

to avail themselves of. The result, therefore, is that the rule must be discharged and the petition dismissed with costs.

Attorneys for petitioners: *Crawford, Bailey & Co.*

Attorneys for respondents: *Little & Co.; Vakil, Dadabhoy & Bharucha.*

*Petition dismissed.*

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*Before Mr. Justice Tendolkar.*

ALLAUDIN ALLABUX AND OTHERS, PETITIONERS v. M. R. MEHER AND ANOTHER, RESPONDENTS.\*

*Administration of Evacuee Property Act (XXXI of 1950), ss. 7 and 40—Administration of Evacuee Property (Central) Rules 1950, form No. 1—“The persons interested”, meaning of—Notice to “persons interested”, mandatory—Failure to give notice vitiates proceedings—Proceedings contrary to fundamental principles of justice—Petition for writ of certiorari maintainable.*

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The “persons interested” to whom a notice is required to be given under s. 7 (1) of the Administration of Evacuee Property Act, means persons who either claim to be interested or whom the Custodian considers to be interested; the two categories are separate, though not necessarily mutually exclusive. Therefore, a person who claims to be interested, even though the Custodian may not consider him to be interested, is entitled to a notice under s. 7 (1) of the Act. Where no person comes forward claiming to be interested, the Custodian would have to give notice to persons whom he considers to be interested. This class of persons necessarily includes persons having legal title to the property in question but is not restricted to such persons only and embraces all persons who have an interest in the property, howsoever limited.

The giving of a notice is a statutory requirement; it is not procedural only but is mandatory. In the absence of a notice to persons interested the declaration by the Custodian that the property is evacuee property is without jurisdiction and liable to be set aside.

Notice is to be given in such manner as may be prescribed by the rules made under the Act. If the manner in which notice should be given to interested person is not prescribed, or a suitable form of notice is not prescribed, the Custodian is nevertheless under an obligation to give a notice.

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\* O. C. J. Misc. Appln. No. 28 of 1951.

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The notice prescribed (Form No. 1) under Rule 6 is appropriate only in the case of an evacuee and not in the case of persons interested in the property other than evacuee. Form No. 1 does not cover the case of a transferee from an evacuee, who is entitled to notice, nor does it cover the case of a person who claims to be interested adversely to the evacuee in the property which the Custodian has reason to believe belongs to the evacuee.

Although, therefore, there was no form prescribed for a notice to such persons, who are nonetheless entitled to notice by virtue of the mandatory provisions of s. 7 (1) of the Act, the Custodian was bound to give to such persons a proper notice.

The petitioners were partners in a bakery business with one Mahomed Shafi who had one-fourth share in it. Shafi went away to Pakistan in November, 1947, and on September 12, 1950, his one-fourth share was declared evacuee property. The petitioners claimed that Shafi had relinquished and surrendered his share to them and applied for confirmation of relinquishment and surrender under s. 40 of the Act. This application was rejected but the Custodian declared the whole of the tenancy right in the business premises which stood in the name of Shafi as belonging to Shafi and as evacuee property without giving notice to the petitioners.

*Held*, that the Custodian had acted without jurisdiction in declaring the entire tenancy right to be evacuee property.

*Held*, also that it was contrary to the fundamental principles of justice that property, namely, tenancy rights in which a person claimed interest should be declared to be evacuee property without notice to the party concerned.

*Held*, therefore, that although the petitioners had a remedy by way of review or revision under s. 26 of the Act, the Court would interfere by a writ of *certiorari*.

*Municipal Corporation of Greater Bombay v. Sen*<sup>(1)</sup> and *Khurshed Mody v. Rent Controller, Bombay*,<sup>(2)</sup> relied upon.

The three petitioners with Mahomed Shafi were carrying on a bakery business in the name of the "Cafe Grant Bakery". In November, 1947 Mahomed Shafi left for Pakistan.

On May 27, 1950, a notice in form No. 1 addressed to Mahomed Shafi was sent to him and a copy thereof was sent to the first petitioner Allaudin as the person now running the concern. The first petitioner by his letter dated June 30, 1950, informed the Deputy Custodian of Evacuee Property that Mahomed Shafi had no longer any interest in the business which since November, 1947, belonged to the petitioner and his two other partners.

