

(2007) 03 DEL CK 0138

In the Delhi High Court

Case No : Writ Petition (C) No. 429 of 1984

Tasnemul Haq

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 19-03-2007

Acts Referred:

Administration of Evacuee Property (Central) Rules, 1950 — Rule 29
Constitution of India, 1950 — Article 226
Displaced Persons (Compensation and Rehabilitation) Act, 1954 — Section 20B
Limitation Act, 1908 — Article 137, 12, 4, 5

Citation : (2007) 141 DLT 647

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Rajeev Goyal, for the Appellant; P.P. Malhotra, ASG, Suresh Kait, for Respondent 1 and Dinesh Singh, Joint Secretary, Ministry of Home Affairs in person, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The petitioner has filed this writ petition under Article 226 of the Constitution of India seeking directions against the respondents, Union of India and the Commissioner of the Department of Rehabilitation, for allotment of land and for mesne profits. The factual dispute is limited.

2. The Administration of Evacuees Property Act, 1950 (hereinafter referred to as the said Act) was enacted for providing administration of evacuee property and certain matters connected therewith. On the Partition taking place in 1947, there was large migration of population. Properties were left behind in India by persons who migrated to Pakistan. The said Act was enacted to deal with the properties of such persons who had so migrated to Pakistan which properties were declared as evacuee properties.

3. The petitioner was a Government employee and continued to remain in India though his brother and sister migrated to Pakistan. The custodian of the evacuee

property under the said Act inadvertently declared the petitioner also an evacuee along with his brother and sister and, thus, the total properties held by them was declared as evacuee properties. The petitioner aggrieved by the same, filed a representation before the Custodian General for restoration of his share in the properties. Section 16 of the said Act contains the power for the Central Government to restore such properties.

4. The relevant portion reads as under:

16. 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 Central Government, or from any person authorised by it 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 Sub-section (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

(a) make a formal order declaring that the property shall be restored to the applicant; or

(b) reject the application; or

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

Provided that no order for restoration shall be made under this section, unless provision has been made in the prescribed manner for the recovery of any amount due to the Custodian in respect of the property or the management thereof.

5. The said representation resulted in an order being passed on 18.3.1955 by the Assistant Custodian, Gurgaon in the following terms:

ORDER:

This is an application by Mohd Islam-UI-Uk s/o Mohd Salim-ul-uk that the land in question belonged to Salim-ul-Hak and devoted on his death, on his son, daughters and widows according to Muslim Law. The sons from one wife had no share left on account of Mithal partitions petitions mother also died and his two brothers and two sisters and he succeeded. The plaintiff never migrated to Pakistan and has Therefore his 1/3 shares in tact. He wants that his one third shares in the land in question be declared not to be evacuee property.

The evidence led by him conclusively shows that he has all along been here serving in the Lady Irwin Hospital as Senior Clerk. Therefore his share could not be evacuee property. Extent of his share is established by the Revenue Record showing that his step brothers had no share left in this land on account of partition among the family members and this land came to plaintiff mother and brother. plaintiff's mother died later but the step son could have no claim to her share against the real son and daughter. Therefore, the mutation in favor of his step son was wrong. The possession has not been of step son actually so as to ripen into ownership. Therefore, it is declared that 1/3rd share in the land in question is petitioner's share and the same share is not evacuee property.

6. A reference to the aforesaid order shows that there are two aspects dealt with in this order. The first is the basic aspect that the petitioner had all along been serving as a Senior Clerk in Lady Irwin Hospital and, thus, his share in the properties could not be declared as evacuee properties. The second aspect is the extent of his share which was declared as 1/3rd. This share of 1/3rd was arrived at after discussing the basic principles of Muslim Law and the number of heirs involved. In fact, the order deals with the wrong mutation made in favor of the step son and after looking into all these aspects 1/3rd share was declared as non-evacuee property.

7. The aforesaid order, however, did not result in the restoration of the land on account of the fact that in the meantime the land in question had been sold to third parties. This resulted in various communications inter se the parties as to how to compensate the petitioner. Some of these communications need to be referred to.

