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Mr. Seervai has also drawn our attention to the fact that in the proviso to s. 6 (4) where it was intended by the Legislature that something definite should appear in the order the Legislature has made provision for it, and what is pointed out is that in the proviso the Legislature has specifically provided that the declaration as to the vacancy to be made must be embodied in the order itself. The reason why this is not so stated in s. 6 (4) (a) with regard to the purpose for which the requisition is to be made is obviously because the earlier expression "order in writing" in s. 6 (4) qualifies the whole of the expression occurring in s. 6 (4) (a), and therefore it would have been redundant for the Legislature again to state that the order in writing should also contain the purpose for which the premises were being requisitioned.

Therefore, in our opinion, the view taken by Mr. Justice Shah that the order is invalid *ex facie*, inasmuch as it did not contain the necessary declaration that the property was being requisitioned for a purpose of the State or a public purpose, was right. The appeal, therefore, fails and must be dismissed with costs.

Attorneys for appellants: *Little & Co.*,

Attorneys for respondents: *Madhavaji & Co.*

Appeal dismissed.

A. J. P.

ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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P. R. NAYAK APPELLANT, (ORIGINAL RESPONDENT) v. EBRAHIM ABOO-BAKER AND ANOTHER, RESPONDENTS, (ORIGINAL PETITIONERS).*

Administration of Evacuee Property Act (XXXI of 1950), ss. 2 (f), 10 (1), 56 and r. 9—Custodian taking possession of whole property in which evacuees had four-seventh share—Custodian has no power to take possession of property of strangers—Joint property—Rule 9, sub-r. 2 (b) empowering possession of joint property by Custodian ultra vires.

The scope and intent of the Administration of Evacuee Property Act is confined to the securing administering, preserving and managing

* O. C. J. App. No. 101 of 1950: Misc. No. 204 of 1950.

property belonging to an evacuee and not the property of a stranger who may happen to have a joint share with an evacuee.

Section 2 (f) of the Act defines evacuee property as property in which an evacuee has any right or interest to the extent of his right or interest only.

The whole of the property in which an evacuee has a share or some right or interest does not become evacuee property.

Section 10 (1) of the Act empowers the Custodian to take all such measures as he considers necessary or expedient for the purposes of securing administering, preserving and managing evacuee property. The Act does not empower the Custodian to take possession of property in which an evacuee has an undivided share along with a person who is not an evacuee.

The Custodian of Evacuee Property took possession of the whole of the Imperial Cinema in which two brothers who were declared as evacuees had four-seventh share. The remaining three-seventh share did not belong to any evacuee.

The proviso to sub-r. 2 (b) of r. 9 framed by the Central Government under s. 56 of the Act provided that where the share of an evacuee in a property held jointly by the evacuee with others, was more than half of the whole property, the whole of the property may be taken possession of by the Custodian. The Custodian purporting to act under this proviso, took possession of the whole of the Imperial Cinema.

Held, that the rule went beyond the scope and ambit of the Act and was therefore *ultra vires* and the Custodian had no power to take possession of the three-seventh share in the Imperial Cinema, which did not belong to the evacuees.

One Aboobaker owned the Imperial Cinema at Bombay. He had three sons Hussein, Alimahomed and Ebrahim and one daughter Hawabai. Husein and Alimahomed went away to Pakistan and were declared evacuees. Aboobaker died on May 14, 1950.

On May 31, 1950, the Custodian of Evacuee Property issued a notification declaring the whole of the Imperial Cinema as evacuee property. The petitioner Ebrahim and his sister Hawabai were not evacuees and they had a three-seventh share in the said property.

They therefore filed this petition to prevent the Custodian from taking possession of their three-seventh share.

The notification issued by the Custodian was in the following terms:—

“In pursuance of sub-s. (3) of s. 7 of the Administration of Evacuee Property Act, 1950, the Deputy Custodian of Evacuee Property, Bombay,

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is pleased to notify for general information the list of the evacuee properties specified in the schedule annexed hereto, which has vested in him.

