

## Mahomed Ebrahim Mahomed Vs Essak Haji Alimahomed Haji Sumar and Others

**Court:** Bombay High Court

**Date of Decision:** Sept. 15, 1960

**Acts Referred:** Administration of Evacuee Property Act, 1950 " Section 17, 17(1), 7, 8

Civil Procedure Code, 1908 (CPC) " Order 34 Rule 15, Order 34 Rule 3

Evacuee Interest (Separation) Act, 1951 " Section 10, 11, 2

Transfer of Property Act, 1882 " Section 55(6)

**Citation:** AIR 1962 Bom 169 : (1961) 63 BOMLR 798

**Hon'ble Judges:** Mudholkar, Acting C.J.; Shah, J

**Bench:** Division Bench

**Advocate:** C.M. Daji and D. Latifee, for the Appellant; S.J. Sorabjee, J.S. Khambatta, Kantawala and R.L. Dalal, for the Respondent

### Judgement

Mudholkar, Actg. C.J.

(1) This is an appeal from the judgment of Mr. Justice K. K. Desai in suit No. 277 of 1954.

(2) The relevant facts are as follows: The defendants Nos. 1 to 4 had agreed under a deed dated 21st February 1949 to sell to the plaintiff, who is

the appellant before us, certain property situate in the city of Bombay for a sum of Rs. 2,80,000/-. Under the agreement the plaintiff paid to the

defendants Nos. 1 to 4 a sum of Rs. 15,000/- as earnest money. The defendants had agreed to make out a marketable title free from all claims

and demands. The plaintiff thereafter through his attorneys repeatedly called upon the defendants Nos 1 to 4 to make out a marketable title to the

property but the defendants failed to make out such a title. Ultimately, the plaintiff by his attorney's letter dated 21st August 1951 put an end to the

agreement for sale and called upon the defendants Nos 1 to 4 to return the earnest money of Rs. 15,000/- with interest thereon at 9 per cent per

annum from 21st February 1949 and a further sum of Rs. 3,500/- being the estimated cost and the expenses incurred by him in the meanwhile.

Eventually the plaintiff instituted the suit of which his appeal arises.

(3) In that suit the plaintiff has claimed a charge u/s 55(6)(b) of the Transfer of Property Act upon the property which was agreed to be sold. It

would appear that the defendants Nos. 1,3 and 4 eventually migrated to Pakistan.

(4) By a notification dated 21st April 1953 made in pursuance of sub-section (3) of Section 7 of the Administration of Evacuee Property Act,

1950 (hereinafter referred to as the Administration Act) the right, title and interest of the defendants Nos. 1, 3 and 4 in the said Immovable

property was notified as evacuee property. By virtue of the provisions of Section 8 of the Administration Act this interest vested from that date in

the Custodian of Evacuee Property, who has been joined in the suit as the sixth defendant. It would appear that the defendants Nos. 1 to 4 had

effected a mortgage over this property by an indenture of mortgage dated 21st June 1951 in favour of the fifth defendant. For this reason this

defendant was joined as a party to the suit and the plaintiff, apart from claiming a charge on the property, claimed priority over the fifth defendant.

(5) The defendants Nos. 1 to 4 did not file any written statement and were proceeded against ex parte. The sixth defendant by his written

statement contended that the claim only related to a composite property which the Competent Officer was empowered to decide under the

Evacuee Interest (Separation) Act, 1951 (hereinafter referred to as the Separation Act) and consequently this Court had no jurisdiction to decide

the plaintiff's claim. The sixth defendant further contested the plaintiff's right to the declaration in respect of the charge on the ground that this

charge was not confirmed by him u/s 40 of the Administration Act. Then he pointed out that this property was sold by a competent Officer under

the Separation Act and that accordingly there was no property available for sale in the suit. It may be mentioned that the suit itself was instituted on

the 11th of March 1954, while the sale by the Competent Officer was effected on 15th December 1955 and a certificate of sale was granted by

him to the purchaser on 24th January 1956. The sixth defendant raised some further defences with which we need not concern ourselves.

