
(2002) 09 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 88 of 1982

Tariq Hameed and Others

APPELLANT

Vs

Custodian Evacuee Property and Another

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Jammu and Kashmir Evacuees (Administration of Property) Act, 2006 — Section 14, 14(1)

Citation : (2010) 4 JKJ 159

Hon'ble Judges : Syed Bashir-ud-Din, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Syed Bashir-ud-Din, Judge

1. Imam-ud-din and Qamar-ud-din owned property in the State of Jammu and Kashmir. At the time of partition of the country in 1947, Imam-ud-

din and Qamar-ud-din both migrated to Pakistan. Their third brother Ahmad Din stayed back in India in this part of the State. On application the

Evacuee Property of both Imam-ud-Din and Qamar-ud-Din was allotted to Ahmad Din who died some where in October, 1964. In 1969

Custodian issued notice for cancellation of the allotment, which was subsequently quashed by the Custodian General. However, on 06-01-1978

Custodian issued another Show Cause Notice for cancellation under Rule 14 of the Rules under Evacuee's (Administration of Property) Act 2006,

(hereafter 'Rules'). This Show Cause Notice came to be challenged in writ petition No. 39/ 1978. The writ petition was dismissed in 1981 as

premature. LPA 24/1981 against the above writ court order was also dismissed on 29-09-1981, after reference to the following excerpt of the

learned Single Judge's judgment:-

That apart, he (Custodian) seeks to cancel the allotment of the petitioners but does not seek to do away with their proprietary rights in the

property, if any. The petitioners will be, therefore, well within their rights to urge before him that they cannot be considered as allottees qua the

entire property since ownership of it has already vested in them as owners thereof. A few questions of fact are bound to arise for decision on

taking further evidence as for example whether or not the property of Imam Din and Qamar Din has developed upon the petitioners through

inheritance and if so to what extent? This can be done only in a regular inquiry initiated by the Custodian.

The LPA Bench also observed:-

Thus, he (Trial Judge) has left it open, for the petitioner to urge this objection before the Custodian in the belief that the Custodian will determine

this objection in accordance with law and rightly so because one of the objections to the show cause notice can be that because of this subsequent

development, the petitioner no longer continues to be an allottee of the entire property.

2. Petitioner litigated the matter further in SLP No. 879 of 1981 which too was dismissed by the Supreme Court with the following observations:-

The High Court has already observed that the petitioners shall be at liberty to urge all the relevant points before the Custodian and to lead evidence

thereon. The Custodian is bound to act in accordance with that order.

3. The petitioner filed an application u/s 14 of the Jammu and Kashmir Evacuees (Administration of Property) Act, 2006, (hereafter Act') for

restoration of the property. During pendency of this application and the earlier Show Cause Notice for cancellation of allotment under Rule 14 of

the Rules which was being inquired, petitioners were directed to produce "'No Objection Certificate' from the Government/Competent Authority as

mandated by Section 14 (1) of the Act. This was contested by the petitioners. The Custodian on 13-03-1982, passed an order holding that

production of 'No Objection Certificate', as requirement of law, is to be produced and directed the petitioners to produce same. This order is

under challenge in this petition, The vires of Section 14(1) and 14 (2) of the Act and Rule 16 (4) of the Rules are challenged as discriminatory and

arbitrary and violative of Article 14 and 19 of the Constitution. In alternative relief direction to the State, Government/Competent Authority to grant

No Objection Certificate', to petitioner is also prayed for.

4. The Ld. counsel for petitioners submit that u/s 14 (2) of the Act, power to reject application for restoration is absolute, unguided and

uncontrolled. There are no guidelines for grant or rejection of, "No Objection Certificate", to an evacuee. Its grant or refusal is at the whims of

Custodian and therefore, violates Article 14 of the Constitution. Rule 16 (4) of the Rules does provide the guidelines for issuance of 'No Objection

Certificate" for Evacuees but no such guidelines are provided for 'No Objection Certificate' to be issued to a heir. Proviso to Sub Section (1) to

Section 14 of the Act, subjects claim of heir to restoration on sweet will of the Government. In case the Government refuse to issue the "No

Objection Certificate", heirs claim for restoration cannot be granted and no guidelines are provided, when the Government is to issue the 'No

Objection Certificate' and when not to issue same. There is a possibility of misuse of the power even for extraneous consideration. The vesting of

the powers in such a situation is arbitrary and discriminatory. The counsel further goes to submit that petitioners having succeeded to property of

their father and his share in the property of his two deceased brothers namely. Imam-ud-Din and Qamar-ud-Din, the property vested in the

petitioners with the death of their father. Therefore, requiring 'No Objection Certificate" in such a case is violation of petitioners rights to acquire,

hold and dispose of property as guaranteed under Article 19 of the Constitution. In case of evacuee, Rule 16 of the Rules does provide guidance

for issuance of 'No Objection Certificate.