8. In the course of these communications addressed between the parties, the question of the exact particulars of land cropped up as the same are not described in the aforesaid order. On 2.2.1961 the District Rent and Managing Officer at Rohtak requested the petitioner to disclose the particulars of the land including its khasra numbers in respect of which the land had been declared as non-evacuee land. The petitioner vide letter dated 27.12.1961 forwarded the same to the concerned authority. The Assistant Custodian, Patiala addressed a communication to the same authority at Rohtak about the implementation of the orders and sending the complete file therewith. The property was stated to be urban, agricultural land within the jurisdiction of that authority. Another communication was sent by the Assistant Custodian, Jullundhar to the Chief Settlement Commissioner informing that since the land involved in the case was situated in urban area of Faridabad, the District Rent and Managing Officer was requested to look into the implementation of the orders passed and once again requesting urgent action in this behalf. Further communications continued in 1965 where again and again more copies of the same Jamabandis were asked from the petitioner, which were duly supplied, last such memorandum apparently being issued on 30.8.1965.

9. The controversy has began with the memorandum dated 27.1.1967 of the Assistant Custodian, Punjab, Jullundhar. The memorandum reads as under:

MEMORANDUM:

Please refer to memo No. ARJ/1963 dated 9.1.67 from the Deputy Commissioner Gurgaon, to this office, and copy enclosed to you for information.

2. The Deputy Commissioner, Gurgaon, has reported that the requisite file was sent to Assistant Custodian, Rohtak, on 17.7.62. The office of the Assistant Custodian Rohtak has since been wound up and all the record were shifted to Jullundhar office. All efforts were made to trace out the said file but all in vain.

3. According to the Jamabandi produced by you at Camp Palwal, you have been found entitled to the release of 7/24 share in Khasra Nos. 137, 147, 150, 151, 152, 157, 136, 144, 146 and 148 situate in Faridabad. Teh: Ballabhgarh, District Gurgaon, to the extent of 8 B-4B in the light of the order passed by the Assistant Custodian Gurgaon, on 18.3.1955.

4. Please intimate by return of post whether you are satisfied with the above cited area. On receipt of your reply, further action to implement the orders passed by the Assistant Custodian Gurgaon and Deputy Custodian General, will be taken.

5. The matter may please be treated as urgent.

10. A reading of the aforesaid order shows that the earlier order of the Assistant Costodian, Gurgaon dated 18.3.1955 was sought to be reviewed and the share of the petitioner was sought to be changed from 1/3rd to 7/24th in view of the Jamabandi sent by the petitioner. An interesting aspect is that this order does not take into consideration the purport of the order dated 18.3.1955 whereby it was noted that the Revenue records have not correctly shown the shares of the parties and the correct share of the petitioner was 1/3rd.

11. The controversy did not end and the matter continued to be prolonged for almost 15 years even thereafter. During this period of time the petitioner kept on protesting that his share had to be 1/3rd and not 7/24th. The second aspect was as to how the petitioner could be compensated for the share of his land which had been declared as non-evacuee. In this behalf the petitioner was shown different lands from time to time to compensate him for the land of which the petitioner was deprived under the mistake that his share was evacuee land. The initial attempt was to give him the same area of land which he had. The petitioner protested and took some land under protest. This was done vide a memorandum dated 8.11.1978 when 10 Bighas of land was given to the petitioner in village Lampur. Thereafter additional lands were made available to the petitioner on the plea of the petitioner that the lands which he owned earlier and which he was deprived of were not of the same area. The petitioner claimed that this allotment of land in Lampur was in partial satisfaction of his claim in terms of the letter dated 13.11.1978. The petitioner again addressed a letter

dated 23.5.1979 stating that the area of land which should have been allotted to him should be more. The petitioner claimed that he should be given the land at current market value and not on area to area basis. On consideration of the representations of the petitioner, a decision was communicated to the petitioner to allot him 17 Bighas and 12 bids was of land over and above 10 Bighas already allotted to him in village Lampur vide a memorandum dated 6.6.1981. The petitioner was asked to indicate the choice of the village where he wanted the land to be allotted to him. The petitioner saw various lands whereby possession of land situated in village Hamidpur was given to the petitioner on 19.6.1982. The possession proceedings of the said date show that encroachments were removed and after demarcation, possession was handed over to the petitioner.