(6) The fifth defendant denied that the plaintiff was entitled to any priority in respect of his claim against the 5th defendant as mortgagee. At the

hearing before Mr. Justice K. K. Desai the fifth defendant through his counsel pointed out that in the proceedings before the Competent Officer

under the Separation Act, he had already been paid off the amount due to him as mortgagee and the question of priority as between the 5th

defendant and the plaintiff had not remained outstanding and did not require to be tried. The learned Judge, therefore, asked the plaintiff whether

he should dismiss the suit as against the fifth defendant. The plaintiff, however, insisted that he was entitled to continue the suit against the fifth

defendant and accordingly the suit proceeded against him also.

(7) The learned Judge while holding that the plaintiff was entitled to a refund of Rs. 15,000/- with interest at 6 per cent per annum from the

defendants Nos. 1 to 4 and also for Rs. 3,023-12-0 in respect of costs incurred in respect of and towards completion of sale from them, negated

the plaintiff's contention that he was entitled to a charge on the property which was agreed to be sold to him and also negated the contention that

he was entitled to a priority as against the fifth defendant.

(8) Being dissatisfied with the decree of the Court below the plaintiff has come up in appeal before us. The main argument of Mr. Daji, who

appears for the plaintiff, is that the plaintiff has got a charge u/s 55(6)(b) of the Transfer of Property Act, that he can follow the property even in the

hands of the purchaser and therefore this Court should have passed a decree in terms of prayer (f) in the plaint. That prayer is as follows:

(f) That the respective share, right, title and interest of defendants 1, 2 3 and 4 in the said properties described in schedule Ex. A to the plaint be

sold free from encumbrances if any, in favour of defendants 5, by and under the direction of this Hon"ble Court and the net sale proceeds or such

portions thereof as may be necessary be ordered to be utilised for satisfying the decretal amounts under prayers (a), b) and (c) hereof, or such one

or more of them as to this Hon"ble Court may deemed fit first after payment of the costs, charges and expenses of the sale.

(9) Now, it is true that u/s 55(6)(b) of the Transfer of Property Act, the buyer is entitled, unless he improperly declines to accept the delivery of the

property, the a charge on the property as against the seller and against all persons claiming under him to the extent of the seller's interest in the

property, for the amount of any purchase-money property paid by the buyer in anticipation of the delivery and for interest on such amount.

(10) The first question is whether the Custodian, who was a party to the suit, could be said to be a person claiming through the vendors. The office

of the Custodian of Evacuee Property was created by the various pieces of legislation enacted in this country subsequent to the partition of the

country on the 15th of August 1947. The Act with which we are concerned is the Administration of Evacuee Property Act, 1950, and u/s 5 of that

Act the Central Government is entitled to appoint amongst others Custodians of Evacuee Property in different States. u/s 7 where the Custodian is

of opinion that any property is evacuee property within the meaning of the Act, he may, after causing notice thereof to be given in such manner as

may be prescribed to the persons interested, declare a property to be an evacuee property. By virtue of Section 8 such property would thereafter

vest in the Custodian of the State in which the property is situate. It will thus be seen that the right to administer the property vests in the Custodian

subsequent to a notification made by him u/s 7 of the Act. It is nobody's case that the beneficial interest in the property does or will vest in the

Custodian at any time. In *M.B. Namazi Vs. Deputy Custodian of Evacuee Property and Others*, , Rajamannar C. J., has pointed out that where an

evacuee property is vested in the Custodian there is no deprivation of the property and that all that happens is that the management of the property

vests in the Custodian u/s 8 of the Act. Similarly, in *Dr. Government. R. Chopra Naraindas v. Narayan Prasad*, AIR 1956 Nag 100, it is observed

that:

The term "vested" in Section 8 of the Administration of Evacuee Property Act, 1950, has to be read in relation to the purpose and scope of the

Act. This Act is intended not to affect ownership in property but to provide for its administration. The expression shall be deemed to have vested in

the Custodian for the State" in Section 8, therefore, only means that the property becomes vested for purposes of management.

