

The Swadeshi Commercial Co. Ltd. Vs Union of India (UOI) and Others

Court: Calcutta High Court

Date of Decision: Nov. 30, 2006

Acts Referred: Constitution of India, 1950 " Article 226

Defence of India Act, 1962 " Section 2, 2C

Enemy Property Act, 1968 " Section 10, 13, 17, 18, 19

Transfer of Property Act, 1882 " Section 116

Citation: AIR 2007 Cal 53 : (2007) 2 CALLT 123 : 111 CWN 13

Hon'ble Judges: Tapan Mukherjee, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Shaktinath Mukherjee, Ranjan Deb and Soumik Mukherjee, for the Appellant; Manoj Ray and Sujoy Mondal, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Our task has become easier in view of the recent Apex Court decision in the case of Union of India (UOI) and

Another Vs. Raja Mohammed Amir Mohammad Khan, which the learned Judge did not have as the said judgment came after the disposal of the

writ application.

2. The appellants were the owners of premises No. 14, Netaji Subhas Road. Ground Floor, Kolkata. The predecessor in interest of the appellants

by a deed of indenture dated May 19, 1953 gave on lease approximately 3000 sq. ft. on ground floor of the said premises to National Bank of

Pakistan for a term of 16 years commencing from April 1, 1951. The area was subsequently increased and ultimately the said bank came in

possession of 6235 sq. ft. on the ground floor of the said premises in question at a monthly rent of Rs. 1610.00 per month. In 1965 due to

hostilities between the two countries being India and Pakistan due to Indo-Pak war the said branch of National Bank of Pakistan was declared as

an enemy firm and the respondent authority became the custodian of the enemy property under the provision of the Enemy Property Act, 1968

(hereinafter referred to as the "said Act of 1968") and continued to be in possession since then. The lease expired by efflux of time on March 31,

1967. The Controller, Enemy Property sought renewal of the said lease. The predecessor in interest of the appellants initially did not agree to such

renewal and asked for vacating of the said property. Series of discussions was held. Correspondence was exchanged but that yielded no result.

Initially the owners impliedly permitted them to continue for a temporary period on the basis of their representations by not taking any positive step

for their eviction. Authority, however, did not come to a final solution in the meantime the present appellants became the transferee owner from

their predecessor in interest. They moved the writ petition before this Court, inter alia, praying for direction upon the respondent to vacate the said

premises and hand over possession to the appellants.

3. On perusal of the correspondence exchanged between the parties at the material time it appears that by a letter dated April 4, 1967 the

authority expressed their desire to release the excess portion in favour of the owners provided they were allowed to retain 2000 sq. ft. on the

southern portion for the purpose of maintenance of their records. They also prayed for proportionate decrease of rent.

4. However, the authority changed their stand subsequently and by their letter dated April 24, 2002 addressed to the Advocate for the appellants

the Authority claimed that they became the tenant under the then owners and then the appellants by virtue of acceptance of rent by the owners.

They contended that it was a monthly tenancy in their favour, hence question of release of the said premises did not arise. The appellant also

approached the bank authority at Pakistan. They, however did not show any interest in the matter. From the prospectus of the bank it appears that

they did not have any branch in India as appears from the list of overseas branches appearing at page 45 of the paper book.

5. In the affidavit-in-opposition filed before the learned single Judge identical stand was taken by the respondents.

6. The learned single Judge heard the parties at length and His Lordship came to the conclusion that the writ petitioners were not entitled to claim

eviction of the respondents that too by filing a writ petition. The learned single Judge also recorded that there had been acceptance of rent by the

appellants from the respondents. Hence, it was not a proper case to pass any order on the said application. His Lordship, however, gave liberty to

the appellants to make representation to the respondents.

7. Being aggrieved by and dissatisfied with the said judgment and order the appellants filed the present appeal.

Mr. Shaktinath Mukherjee, learned Counsel appearing in support of the appeal contended that under the provisions of the said Act of 1968 the

appellants were entitled to claim a declaration that the appellants were entitled to an order of divesting u/s 18 of the said Act of 1968. Mr.

Mukherjee contended that the lease was in favour of the Bank of Pakistan. There was no surrender by the bank. The authority became the

custodian of the said property under the said Act of 1968. Hence they did not have any independent right to claim tenancy. Mr. Mukherjee further

contended that the respondent authorities were the trustees of the enemy property and they did not have any right to claim an independent title

dehors the beneficiary.

8. With regard to acceptance of rent Mr. Mukherjee contended that no choice was left open to the appellants but to accept rent so long the

divesting order was not passed and such acceptance could not be considered as an acceptance of the respondents as independent tenant.