On September 20, 1950, a notification was issued by the Deputy Custodian under s. 7 (3) of the Act, declaring the

<sup>(1)</sup> [1952] Bom. 839 s. c. 53 Bom.

<sup>(2)</sup> (1946) 48 Bom. L. R. 565.

one-fourth share of Mahomed Shafi in the said business to be evacuee property.

On October 19, 1950, the petitioners applied to the Deputy Custodian under s. 40 of the Act for confirmation of the relinquishment and surrender of his one-fourth share by Mahomed Shafi in their favour. On November 7, 1950, the Deputy Custodian gave them a hearing and took their statements in writing regarding the relinquishment and surrender of Mahomed Shafi's share.

On November 21, 1950, the Deputy Custodian made an order rejecting the petitioners' application under s. 40 of the Act. He further ordered that the tenancy rights in the premises in which the partnership business was carried on was also evacuee property and called upon the petitioners to hand over possession of the premises.

The petitioners appealed to the Additional Custodian of Evacuee Property who however dismissed the appeal and confirmed the Deputy Custodian's order.

The petitioners, therefore, made this petition under art. 226 of the Constitution for a writ of *certiorari* or other writ or direction to quash the orders of the Deputy Custodian and Additional Custodian of Evacuee Property.

N. A. Palkhiwalla, for petitioners.

M. M. Jhaveri, for respondents.

TENDOLKAR J.—This is a petition for a writ of *certiorari* or other writ, direction or order under Article 226 of the Constitution of India against the Additional Custodian of Evacuee Property, who is the first respondent and the Deputy Custodian of Evacuee Property who is the second respondent, to quash and set aside certain orders made by them. The matter arises in this way. The petitioners and one Mahomed Shafi were partners and carried on business in the name and style of "Cafe Grant Bakery" at 36, Station Road, Bandra. The partners claim to have been beneficially interested in the tenancy rights of a portion of the premises at 36, Station Road, Bandra, which the partnership occupied, although the rent bill in respect thereof was made out in the name of Mahomed Shafi. By an order made on September 12, 1950, the Deputy Custodian of Evacuee Property declared the said Mahomed Shafi to be an evacuee and his right, title and interest in the said partnership, viz. his 1/4th share, to be evacuee property. A notification,

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dated September 20, 1950, was issued under s. 7 (3) of the Administration of Evacuee Property Act, 1950, notifying the said 1/4th share of Mahomed Shafi in the said partnership as evacuee property. The said Mahomed Shafi had migrated to Pakistan in November, 1947. It is alleged by the petitioners that Mahomed Shafi retired from the partnership and surrendered in their favour all his right, title and interest in the said partnership. The petitioners, therefore, applied on October 19, 1950, to the Deputy Custodian of Evacuee Property for confirmation of the relinquishment and surrender under s. 40 of the Administration of Evacuee Property Act, 1950. By an order dated November 21, 1950, the Deputy Custodian not only rejected the application for confirmation, but further ordered that the tenancy rights in the property which the partnership occupied at 36, Station Road, Bandra, may be notified as evacuee property and possession be taken of the same. The petitioners went in appeal to the Additional Custodian of Evacuee Property, and the Custodian dismissed the appeal on January 12, 1951, and confirmed the order declaring the tenancy rights in the said premises to be evacuee property. It is the petitioners' contention that it was not competent to the Deputy Custodian in the first instance or to the Additional Custodian in appeal to declare the tenancy rights to be evacuee property in proceedings under s. 40 of the Administration of Evacuee Property Act and in doing so they acted without jurisdiction. It is further the case of the petitioners that before any property can be declared to be evacuee property, notice has to be given to every person interested, such notice being a condition precedent to the jurisdiction of the Custodian of Evacuee Property to declare any property as evacuee property; and as no notice has at any time been given to the petitioners regarding the tenancy right of these premises which was sought to be declared as evacuee property, both the Deputy Custodian and the Additional Custodian acted without jurisdiction in passing the order that the tenancy right was evacuee property.