5. The counsel for respondent Custodian Evacuee Property and State of Jammu and Kashmir have put forth the common stand and submit that the

impugned order is not vitiated. The provisions of Section 14 (1) and (2) of the Act and Rule 16 (4) of the Rules is intra vires. The provisions do

not violate Article 14 and 19 of the Constitution. The exercise of powers is guided. It is neither discriminatory nor arbitrary. It is further submitted

that both the questions of restoration of property and Show Cause Notice for cancellation of allotment are pending disposal, where entire gambit

of contentions raised in the facts and circumstances of the case is to be

addressed. The factual aspect of the matter have to be gone into and determined on an enquiry. The proceedings and enquiry is in fact kept on hold because of commencement of this writ petition. The provisions of Appeal, review and revision are available to the person aggrieved, when order inter alia is made u/s 14 of the Act. Besides Section 30 (a) of the Act, specifically provides, exercise of powers of Revision, suo moto or on an application made, by Minister In charge (and now substituted by Special Tribunal). The counsel further canvasses that Section 14 of the Act and Rule 16 of the Rules lay down circumstances in which 'No Objection Certificate' can be granted by the Government/competent authority. Rule 16 (4) of the Rules specifically lays down circumstances for issuance of certificate. Section 14 of the Act and Rule 16 of the orders fairly cover the field. The purpose of the enactment and the guidelines thereto, show that the Government while exercising powers u/s 14 (1) of the Act. has to see to it that heir is not engaged in any subversive activities and is desirous to have peaceful and permanent residence in the State. The Custodian is to deal with the evacuee property, so long it is a such evacuee property. Impugned order requiring production of 'No Objection Certificate' is not ultra vires. The petition is as such against the Show Cause Notice. By challenging the vires of Section 14(1) and (2) of the Act, only when no challenge is thrown to Rule 1 (4) of the Rules, while questioning the Show Cause Notice, the matter is finally set at rest by the finding of this Court and the Supreme Court in exercise of SLP jurisdiction. For the alternate relief for direction to the State Government/competent authority to issue ""No Objection Certificate, it is submitted that petitioner has not applied for 'No Objection Certificate' and the allegations in the writ thereto apart from being quite vague is denied. The petitioners are all along questioning the powers and jurisdiction of the Evacuee Department, to demand ""No Objection Certificate' and Government's failure to issue ""No Objection Certificate', yet no particulars of the application made for grant of the certificate is given and even no date is mentioned thereto. The application is not enclosed with the petition, though it is stated that the reminder has been given. Even so many opportunities have been given even by this Court to counsel to submit the particulars and required dates. Respondents have contested in terms of

para 22 of the reply, the assertion that the petitioner has filed the application for 'No Objection Certificate'. It is submitted that no

relief/order/direction can be issued as prayed for, based-on such vague and omnibus controverted allegations.

6. In State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., the Apex Court observed that the approach of the Court in examining

challenge to the Constitutionality of an enactment has to start with presumption of constitutionality. Chiranjit Lal Chowdhuri Vs. The Union of India

(UOI) and Others, : Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, and Burrakur Coal Co., Ltd. Vs. The Union of India (UOI)

and Others, are the other authorities to quote a few among a legion of authorities to lay the same principle regarding presumption in favour of

constitutionality of an enactment and provision thereof.

It is apt to quote the following para of the judgment from State of Bihar and Ors. (supra):-

18. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language

employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment.

After all an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be

plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of

an enactment or its scope and application.

In State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., it is observed:-

A law made by the Parliament or the Legislature can be struck down by Courts on two grounds and two grounds alone, viz(1) lack of legislative

competence and (2) violation of any of the fundamental rights guaranteed in Part-11 of the Constitution or of any other constitutional provision.