In *Ebrahim Aboobaker and Another Vs. Tek Chand Dolwani and Others*, , Mr. Justice Ghulam Hasan, who delivered the judgment of the Court,

pointed out that the object and the scheme of the Act was intended to provide for the administration of the evacuee property and that the property

is ultimately to be used for compensating the refugees who have lost their properties in Pakistan. Referring to Section 16, the learned Judge had

observed at page 12: (of Bom LR); (at p. 303 of AIR);

Section 16 empowers the Custodian to restore the evacuee property upon application to the evacuee or any person claiming to be his heir

provided he produces a certificate from the Central Government that the evacuee property may be restored to him.

And then observed:

These provisions far from suggesting that the person declared an evacuee suffers a civil death and remains an evacuee for all time show on the

other hand that the person may cease to be an evacuee under certain circumstances, that he is reinstated to his original position and his property

restored to him subject to certain conditions and without prejudice to the rights, if any, in respect of the property which any other person may be

entitled to enforce against him. These provisions also establish that the fact of a property being evacuee property is not a permanent attribute of

such property and that it may cease to be so under given conditions. The property does not suffer from any inherent infirmity but becomes evacuee

because of the disability attaching to the owner. Once that disability ceases, the property is rid of that disability and becomes liable to be reported

to the owner.

The observations in all these cases will, therefore, lead to the inference that the beneficial ownership in the property continues to be in the evacuee

even though the property may be vested in the Custodian for the purpose of administration. Since that is the position, it can hardly be argued that

the Custodian who administers the property is the person who claims the property through the evacuee. In fact there can be no question of his

claiming the property because the beneficial interest does not vest in him at any time. Where, however, in the course of administration of the

property, the Custodian sells it, the result would be that the interest of the evacuee would be transferred to the purchaser. Though the transfer

would be affected by the Custodian in such a case, the transferee would nonetheless be deemed in law a person claiming through an evacuee. No

doubt the transfer could not be said to have been effected by the evacuee himself but it is of a kind which is binding on him and which is made on

his behalf by a person empowered to do so under a Statute. A person, who claims title by virtue of such a transfer, must in law, therefore, be

regarded as a person claiming through the evacuee himself. It would follow from this that a transferee from the Custodian of an evacuee property

would be bound by a charge u/s 55(6)(b) of the Transfer of Property Act.

(11) In this case, however, there was no transfer by the Custodian at all, but by the Competent Authority. u/s 4 of the Evacuee Interest

(Separation) Act, 1951, the State Government is empowered with the approval of the Central Government to appoint competent officers for

performing certain functions, under the Act. Section 5 of the Act provides that a competent officer shall have jurisdiction to decide any claim

relating to any composite property situate within the limits of the local area of his jurisdiction. "Composite Property" is defined thus in clause (d) of

Section 2 of the Act:-

(d) "composite property" means any property which, or any property in which an interest has been declared to be evacuee property or has vested

in the Custodian under the Administration of Evacuee Property Act, 1950 and

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(i) in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not

being an evacuee; or

(ii) in which the interest of the evacuee is subject to mortgage in any form in favour of a person, not being an evacuee; or

(iii) in which the interest of a person, not being an evacuee, is subject to mortgage in any form in favour of an evacuee; or

(iv) in which an evacuee has such other interest jointly with any other person, not being an evacuee, as may be notified in this behalf by the Central

Government, in the Official Gazette.