Schedule.

7,401,405,360. Lamington Road and Vithalbhai Patel Road (Imperial Cinema with furniture and fittings therein).....Lamington Road."

On the same day the Custodian of Evacuee Property wrote to the petitioner as follows:

"The property known as 'Imperial Cinema', Lamington Road, Bombay, with all furniture, fittings, other articles and things therein having been treated as evacuee property under the Administration of Evacuee Property Act, 1950, I, acting under the powers conferred on me by the aforesaid Act do hereby give you one month's notice, expiring on June 30, 1950, of termination of the monthly tenancy by virtue of which you are now in possession of the said property."

(b) That this Hon'ble Court be pleased to issue directions or an order or a writ restraining the first respondent from demanding surrender of possession of the said Imperial Cinema and the furniture and fittings therein from the petitioner and from taking possession of the same from the petitioner and from allotting the same to any body."

The petition was heard by Shah J. on October 5, 1950, when his Lordship delivered judgment as follows:—

SHAH J. Under the provisions of the Administration of Evacuee Property Act, XXXI of 1950, the right, title and interest of the remaining two sons of Aboobaker could be declared to be evacuee property, and was so declared by the notification dated May 31, 1950. Obviously, the whole property which belonged to Aboobaker could not under any process recognised by the Administration of Evacuee Property Act, be deemed to be either evacuee property or property of which the Custodian was entitled to obtain possession. Alimahomed and Hussein, the two sons of Aboobaker, were entitled to 4/7th interest in the Imperial Cinema and the fittings and furniture and other articles and things therein; and as owners of that property if they were declared to be evacuees their property would, by reason of s. 8, cl. (1), of the Administration of Evacuee Property Act XXXI of 1950, vest in the Custodian. But nothing more than that interest could vest in the Custodian. Even at the risk of repetition I may mention that Aboobaker was never declared an evacuee; and if he was not so declared an evacuee, his property in the hands of his heirs could be subject to such incidents as would attach to them by the law of the land, and in the hands of the petitioner his 2/7th interest in the property vested in him without any liability to be taken possession of

by the Custodian. The interest of the petitioner could not be taken possession of merely because his two brothers were declared to be evacuees and their property had vested in the Custodian. If Ebrahim Aboobaker, the petitioner, was the owner of the 2/7th interest in the property, the Custodian would have no right to take possession of that 2/7th interest in the property, and in my judgment any claim either made or threatened to be made or intended to be made on behalf of the Custodian to obtain possession of that interest in the property could lawfully be resisted by the petitioner. The petitioner had sufficient ground for apprehending that possession of his interest in the property would be sought to be obtained forcibly by having recourse to the provisions of s. 9 of the Administration of Evacuee Property Act, XXXI of 1950, and his petition on that apprehension is maintainable...

The learned counsel asserted that the Custodian had the right to take possession of the entire theatre with its furniture and fixtures without recourse to a Court of law. He contended, firstly, that on the definition of the expression "evacuee property" under s. 2, cl. (1) (f), of the Administration of Evacuee Property Act, XXXI of 1950, the entire property in which the evacuee has a fractional interest would be deemed to be evacuee property, and therefore, the Custodian would be entitled to take possession of the entire property, notwithstanding the rights of ownership and enjoyment vested in other persons who were not evacuees. Mr. Joshi further contended that in any case, even if what can be and is declared to be evacuee property is only the right, title and interest of the evacuee and not of other persons under sub-s. (4) of s. 8 and under s. 12 of the Administration of Evacuee Property Act, XXXI of 1950, the Custodian has the right to demand possession of the entire property, and not merely of the property which is declared to be evacuee property. Mr. Joshi has finally contended that, even if what vests in the Custodian is the right, title and interest of an evacuee in certain property, by reason of the provisions of r. 9 of the Rules framed under the Administration of Evacuee Property Ordinance, XXVII of 1949, and continued under the provisions of s. 56 of the Administration of Evacuee Property Act, XXXI of 1950, where the share of the evacuee in the whole property exceeds one-half of the whole property, the Custodian is entitled to take possession of the entire property in the manner provided under sub-r. (i) or sub-r. (ii) of that Rule