There is no third ground....if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) and (g) of Article 19

(1), it can be struck down only if it is found not saved by any of the clause (2) to

(6) of Article 19 and so on. No enactment can be struck down

by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment

cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislature composed as they are of the

representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court

cannot sit in judgment over their wisdom.

In State of Madras Vs. V.G. Row, , a Constitutional bench of five learned Judges in the context of exercise of powers of judicial review regarding

imposing restrictions on the exercise of right under Article 19 observed:-

The test of reasonableness, whenever prescribed, should be applied to each individual statutes impugned and no abstract standard or general

pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose

of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing

conditions at the time, should all enter into the judicial verdict.

7. To judge the substance and weight the arguments on constitutionality of the provisions referred herein above of the Jammu and Kashmir State

Evacuee (Administration of Property) Act, 2006 and the Jammu and Kashmir State Evacuee (Administration of Property) Rules 1988, the relevant

provisions are reproduced below: -

14. Restoration of property:-

(1) The Custodian may, on application made to him in this behalf in writing by an evacuee or any person claiming to be the heir of an evacuee

restore, subject to such terms and conditions as he may think fit to impose, the evacuee property to which the evacuee or other person would have

been entitled if this Act were not in force;

Provided that the applicant produces in support of his application a certificate from the Government or from any person authorised by the

Government in this behalf to the effect that the evacuee property may be so restored if the applicant is otherwise entitled thereto.

(2) On receipt of an application under subsection (1) the Custodian shall cause

public notice thereof to be given in the prescribed manner and after

holding a summary inquiry into the claim in such manner as may be prescribed may-

(i) make a formal order declaring that the property shall be resorted to the applicant;

(ii) reject the application; or

(iii) refer the applicant to a civil court for the determination of his claim and title to the property.

Rule 16 of the Rules provides procedure for restoration of property u/s 14 of the Act. Rule 16 (4) reads as:-

(4). A certificate under the proviso to sub section (1) of Section 14 shall be granted by the Government when it is satisfied that the Evacuee has

returned to his original place of residence for peaceful and permanent rehabilitations and that he is not engaged in any subversive activities.

Reading of Section 34 (1) of the Act shows that on a written application by an evacuee or by any person claiming to be the heir of An evacuee, the

Custodian may restore the Evacuee property to the Evacuee or the person entitled, in exercise of powers vested in Custodian. However, for the

applicant it is incumbent to produce, in support of the application, a certificate from the Government or a person authorised by the Government

thereto ""to the effect that the evacuee property may be so restored if the applicant is otherwise entitled thereto.

Sub Section (2) of this Section provides that on receipt of the application, a public notice thereof is to be given in manner prescribed by the rules,

followed by holding of a summary inquiry into the claim again in the manner prescribed by the rules. After these prescribed steps are taken the

Custodian can either pass a formal order of restoring the property to claimant or reject the claim and the application or refer the applicant to a civil

court for the determination of his claim and title to the property. The Rule 16 of the Rules is supplemental to the provision of Section 14 of the Act,

providing for restoration of the property and procedure therefore, Rule 16 (1) of the Rules provides that in addition to Sub Section (2) of Section

14 of the Act an enquiry into the claim shall be made in accordance with Rule 15 of the Rules in so far as applicable to claim of restoration of the

property.

8. Rule 15 of the Rules so far as applicable to matter u/s 14 of the Act, provides in detail for the procedural part of the enquiry to be made, which includes description of property and nature of interest and rights of the claimant, number of parties and court fee to be paid, verification of the application, presentation of same before the prescribed officer/authority, supply of documents of the application, etc. etc. A bare reading of Sub Section (1) of Section 14 with its proviso, is indicative of the fact that claimant whether an Evacuee or any person claiming to be heir of an evacuee, applying for restoration of property, is to produce the certificate from Government or from prescribed authority in support of the application that the Government does not stand in between the claimant and the restoration of the Evacuee property, provided the applicant/claimant is entitled thereto.