Respondent No. 2 has filed an affidavit on this petition in which he has taken up the position that an enquiry under s. 7 of the Administration of Evacuee Property Act (which I will hereinafter refer to as the Act) was taken up along with the enquiry in the matter of the petitioners' application for confirmation under s. 40 of the said Act and that it was open to him to pass a joint order in respect of both the enquiries which he proceeded to do.

Now, before I deal with the important questions of law that arise for determination on this petition, it would be convenient at the outset to set out the proceedings that were in fact taken by the Custodian. On May 27, 1950, notice in Form No. 1, appended to the Administration of Evacuee Property (Central) Rules, 1950, (which I will hereinafter refer to as the Rules) was given to Mahomed Shafi, and a copy of this notice was sent to petitioner No. 1 who is described as "now running the said concern". Petitioner No. 1 by his letter dated June 30, 1950, addressed to the Deputy Custodian, contended that Mahomed Shafi had no subsisting interest in the business and that petitioner No. 1 was running it on behalf of the other three partners. He also stated that the tenancy of the premises had been transferred by the landlord to Abdul Shakoor, petitioner No. 2, but the landlord had refused to transfer the rent bill from the name of Shafi to Abdul Shakoor as he wanted to extort some money. Thereafter, an enquiry was held by the Deputy Custodian in which all the three petitioners were examined before him and have signed the statements made by them. On July 5, 1950, and on July 29, 1950, the account books of certain creditors who had supplied articles to the bakery were also examined by the Custodian; and it is as the result of all this inquiry that a notification was issued on September 20, 1950, that the right, title and interest of 1/4th share of Mahomed Shafi in the business concern known as "Cafe Grant Bakery", 36, Station Road, Bandra, was declared to be evacuee property. Thereafter an application was presented under s. 40 of the Act on October 19, 1950. It asked for a confirmation of the transfer and relinquishment of the 1/4th share of Mahomed Shafi in the said partnership in favour of the petitioners. Thereafter, on November 7, 1950, all the petitioners appeared before the Deputy Custodian, who examined them and reduced their statements to writing; and the statements bear the thumb-impressions of the two petitioners and the signature of the third. It is as a result of this enquiry that the Deputy Custodian made the order complained of on November 21, 1950.

Now, in order to determine whether the Deputy Custodian acted without jurisdiction, it becomes necessary to consider the provisions of the Act and the Rules relating to the powers of the custodian to declare property as evacuee property. Section 7, sub-s. (1) provides that where the Custodian is of opinion that any property is evacuee property, he may, after

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causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property. The notice referred to in this section is a notice to "the persons interested". Now, it cannot be that at the stage of giving notice, the Custodian shall have finally determined who are the persons interested, or could have had any means of determining it; and therefore, if these words in the section have to be given a reasonable interpretation, they can only mean persons who either claim to be interested or whom the custodian considers to be interested, both being separate categories of persons, though not necessarily mutually exclusive, who would be entitled to notice. In the case of a person claiming to be interested even if the Custodian considers that he is not interested, the person would still be entitled to notice under s. 7, and the custodian may, even in a case in which no person comes forward and claims to be interested, give notice to a person whom he considers to be interested. This class of persons necessarily includes persons having the legal title to the property, but it is not restricted to such persons only and embraces all persons who have an interest in the property howsoever limited. Giving of notice is a statutory requirement. It is, in my opinion, not procedural only but it is mandatory and goes to the very root of jurisdiction of the Custodian and if no notice is given to persons interested, the declaration made that any property is evacuee property is without jurisdiction and liable to be set aside.

This notice is to be given "in such maner as may be prescribed". The word "prescribe" in this section means prescribed by rules made under the Act, that being the definition of "prescribed" under s. (2), sub-s. (b). The rule-making power is to be found in s. 56 under which rules have been made providing for the manner in which notice under s. 7 shall be given. But supposing that the rules did not make sufficient provision for the giving of notice to persons who were under statute entitled to notice, is the Custodian thereby absolved from the obligation to give notice or must he give notice in a proper and suitable form. There can, in my opinion be only one answer to the question. Where a suitable manner of notice is prescribed, the Custodian will have to follow it; but if no manner of notice is prescribed, the Custodian will yet have to give notice to all persons interested who are entitled