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In my view there is no substance in any of the contentions advanced by Mr. Joshi. Clause (f) of s. 2 of the Administration of Evacuee Property Act, XXXI of 1950, defines 'evacuee property' as meaning any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity), and includes any property (1) which has been obtained by any person from an evacuee after August 14, 1947, by any mode of transfer, unless such transfer has been confirmed by the Custodian or (2) belonging to any person who, after October 18, 1949, has done or does any of the acts specified in cl. (e) of s. 2, or in which any such person has any right or interest. Then follow three provisoes which exclude certain classes of property from the definition of evacuee property; but with those provisoes we are not concerned in these proceedings. It is submitted by Mr. Joshi that under the definition, if an evacuee has even a fractional interest in any unit of property, the entire unit is likely to be declared evacuee property; and that the expression 'property' as used in the definition means a unit of property and is not confined to a fractional or individual interest in such unit. In my view the definition does not mean that property other than the property which belongs to or belonged to an evacuee is 'evacuee property'. The definition of the expression 'evacuee property' is an exhaustive definition, and means property of an evacuee, including rights or interest of an evacuee, but does not include any interest in property which does not or did not belong to an evacuee. That is the view that I have taken in other applications which have been decided by me; and after fully considering the arguments advanced by Mr. Joshi I see no ground for altering the view that I have already taken; see the judgment delivered in *Acharj Nath, Vig v. R. V. Deshmukh*.⁽¹⁾

If the expression 'evacuee property' means only the property of an evacuee including the right, title and interest of an evacuee in certain property, and does not mean, as contended by Mr. Joshi, the whole property in which the evacuee has or had a fractional interest, then the whole contention built up by Mr. Joshi on that argument must fail. It was argued that if a part of the property belonged or belongs to an evacuee, the whole property becomes evacuee property and vests in the Custodian, and the Custodian is entitled to exercise the rights

⁽¹⁾ (1950) Misc. No. 132 of 1950, decided by Shah J. on September 29, 1950 (Unrep.).

vested in him, in respect of the entire property, notwithstanding the limited ownership of the evacuee in that property. But if what vests in the Custodian is merely the property of an evacuee as defined in s. 2, cl. (1) (f), of the Administration of Evacuee Property Act, XXXI of 1950, then obviously, acting under sub-s. (4) of s. 8 or under s. 12 of the Act, the Custodian is not entitled to take possession of property other than the evacuee property so defined. The 2/7th interest in the Imperial Cinema having vested in the present petitioner, the Custodian had no right or authority either under the provisions of s. 8 or of s. 12 of the Act to demand possession of that right from the petitioner.

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It is also impossible to accept the argument of Mr. Joshi that the expression 'property' as used in sub-s. (4) of s. 8 of the Act has a different meaning or connotation from the one it has in sub-s. (1) of s. 8. The whole scheme of s. 8 appears to be that on the declaration of any property as evacuee property, the property vests in the Custodian, and the Custodian is entitled to certain contingencies to demand possession of that property either under sub-s. (4) of s. 8 or under s. 12 of the Act, and is entitled to exercise the powers vested in him under s. 9 of the Act to take forcible possession of that property only.....

Mr. Joshi has relied upon the provisions of cl. (3) of r. 9 as amended by Government Notification No. 14 (102) Cus.—50 dated March 8, 1950. That clause reads as follows:—

“(iii) Where such property is an undivided share in joint property:

(a) If under some arrangement *inter se* the co-sharers, the evacuee was in separate possession of any part of the joint property, possession may be taken of such part in accordance with the manner provided in sub-rule (i) or sub-rule (ii), whichever is applicable.

(b) In other cases, constructive possession may be taken by affixing a copy of the warrant for possession on a conspicuous part of the property, and if considered necessary by proclamation by beat of drum in the locality in which the property is situated.