(12) Now, as already stated, the defendants Nos. 1, 3 and 4 had migrated to Pakistan. These defendants along with the second defendant and

some other persons, who are not evacuees, had an interest in the property, which was agreed to be sold by the defendants Nos. 1 to 4 to the

plaintiff. This property, consequent on the migration of the defendants Nos. 1, 3 and 4 became "composite property" and it was thus that the

Competent Officer was entitled to perform certain functions in respect of this property. u/s 10 of the Separation Act the Competent Officer,

therefore, had the property auctioned. It may be mentioned that at that auction the plaintiff's alleged charge was duly notified. We mention this fact

at this stage because it has some relevance to the arguments advanced before us and to which we will refer hereafter.

(13) The sale by the Competent Officer in exercise of the powers conferred upon him by the Act is admittedly an involuntary sale. What was sold

by him was the interest of the evacuees and of other persons who had a joint interest in the property which was sold. No doubt, so far as the

evacuees are concerned, their interest had vested in the Custodian for the purpose of administration. But as we have already observed their

beneficial interest in the property had not vested in the Custodian even though the Custodian had the power to dispose of that interest whenever he

liked. So, from what we have said, it would be clear that the purchaser who succeeded to the interest of the former owner of the property, must to

the extent that he succeeded to the interest of the defendants Nos. 1 to 4, be deemed to be a person claiming through the defendants Nos. 1 to 4.

We are, therefore, of the opinion, that the plaintiff is entitled to a charge against the property even in the hands of the purchaser. Unfortunately, the

purchaser is not before us. This purchase was made pendente lite and he has not chosen to apply to the Court to be made a party to the suit.

However, being a purchaser pendente lite, he will be bound by the result of the suit.

(14) Mr. Kantawala, who appears for the 6th defendants, however, contended that the plaintiff's charge had come to an end by virtue of the

operation of the provisions of Section 6, 10 and 11 of the Separation Act. Section 6 of the Act provides that for the purpose of determining or

separating the evacuee interest in a composite property, a competent officer may issue a notice to all persons, who claim interest in the property,

requiring them to submit their claims in respect of that property. Section 8 of the Act entitles the competent officer to decide those claims. Section

10 provides for the separation of interest of the evacuees from those of claimants in the composite property and amongst others empowers the

competent officer to sell either the entire composite property or the interest of the evacuees in that property. Then comes Section 11, upon which

strong reliance is placed by Mr. Kantawala. Sub-section (1) of Section 11 is relevant and it reads as follows:-

(1) Where in respect of any property, notice u/s 6 is issued but no claim is filed or found to exist or where any claim in respect of such property is

found to exist and the competent officer separates the evacuee interest u/s 10, the whole property, or, as the case may be, the evacuee interest in

the property thus separated shall vest in the Custodian free from all encumbrances and liabilities and any payment, transfer or partition made or

effected u/s 10, in satisfaction of any claim in respect of the property shall be a full and valid discharge of all claims in respect of the property.

His contention is that as soon as the property is sold by a competent officer u/s 10 all encumbrances and liabilities upon that property are put an

end to and, therefore, the plaintiff's charge, if any, must be deemed to have been put an end to as soon as the competent officer sold the property

u/s 10. The same argument was addressed before Mr. Justice Desai and while dealing with this argument he has observed as follows in his

judgment:

The question which however remains to be decided is whether the property continues to be subject to the charge as claimed in this suit by the

plaintiff. The object of the Separation Act as mentioned in the preamble is:- "Whereas it is expedient to make special provisions for the separation

of the interests of evacuees from those of other persons in property in which such other persons are also interested and for matters connected

therewith". u/s 11 on separation of interest the whole property or the evacuee interest in the property separated vests in the Custodian free from