12. The present petition has been filed thereafter seeking multiple prayers. The petitioner has prayed in the following terms:

PRAYER

That since the Government was not empowered to dispose of the lands belonging to the petitioner, they may be directed that

(i) they should allot lands to the petitioner equivalent in value of the lands taken over from the petitioner in a most illegal and unnatural way;

(ii) they should give mesne profits for the use of the lands belonging to the petitioner;

(iii) they should adopt the area of 9B - 7B Pukhta as representing 1/3rd share in the composite property in Faridabad which is 8/24 of the total area of such lands and not force the petitioner to accept the area of 8 Bighas - 4 bids was which is just 7/24 of the total area;

(iv) they should be directed to allot all the lands in solid blocks and in adjoining villages and for this action, they may be directed to take back the lands at present allotted to the petitioner in village Lampur.

13. The respondents have contested the petition and have filed a counter affidavit. It is the case of the respondent that the claim of the petitioner was fully satisfied when the two lands were allotted to the petitioner. The share of the petitioner was wrongly considered as 1/3rd in the order dated 18.3.1955 which was remedied in 1967. Thereafter appropriate equivalent land has been restored to the petitioner. The plea of the respondent is that the basis is not to be value for value but only area for area. In that behalf also in view of certain objections of the petitioner about the nature of the land and the total quantum of land allotted to the petitioner, an additional land was allotted subsequently in 1981, of which possession was handed over in 1982. This primarily arose on account of the nature of measurement of the unit of Bigha in Haryana and in Delhi.

14. The hearing in the present matter started quite some time back and it was thought that a feasible settlement could be arrived at between the parties in view

of the nature of controversy. In the proceedings of 11.3.2005 the controversy was set forth as under:

- i) The land of the petitioner being wrongly declared as an evacuee property, the same could not have been dealt with;
- ii) The extent of the share of the land taking into consideration the order dated 18.3.1955 declaring the share as 1/3rd which was subsequently sought to be modified to 7/24;
- iii) Whether the petitioner is entitled to compensation of area to area basis or value to value basis.

15. There were certain proceedings held thereafter where again the endeavor to see that the matter is sorted out did not succeed. In this behalf the report of Mr.Jagdish Sagar was put to the counsel for respondent No. 2, who on further enquiry informed that no action had been taken on the said report which favored the petitioner and the matter had remained only under consideration. The report was not acceptable.

16. There were also some unfortunate developments inasmuch as instructions were not forthcoming to the counsel for the Union of India and the concerned Officer was summoned. The concerned Officer, Mr.Dinesh Singh, Joint Secretary of the Ministry, thereafter appeared and the question of the share of the petitioner being 1/3rd was agreed upon. However, this issue has again raked up as is apparent from various nothings. I do not deem it appropriate to proceed in this matter on the basis of any such concessions in view of the prolonged controversy in that behalf and thus have proceeded to hear the matter to determine the legal question involved in the present dispute. The Joint Secretary concerned has also tendered his unqualified apology to this Court and has remained present in Court during these proceedings. I deem it appropriate to accept the apology and drop any further proceedings against him.

17. The first question which has to be examined is whether the petitioner was rightfully deprived of his land. The answer to the same is obviously in the negative since the land of the petitioner was wrongly declared as evacuee property. However, that aspect was corrected by the order dated 18.3.1955. The difficulty arose on account of the sale of the said land to third parties and the question thereafter arising as to how the petitioner ought to be compensated.