Provided that where the share of the evacuee in such property is more than one half of the whole property, the possession of the whole property may be taken in the manner provided in sub-rule (i) or sub-rule (ii), whichever is applicable.

Now, Mr. Joshi contends that the expression 'the whole property' in the proviso means, not the property which is the property of an evacuee, nor property which is declared to be

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evacuee property, but the property of which the evacuee property is merely a fraction. I am unable to accept that contention. The rule as framed starts by referring to evacuee property vested in the Custodian, and enables the Custodian to take possession of property in accordance with the manner provided in the Ordinance and the rules framed thereunder, and the expression 'the whole property' in the proviso can and must mean in its context property which is evacuee property. In sub-r. (ii) of r. 9 the property which is referred to in sub-rule (i) is referred to as "such property", and similar description is given in sub-rule (iii); and in the proviso, and from the manner in which the proviso is framed and in its context the expression 'the whole property' must refer to the expression 'such property' as is used in sub-rule (iii) or any evacuee property which vests in the Custodian as used in sub-r. (i). Even assuming for a moment that Mr. Joshi is right in his contention as to the meaning of the expression 'the whole property' as used in the proviso to r. 9, in my judgment it would be exceeding the powers conferred by the Legislature for framing rules "for the purpose of the Act" to enable the Custodian by rules to take possession of property other than the property which he is entitled to take possession of under sub-s. (4) of s. 8 or under s. 12 of the Act. If Mr. Joshi's contention is right, the Custodian would be entitled to take possession of property other than evacuee property and property belonging to persons other than the evacuees; but no such authority is conferred upon the Custodian under the provision of Act XXXI of 1950. If the rule is intended to mean what Mr. Joshi contends it means, then, in my judgment, it would provide for something which is beyond the scope of the Act, and the Central Government would have no authority to make such a rule. It would, in my judgment, be again contrary to the provisions of the Constitution, and the rule would, for the reasons mentioned by me for rejecting the contention of Mr. Joshi on the construction of sub-s. (1) of s. 8, be also inconsistent with the provisions of the Constitution and therefore void.

I, therefore, declare that the Custodian is not entitled to obtain possession of the right, title and interest of the petitioner and respondent No. 2 in the property known as the Imperial Cinema, which is described in the petition, and I direct that a writ do issue against the Custodian of Evacuee Property restraining him, his agents and servants from taking possession of the right, title and interest of the petitioner and respondent

No. 2 in that property. The petitioner will be entitled to his costs of the petition from respondent No. 1.

The Custodian appealed.

H. M. Seervai, for the appellant.

Sir Jamshedji Kanga and *P. N. Bhagwati*, for the respondents.

CHAGLA C. J. Although various points were urged before Mr. Justice Shah when this petition, out of which this appeal arises, was argued before him, only one narrow point survives so far as this appeal is concerned and which has been argued by Mr. Seervai on behalf of the Custodian of Evacuee Property. The point briefly put is this:

One Aboobaker died on May 14, 1950, and four-seventh share in a property known as the Imperial Cinema vested in his two sons Husein and Alimahomed as his heirs. Now both these sons have been declared evacuees and their property has been vested in the Custodian. The question that we have to consider is whether it is competent to the Custodian under the Act or under the rules framed thereunder to take possession not only of the four-seventh share vested in him but also the three-seventh share which is not evacuee property; or in other words whether it is open to the Custodian to take possession of the building known as the Imperial Cinema although what is vested in him is only the four-seventh share in the same. Now, prima facie it would seem a startling proposition indeed that the Custodian should have any power to take possession of property which belongs to strangers and who are not evacuees at all under the Act. We have already had an occasion to consider the scope and the intent of the Administration of Evacuee Property Act and that scope and intent is the custody, management and possession of evacuee property. It cannot be disputed that so far as legislative competence is concerned, it would have been open to Parliament to have enacted a piece of legislation which might have permitted the Custodian to encroach upon the rights of strangers. But before one attributes such an extraordinary intention to Parliament one must scrupulously and carefully scrutinise the provisions of the Act. And when we turn to the provisions of the Act it is clear that there is no indication whatever in any provisions enacted by our Parliament that any property was intended to be affected except the property of persons who were declared as evacuees and whose property was liable to be vested in the