to notice under the section. Keeping this in mind, if one turns now to the rules, r. 6, sub-r. (1), provides that the Custodian shall cause a notice to be served in Form No. 1 on the person claiming title to such property or interest therein and on any other person or persons whom he considers to be interested. This rule covers all the persons who are entitled to notice under s. 7, sub-s. (1), as hereinbefore interpreted by me; but when one turns to Form No. 1 which is prescribed, the form appears to be appropriate only in the case of an evacuee and not in the case of persons other than an evacuee who may be interested in what is sought to be declared as evacuee property. The form recites that the Custodian has credible information that the addressee is an evacuee, which shows that this notice cannot well be addressed to a non-evacuee who may claim to be interested in property which is sought to be declared as evacuee property. Then the recital states that the addressee is sought to be declared an evacuee on account of grounds mentioned below, and the illustration of the ground which is given in Form No. 1 is the definition of "evacuee" under s. 2 (d), sub-s. (iii). Then the operative part of the notice calls upon the addressee to show cause why orders should not be passed declaring him an evacuee and all his property as evacuee property.

Now, as I pointed out in my judgment in *Abdul Baki Moosa v. R. V. Deshmukh*<sup>(1)</sup> the Act makes no provision for declaring a person an evacuee. Section 7 merely provides for declaring a property to be evacuee property. It may be implicit in the declaration that some person is an evacuee. The definition of evacuee property in s. 2, sub-s. (f), is:—

"Any property in which an evacuee has any right or interest", and, therefore, when you have a declaration that certain property is evacuee property, it is implicit in it that some person is an evacuee and that such person has any right or interest in the particular property. But the definition also includes two other kinds of properties: (1) Property obtained by transfer from an evacuee after August 14, 1947, such transfer not being confirmed by the custodian under s. 40 and (2) property belonging to an intending evacuee. Now, with regard to the latter category of evacuee property, appropriate provision has been made separately by Chapter IX of the Act for declaration of property of intending evacuees as evacuee property in certain

<sup>(1)</sup> (1950) O. C. J. Mis. No. 190 of 1950, decided by Tendolkar J., on November 13, 1950 (Unrep.).

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cases. I must, therefore, assume that s. 7, sub-s. (1), does not deal with cases of this particular type of evacuee property. In so far as transfers from an evacuee after August 14, 1947, are concerned, such transfers have no doubt to come up before the Custodian for confirmation under s. 40. But the transferee is a person interested even in the determination of the question as to whether his transferor is or is not an evacuee, because that determination is essential before the property can be declared to be evacuee property. Form No. 1 provided by the Rules does not, in my opinion, cover the case of a transferee from an evacuee who is entitled to notice, nor does it cover the case of a person who claims to be interested in the property which the Custodian has reason to believe belongs to an evacuee and who claims adversely to the evacuee. There is, therefore, no form prescribed of notice to such persons, who are none the less entitled to notice by virtue of the mandatory provisions of s. 7, sub-s. (1). That being so, the Custodian is bound, in my opinion, to give a proper notice to such persons.

In the present case the Custodian was well aware that besides Shafi there were three other persons in the partnership, and, therefore if he thought of declaring any portion of the property of the partnership as evacuee property, it was obligatory upon him to give notice to the three other persons who were interested in such property. Of course, if he wished only to declare Shafi's admitted 1/4th share in the partnership as evacuee property, he may not have been under any liability to give a notice to the other partners who did not claim that share. But in the present case, even as regards this 1/4th share, it was the case of the other three partners that it had been relinquished in their favour and transferred to them by Shafi, with the result that they have had an interest, even in respect of this 1/4th share, in the determination of the question as to whether Shafi was an evacuee. It is quite apparent from the statement of facts that I have given earlier that at no stage did the Custodian of Evacuee Property give notice to the petitioners that he intended to declare the tenancy right of these premises as evacuee property. When the Deputy Custodian by his affidavit claims that an inquiry under s. 7, sub-s. (1), and s. 40 was taken up together, I do not think that the record bears out that contention. The inquiry under s. 7 had been terminated by the order which resulted in the notification, dated September 20, 1950; and there was no inquiry pending under s. 7, sub-s. (1), on September 19, 1950, when the application under

s. 40 was presented. The only question that was raised in this application was whether the Custodian should confirm the relinquishment of Shafi's 1/4th share in the partnership, and in determining the question the Custodian had, in my opinion, no jurisdiction to determine that the whole of the tenancy right belonged to Shafi and, therefore, was evacuee property. The Custodian has, therefore, in my opinion, acted without jurisdiction in making the order declaring the tenancy rights to be evacuee property; and this applies to the order of the Deputy Custodian as much as to the order in appeal of the Additional Custodian of Evacuee Property.