18. It is the submission of learned Counsel for the petitioner that the subsequent transaction ought to have been cancelled in the original land restored to the petitioner. It is also pointed out that in another connected legislation, The Displaced Persons (Compensation & Rehabilitation) Act, 1954 Section 20B provided for restrictions on the restoration on certain properties. The Central Government was given the power to decide not to restore the land and in such eventuality land in lieu of the original property to be restored could be given. This provision was struck down in Lachhman Dass and Others Vs. Municipal

Committee, Jalalabad and Others,

19. In my considered view, there is no doubt that normally the land ought to have been restored to the petitioner. However, the respondent decided to give alternative land to the petitioner. A considerable communication ensued thereafter. The petitioner accepted the alternative land though dispute was raised as to the quantum of the land and the valuation thereof. In my considered view in such a situation it is now not open at this stage for the petitioner to state that the allotment of land to the petitioner and the acceptance thereof by the petitioner should be ignored and the matter should go back to the restoration of the original land to the petitioner. The petitioner is, in my considered view, estopped from raising such a plea at this stage having accepted the alternative lands without any demur or protest except on the issue of share and value.

20. The next question which arises for consideration is as to what is the share of the petitioner since indisputably the petitioner has been compensated for land on the basis that his share is 7/24th. There is no doubt that the share of the petitioner was declared as 1/3rd by the order dated 18.3.1955 by the competent authority. The matter remained as such till the second order was passed on 27.1.1967 reviewing the earlier order dated 18.3.1955. The question, thus, arises is whether such a power of review could have been exercised after a period of 12 years. In my considered view the answer to this question is in the negative for the reasons set out hereinafter.

21. The first aspect is that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. In this behalf judgment of the Apex Court in *Patel Narshi Thakershi and Ors. v. Shri Pradyumansinghji* 1970 U.J. (S.C.) 418 may be relied upon. Under the said Act, such power did exist u/s 26. This power was, however, deleted by a conscious legislative decision w.e.f. 22.10.1956. Thus, no such power of review existed on the date when it was sought to be exercised on 27.1.1967. Section 26 as it stood reads as under:

Under this section the powers of Review or Revision have been conferred on the Custodian, Additional Custodian or Authorised Deputy Custodian.

Note_ The word "Authorised Custodian" has been used only in this Chapter. Under Clause 2 of Section 24 the Custodian can transfer appeals for disposal to an Additional Custodian or to a Deputy Custodian but in such an event the Custodian shall have to authorize in writing and the persons so authorized shall be called "Authorized Deputy Custodian."

I Clause (1) of this Section relates to the revisional powers while Clause (2) relates to the powers of review.

Review.

(a) The officers mentioned in Clause (2) may review their own orders. There can be no review of the orders passed by an officer subordinate to him. If an order

passed by a subordinate officer is wrong, the remedy is by way of revision under Clause(1) and not by way of review.

(b) The use of the words "his own" in the last line of Clause (2) does suggest that the power of review can be exercised only by the officer who passed the original order and not by his successor in office.

(c) No order on review can be passed without a previous notice to the person concerned.

Revision.

(a) The Custodian, Additional Custodian and Authorised Custodian alone have powers of revision. An Assistant or Deputy Custodian cannot exercise the powers of revision.

(b) The power of revision can be exercised either sue moto or on the motion of some person but such power can only be exercised after giving the person to be affected prejudicially a reasonable opportunity of being heard.

If an order is passed in revision without such opportunity it will be illegal.

(c) As the power of revision has been conferred on three officers specified in Clause (1), it has been laid down in the second proviso to that clause that if one of such three officers takes action, the other officers will be debarred from entertaining an application for revision.

(d) Revisional powers will be exercised only to examine the legality or propriety of the order complained of.

II. Clause (3) of this section is very important. According to this clause more than one application for review may be filed; provided that it relates to a declaration in relation to an intending evacuee.

This clause has two provisos. The first proviso provides that no application for review under this clause be entertained unless the conditions laid down in Sub-clauses (a) and (b) of this clause are satisfied.

The second proviso provides that the declaration made under this clause requires confirmation by the Custodian-General. Without such confirmation the declaration granted by any of the three officers mentioned in this section will not be effective.