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Custodian as evacuee property. Now, turning first to the definition of evacuee property in s. 2 (f) evacuee property means any property in which an evacuee has any right or interest whether personally or as a trustee or as a beneficiary or in any other capacity and it excludes two kinds of property. Now, it cannot be suggested that by this definition the Legislature intended that the whole of a property in which an evacuee has only a right or interest was to be evacuee property. This definition can only mean that evacuee property is the property in which the evacuee has any right or interest to the extent of his right and/or interest. The object of this definition obviously was not to extend the definition of evacuee property to the whole of the property in which there was some right or interest of an evacuee but confine it to the right or interest in that property. Therefore, although an evacuee may not be the owner of the whole of some property even if he had some right or interest in it to the extent he had the right or interest, that right or interest would be evacuee property. Then our attention has been drawn to s. 10 (1) which gives wide powers to the Custodian to take such measures as he considers necessary or expedient for the purposes of securing, administering, preserving and managing any evacuee property. Now, here again powers given to him are not in relation to any property other than evacuee property. He has no power to take any measures with regard to securing, administering, preserving and managing any other property. Mr. Seervai says that it may be necessary in order to secure, administer, preserve and manage any evacuee property to take possession of some other property, but before we can permit such an interpretation to be placed upon this sub-section and before we could come to the view which would empower the Custodian to take possession of property other than evacuee property we must be satisfied that the Legislature clearly intended such result to follow. Then when we come to the specific powers enumerated in sub-s. (2) of that section our attention is drawn to cls. (a) and (d). Clause (a) deals with carrying on of the business of the evacuee and cl. (d) empowers the Custodian to take such measures as may be necessary to keep any evacuee property in good repair. Here again emphasis is on the business of the evacuee and the property of the evacuee. He can only take measures to keep the property of the evacuee in good repair, and not the property of any one else. It is therefore clear that

so far as the statute itself is concerned it does not empower the Custodian to take possession of any property other than the property of an evacuee. Before turning to the rules we must consider the terms of s. 56 under which these rules are enacted. Section 56 (1) provides that the Central Government may by notification in the Official Gazette make rules to carry out the purposes of the Act. Therefore so far as that sub-section is concerned, the power of the Central Government to make rules is circumscribed by this important condition that these rules must be only for the purpose of carrying out the the purposes of the Act. To the extent that any rule goes beyond the purposes of the Act that rule would be outside the scope and ambit of the Act. When we turn to sub-s. (2), which deals with particular matters with regard to which rules may be framed, it is true that that sub-section does not affect or prejudice the generality of the power given to the Central Government under sub-s. (1); but sub-s. (2) undoubtedly contains an indication of what rules were intended to be framed under s. 56. Clause (d) of sub-s. (2) provides; that rules may be framed with regard to the manner in which possession of any evacuee property may be taken by the Custodian. Now, this is very significant. The Legislature has expressly limited under this clause the power of the Custodian to taking possession only of evacuee property. It is difficult to believe that if the intention of the Legislature was that the Custodian should take possession not only of evacuee property but also of other property, why in this sub-clause when the Legislature was dealing with the power of the Custodian to take possession of property it did not provide that possession may be taken not only of evacuee property but also the property of strangers.

Now, with this background when we turn to the rules, r. 9 provides for the mode of taking possession of immovable property. Sub-rule (1) deals with cases when trespassers are in possession of the property; sub-r. (2) deals with cases when tenants, lessees and licensees are in possession, and it provides the mode in which possession can be obtained, or, if the Custodian so chooses, for the payment to him of rents, lease-money or license fees. It is then provided,

Where such property is an undivided share in joint property:—

(a) If under some arrangement *inter se* the co-sharers, the evacuee was in separate possession of any part of the joint property, possession may be taken of such part in accordance with the manner provided in sub-rule (i) or sub-rule (ii) whichever is applicable.