9. Rule 16 (4) of the Rules prescribes that a certificate required under proviso to sub-section (1) to Section 14 or the Act shall be granted by the Government when it is satisfied that the evacuee has returned to his original place of residence for peaceful and permanent rehabilitations and that he is not engaged in any subversive activities. The proviso is to be read subject to provisions of Sub Section (I) of Section 14 of the Act and as supplemental to that provision of the Act. While as, sub rule (4) of Rule 16 of the Rules provides for the eventuality when the evacuee returns to his original place of residence for peaceful and permanent rehabilitations and is not engaged in any subversive activities, certificate can be granted by the Government. Obviously, this rule provision is meant for an eventuality to take care of the evacuee who returns for peaceful and permanent rehabilitations in the State of Jammu and Kashmir. This provides the guidelines for such an evacuee. However, Section 14 of the Act is wide enough not only to include the evacuee applying for restoration of the property, but also the claim of a heir of an evacuee to restoration of the property. The heir may be an evacuee or permanent resident of the State. In either case the condition is that whether evacuee or heir, he/they is/are to satisfy the government that the person/claimant, peacefully and permanently resides in the State and in any eventuality is not engaged in any subversive activities. It cannot be said that a heir or claimant may or may not be resident in the State of Jammu and Kashmir even though engaged

in subversive activities and not residing at his original place peacefully, is still to be given the prescribed certificate by the competent authority, in

respect of a situation wherein he is to live permanently and peacefully in the State.

10. Contextually, it is to be taken note of that the Jammu and Kashmir State Evacuee (Administration of Property) Act, 2006, was passed at the

time of wide spread civil disturbance and partition of the country, as India and Pakistan and occupation of part of the territory of the Jammu and

Kashmir State still under the control of the Pak. Armed Forces. The property left behind in Jammu and Kashmir by the person(s) who opted to

reside in Pakistan or part of J&K State under the occupation and control of the Pak Armed Forces, was to be administered, looked after and

maintained. It is in this context that the Act, safeguards the interests of the Evacuees and provides for administration, management and preservation

of the evacuee property. The evacuee property as defined by the Act includes any property in which an evacuee has any right or interest. The

allotment of the Evacuee property by the Government or Custodian as person authorised by the Government, is just a temporary right of use or

occupation of any immovable property of an evacuee, otherwise than as lease.

11. The exercise of powers by the Government or authorised person for issuing the prescribed certificate u/s 14(1) of the Act, whether to an

evacuee or heir can be fairly comprehended, once reference is made to Section 14 (A) of the Act. This Section provides that where any evacuee

or his heir is entitled to the restoration of any evacuee property, the Government or any officer, if of the opinion that it is not expedient or

practicable, to restore the whole or any part of such property to the applicant, the Government may transfer any other immovable property

belonging-to it in lieu of the evacuee property or part thereof to the claimant, applicant found entitled to the restoration of such property. Even the

Government can acquire such evacuee property or the portion thereof on payment of compensation under the Jammu and Kashmir Land

Acquisition Act. Therefore, the requirement of certificate under proviso to Section 14 (1) of the Act indicating that the Government may have no

objection to the restoration of the Evacuee Property to the claimant, if otherwise entitled to can be visualised not only for the purpose indicated in

sub rule (4) of Rule 16 the Rules, but even for the purpose or reason which go beyond the purpose given in Rule 16 (4) of the Rules. Obviously, the contingencies and situations for the Government in which to act while considering the application for grant of certificate are there. For granting the certificate, the Government is to act within the ambit of all enabling provisions of the Act and Rules. The facts and circumstances as also the contingencies when to issue the certificate cannot be cataloged or enumerated. The question of title to the Evacuee Property on which basis the claim for restoration is made in this case, is yet to be determined.

12. Section 14 (2) of the Act provides fair and reasonable procedure and manner in which the matter of claim of restoration is to be decided, notwithstanding that a summary enquiry into the claim is provided for. The Custodian may accept the claim and restore the property or may reject the application or yet if not in a position to determine the claim and title to the property refer the matter for such determination to a Civil Court.

13. In Ghulam Qadir v. Special Tribunal and others, 2001 (7) SCC 518, the Supreme Court while pronouncing on various provisions of the Jammu and Kashmir State Evacuee (Administration of Property) Act, 2006, (1949 A.D) and Rules framed thereunder germane to the case before their Lordships observed:-

59. It is true that the Act neither supersedes the law of succession applicable to the evacuee nor does it confer powers upon the authorities under the Act to adjudicate the right to succession of the claimant. If the claim of a person approaching the Custodian is undisputed on admitted facts such a claim may be adjudicated by the authorities in accordance with the provisions of the Act and the procedure prescribed under the rules which envisages the service of a notice to all concerned.

