

REVISIONAL CIVIL

Before A. D. Koshal, J.

BADDAN,—Petitioner

versus

UNION OF INDIA, ETC.,—Respondents

C. R. No. 126 of 1969

May 4, 1970

Evacuee Interest (Separation) Act (LXIV of 1951)—Section 9(2)—Displaced Persons (Compensation and Rehabilitation Act (XLIV of 1954)—Section 36—Mortgage executed by an evacuee in favour of a non-evacuee more than 20 years ago—No action taken by the Custodian to get the evacuee interest separated—Mortgage—Whether deemed to have become extinct—Property—Whether vests in the Custodian—Suit by the mortgagee claiming full ownership of the property by efflux of time of more than 60 years—Jurisdiction of Civil Courts to entertain—Whether barred.

Held, that no evacuee interest vests in the Custodian free from all encumbrances under section 9(2) of Evacuee Interest (Separation) Act, so long as proper action under the Act is not taken to separate the interest of the evacuee from that of persons who claim to be mortgagees. Without approaching the Competent Officer under the Act to separate the evacuee interest, it is not open to the Custodian to apply the provisions of section 9(2) of the Act to a property and to declare all by himself that it vests in Custodian free from all encumbrances and that the mortgage is deemed to have become extinct. The Act provides the machinery to deal with all composite property and the Custodian must have recourse thereto for the determination of his rights in the property before he can meddle therewith. Hence the jurisdiction of the Civil Courts to entertain a suit by a mortgagee of evacuee property claiming full ownership of the mortgaged property by efflux of time is not barred under section 36 of Displaced Persons (Compensation and Rehabilitation) Act unless action under the Separation Act is taken by the Custodian.

Petition under Section 44 of Act IX of 1919 and Section 115 C.P.C. for revision of the order of Shri V. P. Aggarwal, Additional District Judge, Gurgaon dated the 29th October, 1968, affirming with costs that of Shri R. P. Singh, Sub-Judge IInd Class, Gurgaon, dated the 10th April, 1968, whereby he returned the plaint for presentation to proper court holding that the suit was not triable by civil court.

G. C. MITTAL AND P. C. JAIN, ADVOCATES, for the petitioner.

J. S. MALIK, ADVOCATE, for respondents 1 to 3.

JUDGMENT

A. D. KOSHAL, J.—(1) The sole question which arises for determination in this revision petition is as to whether the Civil Courts have jurisdiction to decide the dispute between the parties which relates to land claimed by the Custodian of Evacuee Property, East Punjab, Jullundur (respondent No. 2) to be "acquired evacuee property."

(2) The suit giving rise to this petition was filed by the petitioner Baddan on these allegations. The land in dispute was originally mortgaged by the predecessors-in-interest of four persons named Sardara, Dinu, Budh Singh and Chokhe in favour of Bihari, grandfather of defendants Nos. 5 to 8, who created a sub-mortgage in favour of defendants Nos. 9 to 22 who, in turn, sold their rights to the plaintiff. The mortgage and the sub-mortgage were both usufructuary and were created "long before 1890". Ever since their creation the plaintiff and his predecessors-in-interest had been in possession of the land of which the plaintiff became the full owner by efflux of time after the expiry of the period of 60 years reckoned from the said creation, as the mortgage was never redeemed. The Union of India, the Custodian of Evacuee Property and the Tahsildar (Sales), Gurgaon, defendants Nos. 1 to 3 respectively, were wrongly treating the land as evacuee property and were going to sell it by auction, although they had no right at all with regard to it.

(3) The relief claimed by the plaintiff in the above circumstances was not only a declaration to the effect that he had become the owner of the land in dispute and that the right of redemption of the mortgage originally vesting in the defendants had been extinguished, but also a permanent injunction by way of consequential relief restraining the defendants from interfering with the plaintiff's proprietary possession over the land and from selling the same.

(4) The suit was resisted by defendants Nos. 1 to 3 and 9. The written statement of defendant No. 9 contained a simple denial of the allegations made in the plaint without stating as to what the real facts according to him were. The only specific plea raised by him was that the jurisdiction of the civil Courts was barred by the provisions of section 46 of the Administration of Evacuee Property Act (hereinafter referred to as the Evacuee Act).