9. In support of his contention Mr. Mukherjee relied on the following decisions apart from Raja Mohammad (supra):

(i) AIR 1949 124 (Federal Court)

(ii) Ganga Dutt Murarka Vs. Kartik Chandra Das and Others,

(iii) Ravindra Ishwardas Sethna and Another Vs. Official Liquidator, High Court, Bombay and Another,

Mr. Manoj Ray, learned Counsel appearing for the respondents contended that since . this involved a disputed question of fact relating to title

Article 226 of the Constitution could not be invoked and the writ Court should be slow in interfering and the learned Judge rightly refused to

entertain the writ petition.

10. Mr. Roy further contended that the action on the part of the authority could only be made a subject matter of judicial review only when there

was any error manifested or apparent on the face of the proceeding or a grave injustice or gross failure of justice had occasioned. No such case

was made out by the appellant and such order of dismissal of the writ petition should not be interfered With.

11. Mr. Manoj Ray also contended that the subject in controversy was touching the international law and no domestic Court of law should

interfere in the controversy.

12. He further contended that the appellants claimed a decree for eviction as against the respondents which could only be decided in a suit and not

by the writ Court.

13. In support of his contentions Mr. Roy cited the following decisions:

(i) Union of India (UOI) Vs. Ghaus Mohammad,

(ii) Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes,

(iii) Hindustan Steel Limited, Rourkela Vs. Smt. Kalyani Banerjee and Others,

(iv) Jolly George Varghese and Another Vs. The Bank of Cochin,

(v) U.P. State Road Transport Corporation and another Vs. Mohd. Ismail and others,

(vi) Chandigarh Administration and another Vs. Manpreet Singh and others,

(vii) Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another,

(viii) Surya Dev Rai Vs. Ram Chander Rai and Others,

(ix) Hindustan Steel Works Construction Ltd. and Another Vs. Hindustan Steel Works Construction Ltd., Employees Union,

14. The said Act of 1968 was interpreted by the Apex Court in the case of Union of India (UOI) and Another Vs. Raja Mohammed Amir

Mohammad Khan, . Paragraphs 5, 10, 11, 12, 13, 14, 15 and 16 of the said judgment being relevant herein which are quoted below (paras 11 to

17 of AIR):

9. The Enemy Property Act, 1968 was enacted for the purpose of continued vesting of enemy property, vested in the Custodian of Enemy

Property for India under the Defence of India Rules, 1962 and the Defence of India Rules, 1971. Section 2(b) defines enemy, an enemy subject or

an enemy firm and the same reads as under:

2(b) "enemy" or "enemy subject" or "enemy firm" means a person or country who or which was an enemy, an enemy subject or an enemy firm, as

the case may be, under Defence of India Act, 1962 and the Defence of India Rules, 1962 or to the Defence of India Act, 1971 and the Defence

of India Rules, 1971, but does not include a citizen of India.

10. Section 2 defines the expression "enemy property" as follows:

2(c) "enemy property" means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or on

enemy firm:

Provided that where an individual enemy subject dies in the territories to which this Act extends, any property which immediately before his death,

belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the

purposes of this Act.

11. Section 6 of the Act provides for declaring the transfer of property by a enemy subject which is vested in the Custodian to be void by the

Central Government after giving reasonable opportunity of being heard Section 6 reads as under:

6. Transfer of property vested in Custodian by enemy, or enemy subject or enemy firm - Where any property vested in the custodian under this

Act has been transferred, whether before or after the commencement of this Act, by an enemy or a enemy subject or a enemy firm and where it

appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting

of the property in the Custodian, then, the Central Government may, after giving a reasonable opportunity to the transferee to be heard in the

matter, by order, declare such transfer to be void and on the making of such order, the property shall continue to vest or be deemed to vest in the

Custodian.

This section provides that if any property vested in the Custodian has been transferred, whether before or after the commencement of the Enemy

Property Act, by an enemy, or an enemy subject or an enemy firm and if the Central Government is of the opinion that such transfer is injurious to

the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, the Central Government may

declare such transfer to be void after hearing the transferee in the matter. This provision makes it clear that there is no bar on the transfer of the

enemy property in general by an enemy subject meaning thereby the title still remains with him.

12. Section 8 deals with power of the Custodian in respect of the enemy property vested in him. The same is reproduced here:

8. Powers of Custodian in respect of enemy property vested in him:

(1) With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he

considers necessary or expedient for preserving such property and where such property belongs to an individual enemy subject, may incur such

expenditure out of the property as he considers necessary or expedient for the maintenance of that individual or of his family in India.