"all encumbrances and liabilities". The Competent Officer is empowered under the Act to sell away the property for the purpose of separation of

such interest. These relevant provisions indicate that the sale of the property in favour of the purchaser is intended to be free from "all

encumbrances and liabilities". It was not the intention, Section 11 could not have provided that the property made over and/or payment made to

the custodian of separated interest of the evacuee should be free from all encumbrances and liabilities or that upon payment or transfer made u/s 10

should be "full and valid discharge of all claims in respect of the property". It cannot be the intention of the legislature that when the property is

made over and/or transferred to the Custodian, the same should be free from all encumbrances and liabilities; but if it is sold and purchased by an

outsider the same continues to be subject to certain encumbrances and liabilities. It appears to me that though the Separation Act does not make

any provisions relating to the claim of a charge, holder Section 11 provides that the property in the hands of the Custodian and/or the purchaser

should be free from all "encumbrances and liabilities", and "claims in respect of the property". I have reluctantly come to this conclusion because if

this was not the true meaning of the provisions of Section 11, the object of the Act could not be completely carried out. There would be no

complete separation of evacuee interest if the property continues to be subject to any encumbrances or liabilities or claims. It is important to point

that the word "claims" in Section 11 has, having regard to context, wider meaning than the "claim" as defined in Section 2. Having regard to the

conclusion which I have reached regarding the provision of Section 11 and the sale effected by the Competent Officer the plaintiff is not entitled to

any charge on the property as claimed in this suit.

With great respect to the learned Judge, we cannot accept his view that the word "claim" occurring in Section 11 is to be given a wider meaning

than that contained in the definition. The definition of the word "claim" is as follows:

2. (b) "Claim" means the assertion by any person not being an evacuee , of any right, title or interest in any property-

(I) as a co-sharer or partner of an evacuee in the property; or

(ii) as a mortgagee of the interest of an evacuee in the property; or

(iii) as a mortgagor having mortgaged the property or any interest therein in favour of an evacuee; and includes any other interest which such

person may have jointly with an evacuee and which is notified in this behalf by the Central Government in the Official Gazette;

This definition clearly excludes a charge whether a statutory charge or charge under a decree or a charge of any other kind. The first provision of

the Act in which the word "claim" has been used is Section 6, which deals with notice to submit claims. It is this very section which is referred to in

sub-section (1) of Section 11. The contingency dealt with by sub-section (1) of Section 11 is dependent upon the action taken u/s 6 of the

Separation Act, and, therefore, the word "claim" occurring in sub-section (1) of Section 11 cannot be accorded a wider meaning than that which it

has in Section 6. Now, Section 6 is the first section which follows after the definition clause and we think that at least in the section next following

the definition the legislature would not have intended to give to the expression "claim" a meaning wider than that contained in the definition. Apart

from that this section has to be read along with Section 7, which deals with the manner of submission of claims and reading the two sections

together it will be clear that the claims to be submitted to the Competent Officer are only of the type indicated in the definition and nothing more.

(15) Mr. Kantawala, who appears in support of the judgment of the Court below, frankly stated before us that he did not find it easy to sustain the



reasoning of the learned Judge on the point. Mr. Kantawala, however, contended and so Mr. Sorabjee, who appears for the 5th defendant, that

the important words in the section are ""free from all encumbrances and liabilities"", and we cannot ignore them. According to them, whatever may

be the meaning of the word "claim", once a property is dealt with by a competent Officer u/s 10, it becomes free from all encumbrances and

liabilities howsoever they may have been created. In our opinion, this argument is not sound. The encumbrances and liabilities referred to in sub-

section (1) of Section 11 must necessarily be deemed to be those which flow from the claims to which reference is made earlier in the section. Mr.

Sorabjee said that if we were to take that view then the words ""free from all encumbrances and liabilities"" would be a surplusage. In our opinion,

these words have been used by way of abundant caution and nothing more.

(16) For all these reasons we hold that the charge in favour of the plaintiff was not destroyed by the fact that the composite property was put to

sale by the Competent Officer.

(17) Even though it is our view, we find it difficult to grant the plaintiff the main relief claimed by him, that is, to order the sale of the property

subject to the charge to the extent of the interest of the defendants Nos. 1 to 4. We shall deal with the question of interest of the defendant No. 2

separately but in so far as the defendants Nos. 1, 3 and 4 are concerned, the position is complicated by reason of the operation of the provisions

of the Administration Act and the Separation Act.