22. It may be noticed that some controversy has been sought to be raised, though not contained in the counter affidavit, that the order dated 18.3.1955 may possibly be of the year 1958. The respondents have neither pleaded nor have been able to produce any record to substantiate the same. Be that as it may, if the order had been of 1958, then the power of review did not at all exist on the date when the said order was passed. Thus, it would be of no help to the respondent. The date of this order is further noted in the subsequent order as 27.1.1967. It is only because this order is of 1955 that it is sought to be

canvassed that the power of review existed when that order was passed and, thus, has been so exercised on 27.1.1967.

23. None of the counsel for the parties have been able to bring to this Court any judgment on the aspect as to what would be the position where a review power is abrogated after the passing of the original order. Thus, whether the review power can be exercised in respect of an order which was so passed when that power existed is of question on which no judgment has been cited. However, it is not disputed that by this very nature, review power cannot be inferred and once such a power is abolished, there can be no question of exercise of such power. This aspect finds support from the judgment of the Apex Court in *M/s. Ambalal Sarabhai Enterprises Ltd. Vs. M/s. Amrit Lal and Co. and Another*, which dealt with the issue of the amendment of the Delhi Rent Control Act and the provision whereby on the rent being more than Rs. 3500 per month, the matters were taken outside the purview of the Rent Act.

24. The other aspect is the question of limitation for exercising such powers. Rule 29 of The Administration of Evacuee Property (Central) Rules provided for a review within a period of 30 days. The rule reads as under:

29. Appeals_Review_Revisions_

(1) All appeals under the Ordinance shall, when they lie to the specially designated District Judge, or the Custodian, be filed within thirty days of the date of the order appealed against and when they lie to the Custodian General, within sixty days of such date.

(2) The petition of appeal shall be presented in person or through a legal practitioner or a recognised agent when the appeal lies to the Custodian or a specially designated District Judge. Where an appeal lies to the Custodian General the petition of appeal may be sent by registered post.

(3) Every petition shall state succinctly the grounds on which the order appealed from is attacked and shall be accompanied by a copy of such order unless the appellate authority dispenses with such copy.

(4) Except as otherwise expressly provided in the Ordinance or in these Rules, the procedure laid down in Order XLI of CPC shall, so far as applicable, apply to the hearing and the disposal of appeals under the Ordinance.

(5) Any petition for revision when made to the Custodian shall ordinarily be filed within thirty days of the order sought to be revised, while a petition for revision when made to the Custodian General shall ordinarily be made within sixty days of such date. The petition shall be presented in the same manner as a petition of appeal when it is made to the Custodian but it may be sent by registered post when made to the Custodian General. The petition shall be accompanied by a copy of the order sought to be revised and when made to the Custodian General by also a copy of the original order unless the appellate authority dispenses with the production of any such copy.

(6) An application for review of any order may be made within thirty days of the date of such order and shall be presented either in person or through a legal practitioner or a recognised agent.

(7) The provisions of Section 4, 5 and 12 of the Indian Limitation Act of 1908, shall, so far as they are applicable apply in computing the period of limitation provided in this rule.

(8) A notice of any appeal, revision or review may be given, in addition to the persons concerned, to any other person who, in the opinion of the authority hearing the appeal, the revision or the review, may be interested in the same.

(9) Any authority hearing any appeals or revision may admit additional evidence before its final disposal or may remand the case for admission of additional evidence and report or for a fresh decision, as such authority may deem fit.

25. The power has been exercised after 12 years have lapsed. Not only that, even if the residuary Article 137 of the Limitation Act would apply, certainly the review power could not be exercisable beyond a period of three years. I am, thus, of the considered view that there was no jurisdiction to review the order which was passed on 18.3.1955 and any exercise was certainly much beyond time. This is apart from an important aspect on merit that the order dated 18.3.1955 proceeded to determine the share of the petitioner in accordance with the personal law applicable to the petitioner while the order dated 27.1.1967 proceeded to do so only on the basis of Revenue entries. The order dated 18.3.1955 itself had recorded reasons why the Revenue entries should not be the basis of determination of share since it did not correctly record the share of the parties.

