

# DELHI HIGH COURT

H. Singh

Vs.

Custodian Evacuee Property (Delhi)

First Appeal No. 175-D of 1962.

(S. N. Andley, J.)

24.1.1969

## JUDGEMENT

**S. N. Andley, J.**

1. The property in question was mortgaged by Mohd. Ismail, respondent No. 9 and at the instance of the mortgagee, who had filed a suit and in whose favor a Mortgage Decree had been passed it was put to sale through the Court Auctioneer. In this sale, Kabool Singh (original appellant) and Raghunath Das (original respondent No. 2) were declared the joint purchasers and the sale in their favor was confirmed by an order of the Court dated January 19, 1952. It is not disputed that Raghunath Das (original respondent no. 2) transferred all his rights, title and interest as an auction purchaser in favor of Kabool Singh aforesaid.

2. Since the property was tenanted, mere symbolical possession was given to Kabool Singh on February 28, 1952 under Rule 96 of Order 21 Civil Procedure Code. After a few years of obtaining symbolical possession Kabool Singh on February 2, 1956 filed a suit which was dealt with by the Additional Judge, Small Cause Court, against Lekh Ram, one of the tenants in the said property for recovery of arrears of rent. Lekh Ram resisted the suit on the ground, inter alia, that the property was evacuee property and that the Custodian of Evacuee Property should be imp leaded as a party defendant. Upon this objection, the Custodian was imp leaded and on July 20, 1956, he raised an objection that inasmuch as the property had vested in him under the provisions of the Administration of Evacuee Property (Chief Commissioner's Province) Ordinance XII of 1949, the sale thereof, was void and ineffective by reason of the provisions of Section 17 of the Administration of Evacuee Property Act 31 of 1950. The claim of

the Custodian was rejected by an Order of the Additional Judge, Small Cause Court on December 18, 1956.

3. In the meantime, the Custodian filed an application in the Court of Mr. P.R. Aggarwal, Sub-Judge, Ist Class Delhi which was the executing Court in so far as the aforesaid mortgage decree was concerned. This application was filed on October 4, 1956 under Section 17 of the Administration of Evacuee Property Act 1950 read with Section 151 of the Civil Procedure Code. The executing Court dismissed this application by its order dated August 14, 1957 on the ground that it was barred by *res judicata* on account of the aforesaid order dated December 18, 1956 of the Additional Judge, Small Cause Court.

4. Against both the orders, namely the order dated December 18, 1956 of the Additional Judge, Small Cause Court and the order dated August 14, 1957 of Mr. P.R. Aggarwal, Sub-Judge Ist Class, Delhi the Custodian filed revisions in the Punjab High Court (Circuit Bench) at Delhi. Both these orders were set aside in revision by R.P. Khosla, J. by his order dated January 27, 1961. The learned Judge, however, remanded the case for determination of three issues which were framed by him and which are in the following terms:-

1. Whether the claim put in by the Custodian was in time?
2. Whether the property vested in the Custodian on 5th December 1951 the date of the sale and remained so vested?

3. Relief.

5. The issues were tried by Mr. M.L. Jain, Sub-Judge, Ist Class, Delhi, who by his order dated September 3, 1962 allowing the application dated October 4, 1956 which had been filed by the Custodian under Section 17 of the Administration of Evacuee Property Act, 1950. He held that inasmuch as the property had vested in the Custodian on the date of sale i.e., December 5, 1951, the sale itself was void under Section 17 of the said Evacuee Act and that the said application was not barred by time. It is against this order that Kabool Singh, who is now represented by his legal representatives, has filed the present appeal.

6. Mr. Raushan Lal, learned counsel for the appellant, has argued that the notification dated December 14, 1949 whereby the property is alleged to have vested in the Custodian had been issued in exercise of powers conferred by the said Ordinance No. XII of 1949 and this Ordinance had been declared *ultra vires* by a Full Bench of the Punjab High Court in the decision which is reported in *in re: Durga Parshad v.*

*Custodian of Evacuee Property*.<sup>1</sup> He therefore, contends that there was no vesting of the property in the Custodian as claimed by him. It is not necessary to go into the validity of this argument for the simple reason that the defect, if any, in the said Ordinance No. XII of 1949 was cured by the Administration of Evacuee Property Amendment Act of 1966 whereby sub-section (2-A) had been added to Section 8 of the said Evacuee Act of 1950 and with regard to this amendment Act, the Supreme Court in its decision reported in *in re: Azimunnissa v. Deputy Custodian Evacuee Properties*<sup>2</sup> has said :

"The effect of Section 8 (2-A) is that what purported to have vested under Section 8(2) of the Administration of Evacuee Property Ordinance XXVII of 1949 and which is to be deemed to be vested under Section 8 of the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate (1) What purports to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under Section 8(2) of the Ordinance XXVII of 1949 or Section 8(2) of the Act which repealed the Ordinance; (3) makes the decree and judgments to the contrary of any Court in regard to the vesting ineffective; (4) makes the property evacuee property by its deeming effect; (5) validates all orders passed by the Custodian in regard to the property." Therefore even if Mr. Raushan Lal is right that there had not been any vesting of the property in 1949 when the aforesaid notification was issued, it will not help him because by reason of Section 8(2-A) vesting was made retrospective.