(18) Now, Section 17(1) of the Administration Act runs thus:-

17(1). Save as otherwise expressly provided in this Act, no evacuee property which has vested or is deemed to have vested in the Custodian

under the provisions of this Act shall, so long as it remains so vested, be liable to be proceeded against in any manner whatsoever in execution of

any decree or order of any Court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any

such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on

such commencement and shall be deemed to be void.

At the date of the suit the property in question was undoubtedly vested in the Custodian that is, the 6th defendant. Therefore, that property was not

liable to be proceeded against in any manner whatsoever in execution of any decree or order of any Court. The question is whether a Court would

be competent to pass a decree for sale of such a property after it has vested in the Custodian Mr. Daji says that Section 17 cannot stand in the

way of granting the relief for two reasons. In the first place, according to him where a Court passes a decree for sale under Order XXXIV R.15

read with Rule 3, it does not proceed against the property in execution. The second reason is that at the date of the decree the property could no

longer be said to be vesting in the Custodian because it has already been sold and it has been in the hands of the purchaser. No. Doubt, Section 17

does not specifically say that the Court will have no power to pass a decree against the Custodian, but when it lays down that the property which

was vested in him will not be liable to be proceeded against in execution, it would mean that the Court would not have the power to pass a decree

for sale of that property in execution. A preliminary decree under Order XXXIV, C. P. C. In a suit for the enforcement of a mortgage or a charge

stands on a different footing from a mere money decree. Where the Court, however, has to pass a decree which not merely declares an amount

payable to the plaintiff but also declares that the amount, which is payable to the plaintiff, is to be realised by the sale of certain property, then such

a decree would be affected by the provisions of the kind to be found in Section 17 of the Administration Act. By passing a decree of this kind the

Court would in effect be saying that the property though vested in the Custodian is liable to be proceeded against in execution and that is precisely

what is not permitted to be done by Section 17.

(19) We do not think that the circumstance that the property has now passed into the hands of the purchaser by virtue of a sale effected by the

Competent Officer will make any difference. The whole idea seems to be that the property which is dealt with under either of the two Acts, that is,

the Administration Act or the Separation Act, should not be liable to be dealt with under the ordinary law. Now, before the property passed to

the purchaser it was dealt with in a particular manner by the Competent authority. Therefore, it would be in keeping with the provisions of the Act

and with the object of the Act to hold that that property enjoys the same protection as it had while it had vested in the Custodian. In our view, the

property's charge would after the sale, be transferred to the sale proceeds.

(20) The view which we have taken would not defeat the rights of the plaintiff or any other person similarly situated. Rule 22 is one of the rules

framed under the Administration Act and it provides that third parties who have claims against evacuee property are entitled to lodge their claims

with the Custodian and the Custodian is empowered to deal with those claims after being satisfied about their genuineness and subsisting character.

The plaintiff has thus a remedy open to him even to-day.

(21) In so far as the second defendant is concerned, the position can really be no different even though his interest had never vested in the

Custodian. Under the separation Act the Competent Officer has power u/s 10 to sell the interest of a claimant. The second defendant who is not

an evacuee falls within the definition of "claimant" contained in that Act. As we have already pointed out earlier the words "free from all

encumbrances and liabilities" which occur in sub-section (1) of Section 11 are such as flow from the claim to which reference has been made

earlier in the Section. Therefore, so far as the purchaser is concerned, he will get the property free from all encumbrances and liabilities with

respect to the claim of the second defendant. The plaintiff, who has a claim against the second defendant, can, therefore, stand on no higher footing

than the second defendant himself. In these circumstances, we agree with the learned Single Judge that a decree in terms of prayer (f) cannot be

passed.

(22) For these reasons we uphold the judgment of the Court below and dismiss the appeal with costs with liberty to the respondents Nos. 5 and 6

to withdraw the amount deposited towards costs.

(23) Appeal dismissed.