954 Patna 238 : (1954) 2 BLJR 148

Hon'ble Judges : Ramaswami, J; Banerji, J

Bench : Division Bench

Advocate : B.C. De, L.K. Choudhuri, Rameshwar Choudhuri and Sushil Kumar Jha, for the Appellant; A.G. and Bhuneshwardhari Singh, for the Respondent

Judgement

Ramaswami, J.—In this case the petitioner Srimati Kusum Kumari Devi has moved this Court for a writ in the nature of certiorari to call up and quash the order of the Custodian of the Evacuee Property dated the 1st (sic.) of July 1953 which cancelled an order of the Deputy Custodian dated the 20th of February, 1950 confirming the sale of certain properties.

2. Bibi Um-e-Sakina and Bibi Aisha Mariam owned a house known as "Nawab Manzil" at Fraser Road in the town of Patna. Bibi Um-e-Sakina had 10 annas share in the house property and Bibi Aisha had 6 annas share. On the 15th of September, 1949 the Assistant Custodian of the Evacuee Property made an order u/s 5 of Bihar Ordinance No. 3 of 1949 declaring that the house named "Nawab Manzil" was an evacuee property. The Assistant Custodian took possession of the property on the 17th of September 1949. An appeal was taken against this order by Mr. Hussain Imam, who was acting on behalf of the ladies. On 4th of July 1950 the Custodian dismissed the appeal. It appears that on the 1st of May 1949 Mr. Hussain Imam entered into an agreement for sale of two kathas of the house property in favour of the petitioner. The Bihar Ordinance came into force sometime later on, i.e., on 21st of June 1949. The Central Ordinance, viz.,

Ordinance No. 27 of 1949 was passed on the 18th of October 1949. On 18th of January 1950 the sale deed was executed and registered by Mr. Hussain Imam, with respect to the two kathas of land sold to Ssimati Kusum Kumari.

According to the case of the petitioner a sum of Rs. 3000/- had been paid on the 1st of May 1949 and the balance of Rs. 1000 /- was paid on the date of the execution of the sale deed. The petitioner applied to the Deputy Custodian for confirmation of the sale under the provisions of Section 38 of the Central Ordinance. An enquiry was made into the matter by Mr. U. N. Sinha, Deputy Magistrate, who submitted a report stating that the sale was for a valuable consideration and it was made in good faith. Accepting this report the Deputy Custodian confirmed the sale. Thereafter the petitioner erected a house on the land which is estimated to cost a sum of Rs. 26,000/-. More than 3 years afterwards, i.e., on 18th of May 1953 the Custodian issued a notice against the petitioner asking him to show cause why the order of confirmation of the sale made by the Deputy Custodian on the 20th of February 1950 should not be set aside. The petitioner showed cause but on the 1st of July 1953, the Custodian, Mr. R. P. Singh, held that the Deputy Custodian had no jurisdiction to confirm the sale and therefore set aside his order passed u/s 38 of the Ordinance.

3. The main argument addressed by Mr. B. C. De on behalf of the petitioner is that the Custodian, Mr. R. P. Singh, had no Jurisdiction to set aside the order of the Deputy Custodian made on the 20th of February 1950. In support of his argument counsel pointed out that the whole basis of the reasoning of the Custodian is erroneous. Counsel pointed out in the first place that Section 38(1) of the Ordinance reads as follows:

"No transfer of any right or interest in any property made in any manner whatsoever after the 14th day of August, 1947, by or on behalf of an evacuee or by or on behalf of a person who has become an evacuee after the date of the transfer, shall be effective so as to confer any right or remedies on the parties to such transfer or on any person claiming under them unless it is confirmed by the Custodian."

Ordinance No. 27 of 1949 was repealed and in its place Central Act 31 of 1950 was enacted by the Parliament. Section 40(1) of the Act states:

"No transfer of any right or interest in any property made in any manner whatsoever "after the the 14th day of August, 1947, by or on behalf of any person whose property is notified or declared to be evacuee property, shall be effective so as to confer any rights or remedies on the parties to such transfer or any person claiming under them unless it is confirmed by the custodian."

The Central Act came into force on the 17th of April 1950. But there was an amendment made by Act 11 of 1953 to the various provisions of the Central Act. By these new amended provisions a distinction was made by the Parliament between two class of transfers, viz., transfers respecting property subsequently declared to be evacuee property and transactions entered into by persons in

respect of property already declared to be evacuee property. Section 40(1) of the Act as amended by Act 11 of 1953 states :

"No transfer made after the 14th day of August 1947, by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto.....if at any time after the transfer, the transferor, becomes an evacuee within the meaning of Section 2 or the property of the transferor is declared or notified to be evacuee property within the meaning of this Act unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act."

Section 41 of the amended Act deals with transactions entered into by persons with respect to property already declared to be evacuee property within the meaning of the Act. Section 41 states :

"Subject to the other provisions contained in this Act, every transaction entered into by any person in respect of property declared or deemed to be declared to be evacuee property within the meaning of this Act, shall be void unless entered into by or with the previous approval of the Custodian."

Mr. B. C. De contended that the Custodian misunderstood the legal effect of Sections 40 and 41 of the Amended Act and proceeding upon this misunderstanding has set aside the order of the Deputy Custodian. In my opinion this argument is correct. It is not disputed in the present case that the property was declared to be evacuee property on the 15th of September 1949. The gazette-notification on this point was published on the 26th of October 1949. The transaction of sale was effected on the 18th of January 1950 when the sale deed was executed and registered in favour of the petitioner. The Custodian in his order dated the 1st of July 1953 has proceeded on the basis that Section 41 of the Amended Act 1953" was retrospective in effect and the Deputy Custodian had no jurisdiction to confirm the sale. The view taken by the Custodian is that the proper course for the petitioner was to obtain the previous approval of the Deputy Custodian before entering the transaction of sale.