(5) The plea of want of jurisdiction in the civil Courts was reiterated by defendants Nos. 1 to 3 although reliance in support thereof was placed not on section 46 of the Evacuee Act but on section 36 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as the Compensation Act). They further averred that the mortgage in question, being more than 20 years old, had become extinct by virtue of the provisions of section 9(2) of the Evacuee Interest (Separation) Act, 1951 (hereinafter referred to as the Separation Act), that the land in suit had thus become evacuee property and had vested in respondent No. 2 and that ultimately it was acquired by defendant No. 1 under section 12 of the Compensation Act. It was claimed that the land being thus "acquired evacuee property", defendants Nos. 1 to 3 were fully competent to dispose of the same.

(6) Relying on *Custodian, Evacuee Property, Punjab, and others v. Jafran Begum* (1), both the Courts below have held that the civil Courts have no jurisdiction to entertain the suit in view of the provisions of section 46 of the Evacuee Act inasmuch as it raises the question as to whether the land in dispute is or is not evacuee property. They have, therefore, dismissed the suit of the plaintiff who has come up in revision to this Court.

(7) This petition must, in my opinion, succeed, as the Courts below appear to have misconceived the true nature of the case. The plaintiff is admittedly a mortgagee of the land in dispute and has conceded in the plaint that the original mortgagors are evacuees. What is claimed by defendants Nos. 1 to 3 is the evacuee interest in a "composite property" within the meaning of that expression as defined in the Separation Act. even though such interest, according to them, has ripened into ownership under the provisions of section 9(2) of the Separation Act. Those provisions, however, far from helping the case of defendants Nos. 1 to 3, go against them inasmuch as no evacuee interest can vest in them free from all encumbrances so long as proper action under the Separation Act is not taken to separate the interest of the evacuees from that of persons who claim to be mortgagees, and till such action is successfully taken, defendant No. 2 has no authority to interfere with the plaintiff's possession. This is precisely what was held in *Bhanwarlal and another v. Regional Settlement Commissioner, Jaipur-cum-Custodian, Evacuee*

(1) A.I.R. 1968 S.C. 169.

Property, and others (2), which was followed by Mahajan, J. in *Baddan v. Custodian Jullundur, etc.* (3), wherein the facts were practically the same as those with which we are here concerned. The dispute in the present case is not whether the mortgagors' rights are or are not evacuee property but whether the equity of redemption is still alive and that is a matter which will have to be settled under the Separation Act by the Competent Officer who, it is common ground, has not dealt with it at all. Without approaching the Competent Officer, it is not open to defendants Nos. 1 to 3 to apply the provisions of section 9(2) of the Separation Act to a property and to declare all by themselves that it vests in them by reason of those provisions. The Separation Act provides the machinery to deal with all composite property and defendants Nos. 1 to 3 must have recourse thereto for the determination of their rights in the land in dispute before they can meddle therewith.

(8) Mr. Malik, learned counsel for defendants Nos. 1 to 3 had nothing to urge against the applicability of the dictum in *Bhanwarlal's case* (2) (*supra*) to the facts of the present case and, in fact, conceded that his client not having taken any action under the Separation Act, the jurisdiction of the civil Courts could not be said to have been barred.

(9) For the reasons stated, I allow this petition, set aside the judgments and the decrees of the Courts below and remit the case to the trial Court for decision in accordance with law as interpreted by their Lordships of the Supreme Court in *Bhanwarlal's case* (2) (*supra*).

B. S. G.

CIVIL MISCELLANEOUS

Before Bal Raj Tuli, J.

GURDIP SINGH SRA AND OTHERS,—Petitioners

versus

THE STATE OF PUNJAB AND OTHERS,—Respondents

Civil Writ No. 2273 of 1968

May 4, 1970

Constitution of India (1950)—Articles 14 and 16—*Punjab Educational Service Class III School Cadre Rules* (1955)—Rule 7—*Creation of lecturer's*

(2) A.I.R. 1965 S.C. 1885.

(3) C.R. No. 1017 of 1968 decided on 7th Oct., 1969.