26. The result of the aforesaid is that the share of the petitioner is held to be 1/3rd and not 7/24th.

27. The last aspect to be examined is the question of the nature of compensation to be given to the petitioner. The petitioner has claimed value for value while it is the plea of the respondent that the land has to be restored on a area to area basis. I have no doubt in my mind that really speaking the basic principle which has to be kept in mind is that the petitioner must be in the same position as the petitioner was if the land would have been restored to him. Thus, it cannot be said that the land of very inferior quality can be allotted to the petitioner on the area to area basis. This is the reason why various lands were shown to the petitioner with the object of compensating the petitioner on a area to area basis by taking into consideration the intrinsic quality of the nature and value of the land which was sought to be allotted to the petitioner. Thus, though I am of the view that the petitioner must be put in the same position as the petitioner was if the original land would have been restored, the procedure adopted of making available land on area to area basis, the land being in the nature of similar value to the original land, satisfies the test of restoration of the petitioner to the original position. The petitioner took his own time to make a decision, picked up

the land in the requisite area while rejecting other lands and, thus, the petitioner cannot reopen this chapter.

28. The real opposition by the respondent to the value basis for determination for compensation of the land appears to be the judgment of the Supreme Court in the case of Lachhman Dass and Ors. etc. (supra). The said judgment, however, only held that Section 20B of the Displaced persons (Compensation & Rehabilitation) Act, 1954 as ultra virus the Constitution as the provision was for the option to the Government not to restore the whole or part of the property. This would amount to depriving the original owner of the property. The Government has the option of transferring any other property being of the same value as the property to be restored. The section was held not to fix any compensation or lays down any principle for compensation apart from the time period in relation to which such valuation has to take place. A reading of the said judgment by the respondents, as apparent from the nothings, show that the respondent is under a misconception that there cannot be any restoration on a value basis. This is not the principle laid down in the said judgment. In fact, a reading of the judgment shows that what weighed with the Constitution Bench while striking down Section 20B of that Act was the unbridled power with the Government to deprive a person of the right to his property. There was no proper method of valuation. In the present case the Government is unable to restore possession even though there is no provision for giving any alternative land. The respondents have to put back the petitioner in the original position. This can be on the basis of area to area but that would imply putting the petitioner in the original position by giving land of similar value. Thus, the element of valuation intrinsically comes into play while determining which land has to be allotted on an area to area basis.

29. The only linked question which remains now is how to compensate the petitioner for the differential of the area in land between the share of 1/3rd and 7/24th. Mr.Dinesh Singh, Joint Secretary, present in Court, states that the respondents have been following the practice and will follow the practice of restoration on area to area basis to the petitioner. This, to my mind, would imply that petitioner would be restored with equivalent land as he has been deprived of in respect of the remaining share. However, this would equally imply that the land to be restored to the petitioner must be of a similar nature and location as the earlier land as it is only in that eventuality that the petitioner can be properly compensated for being deprived of the original land. It is stated by the respondent that the lands are available.

30. Before parting with the matter, I must note on record that the basic endeavor to see that resolution of the dispute seems to have lost on both the parties, I can, but not state, what has been referred to in Ambalal Sarabhai Enterprises Ltd. (supra) as under:

To win a battle for a client is the legitimate expectation of all but in doing so deliberations should not be such which lengthens the litigation, even if it confers

temporary gain to one's client in a lis. Every member of the judicial fraternity has to play his role with the main object to find the truth and render justice to the litigant. This judicial culture has not to be lost sight of. The present case is one of such cases, which causes concern in this regard.

31. A writ of mandamus is issued directing the respondent No. 1 to allot to the petitioner land for the differential area arising from the share of the petitioner being determined as 1/3rd in the original land as against 7/24 on area to area basis but the land being of similar nature and location as the land which the petitioner was deprived of originally by wrongful sale to a third party, though the land was non-evacuee land. The petitioner, thus, must be fully compensated in the value terms.

32. Learned Counsel for respondent No. 1, on instructions, states that the list of such lands will be made available to the petitioner within three months from today and the petitioner can exercise his option thereafter. In case the appropriate land is not made available, the question of how to compensate the petitioner in equal terms will remain open to the petitioner to be adjudicated in separate legal proceedings.

33. Petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.