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Therefore this part deals with the Custodian taking separate possession of the share of the evacuee in joint property.

(b) In other cases, constructive possession may be taken by affixing a copy of the warrant for possession on a conspicuous part of the property, and if considered necessary by proclamation by beat of drum in the locality in which the property is situated.

Therefore, this part deals with taking constructive possession, again, of property which is the undivided share of the evacuee in joint property. Then we come to the proviso which really creates the difficulty. The proviso is:

Provided that where the share of the evacuee in such property exceeds one-half of the whole property, the possession of the whole property may be taken in the manner provided in sub-rule (i) or sub-rule (ii) whichever is applicable.

Therefore, this proviso clearly gives the power to the Custodian to take possession of the undivided share of the strangers if that undivided share is less than one-half of the whole property. We agree with Mr. Seervai that on a proper interpretation of this proviso if this power is good in law, then undoubtedly the Custodian has the power to take possession not only of the four-seventh share in the Imperial Cinema which is vested in him but also the three-seventh share which is not evacuee property. But the question is whether this power is within the ambit and scope of the Act, and whether the Central Government were empowered to frame such a proviso looking to the rule-making power conferred upon the Legislature under s. 56. Now, if we are right in what we have held with regard to the extent and scope of the Act, then clearly any rule which confers a power upon the Custodian to take possession of the property which does not belong to the evacuee but belongs to a stranger would be beyond the scope of the Act. Mr. Seervai points out the difficulties that may arise in cases where it may be difficult to manage the undivided share of an evacuee without taking possession of the other share. But surely ordinary law makes proper provision for difficulties like this. Joint tenancy can be severed and difficulties in managing a property which is joint property can be obviated by having recourse to the procedure provided by law. But even if the difficulties were insurmountable, that cannot lead us to the conclusion which would be so startling in its nature and extent that we should pause and hesitate before arriving at such a conclusion unless we were driven by clear and express language of the statute. But as we have already stated, the

Act, far from using any language that would compel us to hold that such a power was contemplated to be given to the Custodian, on the contrary makes it clear that the scope of the Act is only with regard to the securing, administering, preserving and managing the evacuee property, and that no power is conferred upon the Custodian to take possession of the property which does not belong to the evacuee. That was the view taken by the learned Judge in the Court below. In our view that view was correct. The appeal, therefore, fails and is dismissed with costs.

Attorneys for appellant: *Little & Co.*

Attorneys for respondent: *Amarchand & Mangaldas.*

Appeal dismissed.

A. J. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

PHIROZE FRAMROZE TARAPOREWALLA, AND OTHERS, PETITIONERS
v. THE MUNICIPAL CORPORATION OF THE CITY OF POONA, AND
OTHERS, OPPONENTS.*

1951
July 26

The Bombay Municipal Boroughs Act (XVIII of 1925) s. 110—Appeal pending before Magistrate—The Bombay Provincial Municipal Corporations Act (LIX of 1949) s. 406 (1)—Jurisdiction to hear appeals vested in a Judge of the Small Causes Court—Whether pending appeals saved—Bombay General Clauses Act (I of 1904) s. 7—Effect of repeal of the previous Act.

The jurisdiction of the Magistrate before whom an appeal is pending under s. 110 of the Bombay Municipal Boroughs Act, 1925, is not taken away by the repeal of the said Act by the Bombay Provincial Municipal Corporations Act, 1949.

There is nothing in the Bombay Provincial Municipal Corporations Act, 1949 which in any way is contrary to what is provided in the Bombay General Clauses Act, 1904 according to which the effect of a repeal of a statute is that all pending proceedings are saved from the operation of the repealing Act.

Civil Revision Application from the decision of D. G. Ghugale, City Magistrate, F. C., Poona.

* Civil Revisional Application No. 1058 of 1950.