However, the claim and title to the evacuee property may be disputed or otherwise complicated in which contingency Custodian can refer the applicant/claimant to the Civil Court for determination of such question.

14. Seen thus, it cannot be said that the power to reject an application for restoration is absolute, unguided and arbitrarily. The lay out for exercise of powers is well set and grounded on reasons. It is not dependent on ipsi-dixit of the Custodian. The Government is also provided with the basis and given powers to be exercised for reasons within the legal parameters set for

issuance of the certificate as required by Section 14 of the Act and Rule 16 of the Rules. The charge of misuse of the powers or use thereof for extraneous considerations is devoid of merit. In fact there is a presumption in favour of official acts being performed in due course and legitimately.

15. Section 14 (1) and (2) of the Act and Rules 16 (4) of the Rules, do not in any manner militate against the concept of vesting of rights in a heir

on the death of last property holder. The provision itself provides for restoration of the Evacuee property to a heir, once the claim and title of the

property is made out. By no stretch of reasoning, it can be said that these provisions deprive a heir of the rights, which such heir acquire in an

evacuee property, because of his relation with the evacuee and other related contingency happening may be death of evacuee. Allotment under the

Act does not confer any ownership rights in the land on the allottee and the interest of the allottee of such land cannot be said to be property within

the meaning of fundamental rights. Under Article 19 of the Constitution, protection is to the properly capable of acquisition and disposal. The

Government or the prescribed authorities holding the property with a view to administer and manage the properties and to improve and protect

such properties are more or less trustees. Therefore, it cannot be said that evacuee property would go straight to a heir by operation of law.

without the Government or the authority having to do anything with such evacuee property. The law of succession is recognised and observed by

State, governed by rule of law. The claim to restoration of the evacuee property as an heir has to be determined in accordance with the provisions

of law, of course subject to public policy and exigencies of situation and that is exactly what Section 14 (1) and (2) of the Act and Rule 16 of the

Rules, has done.

16. The Act has been enacted with the object of administering, managing, preserving and improving the Evacuee property. It is to be so looked

after by the Government, as it is obligated to do so due to absence of evacuee. The Government and the prescribed authorities are holding

property in trust on obligation to restore it to the evacuee or the heirs subject to provisions of the Act. The condition for producing the certificate in

support of application for restoration of the property by proviso to Section 14 of

the Act and 'No Demand Certificate'" by Rule 16 (4) of the Rules, ingrained as it is in the provisions, is with the object and purpose that the property is restored to the genuine and real person or heir(s) entitled to such restoration. The Government as trustees cannot afford to part with the property as such trustee expect in favour of the real owner or a person legally entitled to restoration of such property. In such circumstances, classification of an evacuee or a heir within the meaning of Section 14 (1) of the Act and Rule 16 (2) of the Rules appears real and reasonable. They are class in themselves. The nexus between basis and object of the classification and the classification itself by enacting Section 14 (1) of the Act is real and apparent.

17. It is seen further that Section 30 of the Act provides for the relief of appeal, review and revision to a person aggrieved of an order made inter alia u/s 14 of the Act on terms of Section 30 of the Act. Even Section 30 (A) of the Act give general powers of revision, suo- moto or on application made in this behalf to Minister Incharge (now Special Tribunal). These provisions also take sufficient care of the orders passed u/s 14 of the Act in the matter of restoration of declining to restore or reference of the matter to Civil Court. The exercise of powers u/s 14 (2) of the Act cannot be said to be in any manner vitiated or discriminatory.

18. In the aforesaid view of the matter and for the above reasons, I am of the opinion that provisions of Section 14 (1) and (2) of [he Act and Rule 16 (4) of the Rules do not suffer from any constitutional infirmity and the contentions/arguments advanced of hostile discrimination and arbitrariness in the context of Article 14 and Embargo to acquire, hold and dispose of the property as guaranteed by Article 19 of the Constitution, are not available to the petitioner in this case.

19. Appropriate alternative relief for directing the Government to grant "'No Objection Certificate' cannot be also countenanced. Whether to grant or not to grant such a certificate is a matter for the Government and the competent authority. It is not shown that the petitioner did apply for such certificate and that the Government has not considered the matter or is simply sleeping over the matter. As the matter is still alive and pending before the competent authority with regard to allotment and restoration of the property, the petitioner is free to take steps under the Act and Rules

for the prescribed certificate. Dismissed.