7. The next question that has to be determined is whether the application dated October 4, 1956 filed by the Custodian under Section 17 of the Evacuee Act of 1950 was within time. In view of the decision of the Supreme Court reported in *in re: Ramanna v. Nallaparaju*,<sup>3</sup> it is not disputed that the appropriate article of the 1908 Limitation Act would be Article 181 and no other. This Article prescribes the period of limitation for an application for which no period of limitation has been prescribed. The period prescribed is three years and the time from which the period begins to run is "When the right to apply accrues".

8. The contention on behalf of the appellant is that assuming that the property vested in the Custodian, his possession was disturbed by the delivery of symbolical

possession to the appellant on February 28, 1952 and, therefore, the right to apply accrued on this date. On the other hand, Bawa Shiv Charan Singh, learned counsel for the Custodian contends that the sale being void by reason of Section 17 of the Evacuee Act of 1950, it was open to the Custodian not to take any notice of it and that he could take notice of it only when he was made aware that somebody else was claiming a right in the property to his prejudice. According to the argument, such awareness came to the Custodian only on July 20, 1956 when he was served with the notice by the Additional Judge, Small Cause Court, and, therefore, the right to apply accrued only on this date.

9. The status of the Custodian is not the status of a stranger or an entirely different person *qua* the evacuee. It is no doubt true that he has been given certain rights and even powers by the Evacuee Act, which were not possessed by the evacuee. Nevertheless, the fact remains, that he is a Custodian of the property of the evacuee in the capacity of a representative or manager. It is difficult, for me to accept the argument that the possession of the evacuee property by the Custodian or its vesting in him creates some sort of independent statutory title in him with reference to that property. A Division Bench of the Punjab High Court has expressed the view in the case *Abda v. Yusaf Khan* <sup>4</sup> that the object of the Evacuee Act is to preserve the property of an evacuee and that even though the property of the evacuee vests in the Custodian such vesting does not deprive an evacuee of his right to continue his case in a Court of law.

10. Similar observations have been made in the case reported in *in re: Mohd. Ali Hasan Khan v. Bhagirathilal* <sup>5</sup> where it is stated that it is not the object of the Administration of Evacuee Property Act to make the Government or the Custodian of Evacuee Property the owner of the property declared as evacuee property. Notwithstanding such a declaration the property shall continue to be the property of the evacuee and the vesting thereof in the Custodian would only mean that the Custodian is stepping into the shoes of the evacuee as a statutory agent or manager for continuing administration and management of the same.

11. The question of limitation has therefore, to be looked at from the point of view that the Custodian is an agent or manager of the evacuee. Bawa Shiv Charan Singh has drawn my attention to Section 50 of the Evacuee Act of 1950 which provides that if in any suit, it appears to the Civil Court that a question relating to the property of an evacuee or an intending evacuee is involved, the Court shall not proceed to determine that question until notice has been given to the Custodian. It is contended that since no

notice was given to the Custodian by the executing Court, the Custodian is not bound by the execution proceedings or by the sale of the property by Court auction and could not have been expected to have taken any steps until his possession was in fact disturbed. It is further contended that delivery of symbolical possession to the auction purchaser would not be disturbance of the Custodian's possession. Section 50 certainly requires the Courts mentioned therein to give notice to the Custodian. But that is only if it appears to such Courts that a question relating to the property of an evacuee or an intending evacuee is involved in the proceedings before that Court. This section cannot arrest the running of time under the Limitation Act if time has already begun to run.

12. The next contention on behalf of the respondent is that symbolical possession, which is delivered under the provisions of Rule 96 of Order 21 Civil Procedure Code may amount to delivery of possession where the tenants are of the judgment-debtor himself. In this case, it is contended that the tenants were not of the judgment-debtor but of the Custodian and therefore delivery of symbolical possession in this case could not be said to be interference with the possession of the Custodian. It is difficult to accept this argument.

13. The Privy Council has observed in *in re: Adya Nath v. Krishna Prasad Singh* <sup>6</sup> that delivery of symbolical possession of property found to be in occupation of a tenant of the judgment-debtor effectively terminates the possession of both the judgment-debtor and the tenant. Similarly in *in re: Mst. Mewa v. Amar Singh* <sup>7</sup> delivery of symbolical possession has been given the same status as delivery of actual physical possession.

14. In view of the fact (1) that the title of the Custodian cannot be said to be independent of the title of the judgment-debtor and (2) that the Custodian merely steps into the shoes of the judgment-debtor, the law of limitation has to be applied to the Custodian as it would have been applied to the judgment-debtor himself. Lack of notice to or the ignorance of the Custodian cannot be taken into consideration in determining the commencement of the running of the period under Article 181 of the Limitation Act 1908. The time from which the period begins to run is when the right to apply accrues and that right in my opinion definitely accrued to the judgment-debtor and, therefore, to the Custodian on February 28, 1952 when symbolical possession was delivered to the appellant.

15. Under the circumstances, I hold that the application dated October 4, 1956, filed by the Custodian under Section 17 of the Evacuee Act of 1950 was filed beyond the

time prescribed by Article 181 of the Limitation Act of 1908. This appeal is, therefore, allowed with costs.

Appeal allowed.

Cases Referred.

1. AIR 1960 Punjab 341
2. AIR 1961 Supreme Court 365
3. AIR 1956 Supreme Court 87
4. (1948) 50 Pun. L. R. 210,
5. AIR 1964 Andhra Pradesh 126
6. AIR 1949 PC 124
7. AIR 1959 Punjab 515