4. In taking this view of law, the Custodian has, in my view, committed a very serious mistake; for Section 38 of the Central Ordinance has not made a distinction between two classes of cases, viz., transactions entered into by persons with respect to property subsequently declared to be evacuee property and transactions with respect to properties which have been previously declared to be evacuee property within the meaning of the Act. The distinction was for the first time made by the Parliament by amending Act 11 of 1953. As I have said, there is no such distinction made in the Central Ordinance "No. 27 of 1949. Section 38 of this Ordinance does not make any distinction between these classes of transactions. Section 38 merely states : (After quoting the section as in para 3 above, the judgment proceeds as under :) As the law stood on the material date the Deputy Custodian had jurisdiction to confirm the sale of the

property in favour of the petitioner Srimati Kusum Kumari u/s 38 of the Ordinance. There is no provision made in the Ordinance that with respect to property which was already declared to be evacuee property the vendee must obtain previous approval of the Deputy Custodian.

5. There is another defect in the reasoning of the Custodian in this case. The Custodian is of the view that the amending Act of 1953 is retrospective in effect. It is true that the Amending Act is retrospective in this sense that it applies to transactions which have taken place after the 15th day of August, 1947, but it is surely not correct to postulate that the procedure mentioned in the amending Act of 1953 should be applied to transactions of sale which have already been confirmed by Deputy Custodian u/s 38 of the Central Ordinance. The question may be asked -- how is the Deputy Custodian to forecast in the year 1950 that the Parliament would make any amending Act in the year 1953 making a distinction between the two class of transactions?

There is also another important consideration. After the transaction of sale was confirmed by the Deputy Custodian the petitioner had erected a house on the land in question at the estimated cost of Rs. 26,000/-. It is a familiar rule that no statute shall be construed to be of retrospective operation unless the terms of the statute expressly state that it is retrospective or such a construction arises by necessary implication. The rule is based on the presumption that that legislature does not intend what is unjust or that transactions which have already vested title to property should be re-opened or thrown into doubt. There is nothing in the Amending Act, of 1953 to suggest either in express terms or by necessary implication that the distinction made in the new Sections 40 and 41 should have any retrospective effect. Taking this view as to the construction of the amended Sections 40 and 41 I am of opinion that the order of the Deputy Custodian dated the 20th of February 1950 was an order passed with jurisdiction and the Custodian has committed a serious error of law in holding to the contrary and in setting aside the order of the Deputy Custodian.

6. But the question in this case is whether the High Court should grant a writ in the nature of certiorari for quashing the order of the Custodian dated the 1st of July 1953. The Advocate General conceded that the Custodian has committed a serious error of law but argued that there was no ground for Interference of the High Court by the issue of a writ. The Advocate General stressed the point that a writ of certiorari would lie only if the tribunal committed any excess of jurisdiction and not merely because the tribunal committed an error of law. In my opinion the argument is not correct. A writ of certiorari is a remedy of a very special character. The doctrine of certiorari is that the High Court exercises control over inferior tribunal by issue of writ. The control is exercised by means of a power to quash the determination of the tribunal which on the face of it contravenes the law. The scope of a writ of certiorari is very wide. A writ of certiorari lies not merely when the tribunal acts in excess of jurisdiction but also when the tribunal commits an error of law patent on the face of the record; in

other words, the High Court is able by virtue of the writ to see that the inferior tribunals keep within their jurisdiction and also to see that the inferior tribunals observe the law in the course of exercise of that jurisdiction. The principle is stated by Lord Sumner in -- "Rex v. Nat Bell Liquors Ltd." (1922) 2 AC 128 (A), as follows :

"The supervision by certiorari goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".

7. That is also the view taken by the King's Bench Division in -- "Rex v. Northumberland Compensation Appeal Tribunal" (1951) 1 KB 711 (B), it was argued in that case that a writ of certiorari would lie to a tribunal only in case of want or excess of jurisdiction and that a writ could not be granted in respect of the decision of a tribunal on the ground of error on the face of the record. The argument was rejected by Lord Goddard C. J. who held that the Divisional Court had jurisdiction to quash by certiorari the decision of an inferior tribunal for an error of law apparent on the face of the record. The Lord Chief Justice reached this conclusion after examining the matter from the historical aspect. The decision of the King's Bench was affirmed by the Court of Appeal in -- "Rex v. Northumberland Compensation Appeal Tribunal" (1952) 1 KB 338 (C). Adopting this principle I am of opinion that a writ in the nature of certiorari under Article 226 could be granted for an error of law apparent on the face of the decision of an inferior tribunal. In the present case the Advocate General has conceded that the Custodian has committed a serious error of law in acting in revision and in setting aside the order of the Deputy Custodian dated the 20th of February 1950. It is also manifest that the Custodian has revised the order of the Deputy Custodian after a period of three years. The petitioner had constructed in the meantime a house worth Rs. 26,000/- on the disputed land believing that the order of confirmation made by the Deputy Custodian was a valid order. In view of these special facts I think that the High Court should in this case issue a writ of certiorari quashing the order of the Custodian dated the 1st of July 1953.

8. For the reasons I have expressed I think that this rule must be made absolute and a writ in the nature of certiorari should be issued quashing the order of the Custodian of the Evacuee Property, Mr. R. P. Singh, dated the 1st of July 1953.

9. There will be no order as to the costs of this application.

Banerji, J.

10. I agree.