But it is urged by Mr. Javeri that in any event a writ of *certiorari* should not be granted because the petitioners have another specific and adequate legal remedy. That remedy is a power of review or revision by the Custodian General under s. 26 of the Act. Now, as pointed out in my judgment in *Municipal Corporation of Greater Bombay v. Sen*,<sup>(1)</sup> the true position in law as laid down by a division bench of this Court in *Khurshed Mody v. Rent Controller, Bombay*,<sup>(2)</sup> is that although there may be another remedy, the Court will interfere by a writ of *certiorari* if some thing has been done which is contrary to the fundamental principles of justice. It is quite obviously contrary to the fundamental principles of justice that property in which a person claims to be interested should be declared to be evacuee property without notice of intention to do so being given to the party concerned.

It is also contrary to the fundamental principles of justice that in a proceeding to confirm the relinquishment and transfer of the 1/4th share of an evacuee in a certain tenancy right, the Custodian should proceed to determine that the entire tenancy right belongs to the evacuee. Therefore, notwithstanding the fact that the petitioners had a remedy under s. 26 of the Act, I am of opinion that a writ of *certiorari* lies. I will, therefore, make the rule absolute and quash the order of the Deputy Custodian and the Additional Custodian in appeal to the extent to which it relates to the declaration that the tenancy rights are evacuee property and orders possession to be taken of the same. In so far as Shafi had an admitted 1/4th share in this tenancy right and his right, title and interest in the partnership has already been declared to be evacuee property, by an order

<sup>(1)</sup> [1952] Bom. 839 s. c. 53 Bom. L. R. 917.

<sup>(2)</sup> (1946) 48 Bom. L. R. 565.

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which has not been challenged, his 1/4th share in the tenancy right would also continue to be evacuee property, despite the fact that the portion of the order of the Deputy and Additional Custodian dealing with the tenancy right has been quashed by me. The respondents to pay the costs of the petitioners.

Attorneys for petitioners: *Gagrat & Co.*

Attorneys for respondents: *Little & Co.*

*Rule-made absolute.*

A. J. P.

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*Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Bhagwati.*

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RANGNATH KHEMRAJ, APPELLANT v. BAI THAKOREBAI WIDOW AND OTHERS, RESPONDENTS.\*

*The Code of Civil Procedure (Act V of 1908), O. 41, r. 10—Security for costs of the suit to the Court of Appeal—Principle on which such security would be ordered.*

Although under O. 41, r. 10 of the Civil Procedure Code, it is in the discretion of the Court of Appeal to order the appellant to give security for the costs of the trial Court, that discretion should only be exercised provided the Court of Appeal is satisfied that there is a vexatious determination on the part of the appellant not to pay the costs of the suit ordered by the trial Court or that the appellant has contumaciously or wilfully failed to pay those costs. But, where the appellant is unable to pay the costs of the suit through poverty or through other inability and not due to his fault but due to misfortune, security for the costs of the suit should not be ordered.

*Ahmed Din Shaik Essa Kaliffa v. Shaik Essa Din Kaliffa*,<sup>(1)</sup> followed.

*Birendranath Mitra v. Sultan Muwayyid Zada*,<sup>(2)</sup> explained.

*Pratapgir Narsingirji v. Official Liquidator, Prahlad Mills, Ltd.*,<sup>(3)</sup> distinguished.

Notice of motion for security for costs of the trial Court and of the appeal.

The appellant-plaintiff was adjudicated an insolvent in September 1930, and his properties vested in the official assignee (defendant and respondent No. 6).

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\* App. No. 92 of 1950. Suit No. 265 of 1949.

<sup>(1)</sup> (1889) 13 Bom. 458.

<sup>(2)</sup> (1931) 58 Cal. 117.

<sup>(3)</sup> (1938) 40 Bom. L. R. 470.