(2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as may be specifically authorised by him in this

behalf, may, for the said purpose,-

(i) carry on the business of the enemy;

(ii) take action for recovering any money due to the enemy;

(iii) make any contract and execute any document in the name and on behalf of the enemy;

(iv) institute, defend or continue any suit or other legal proceedings, refer any dispute to arbitration and compromise any debts, claims or liabilities;

(v) raise on the security of the property such loans as may be necessary;

(vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority

and of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the contributions to, or in

respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;

(vii) transfer by way of sale, mortgage or , lease or otherwise dispose of any of the properties;

(viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be

approved by the Central Government for the purpose;

(ix) make payments to the enemy and his dependents;

(x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on 25-10-1962 or on 3-12-1971;

and

(xi) make such other payments out of the funds of the enemy as may be directed by the Central Government.

Explanation - In this sub-section and in Sections 10 and 17, "enemy" includes an enemy subject and an enemy firm.

13. Section 9, provides that all enemy property vested in the custodian shall be exempt from attachment, seizure or sale in execution of decree of a

civil Court or orders of any other authority.

14. Section 13 makes provision for validity of action taken in pursuance of orders of the Custodian and reads as under:

13. Validity of action taken in pursuance of orders of Custodian .- where under this Act.-

(a) any money is paid to the Custodian; or

(b) any property is vested in the Custodian or an order is given to any person by the Custodian in relation to any property which appears to the

Custodian to be enemy property vested in him under this Act, neither the payment, vesting nor order of the Custodian nor any proceedings in

consequence thereof shall be invalidated or affected by reason only that at a material time,-

(i) some person who was or might have been interested in the money or property, and who was an enemy firm, had died or had ceased to be an

enemy or an enemy firm; or

some person who was so interested and who was believed by the Custodian to be a enemy or an enemy firm, was not a enemy or a enemy firm.

15. Section 18 deals with divesting of enemy property vested in the Custodian and reads as under:

18. Divesting of enemy property vested in the Custodian.- The Central Government may, by general or special order, direct that any enemy

property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be

prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the

Custodian and shall revert in such owner or other person.

A reading of Section 18 makes it evident that enemy property is not permanently vested in the Custodian and divesting the Custodian of such

property is contemplated.

16. Section 19 protects the action taken under the Act and provides that no suit, prosecution or other legal proceeding shall lie against the Central

Government or the Custodian of Enemy Property for anything which is done in good faith or intended to be done under the Act.

15. On a combined reading of the aforesaid paragraphs quoted (supra) it appears that the property once declared as enemy firm or an enemy

property is automatically vested in the custodian appointed by the Central Government under the said Act. Custodian is empowered to look after

the said property and he has to hold the said property in trust for the beneficiary. u/s 18 if the Central Government feels that any of the property

vested in the custodian should be divested and should be returned to the owner or such other person appropriate order should be passed under

the said provision.

16. In the case before the Apex Court in Union of India (UOI) and Another Vs. Raja Mohammed Amir Mohammad Khan, , the owner of the

property was a Pakistan National. He left India and ultimately died in London in 1973. His heir made numerous representations to the Central

Government as well as to the custodian to release the said property as the same could not continue to vest in the custodian after the death of Raja.

It is significant to note that the son of Raja was an Indian citizen. The representation was not adhered to. A suit was filed by the son. The suit was

dismissed for non-joinder of the custodian. A second suit was filed contending that the concerned property could not continue to have been vested

upon the custodian as the vesting was limited to taking over of possession, management and control of the property till such time the property

remained enemy property. The trial Court decreed the suit in favour of the son by giving a declaration that the son was the sole heir and successor

of his father and was entitled to 25% or whatever percentage it may be, the son was entitled to. The Central Government did not prefer any

appeal. Even then they refused to hand over the properties to the son which gave rise to a writ petition. The High Court allowed the writ petition

and, held on interpretation of Sections 6, 8 and 18 of the said Act 1968 that due to vesting order the owner was not divested of his right, title or

interest of the property and the vesting was limited to temporary taking over of possession, management and control. The High Court ultimately

directed handing over of possession. The Central Government approached the Apex Court. The Apex Court after interpreting the relevant sections

quoted (supra) observed as follows (para 23 of AIR):

A conjoint reading of Sections 6, 8 and 18 of the Act indicates that the enemy subject due to the vesting of his property in the Custodian is not

divested of his right, title and interest in the property. The vesting in the Custodian is limited to the extent of possession, management and control

over the property temporarily. This position was not disputed before us by the learned Counsel appearing for the appellant. The object of the

Enemy Property Act is to prevent a subject of an enemy State from carrying on business and trading in the property situated in India. It is,

therefore, contemplated that temporary vesting of the property takes place in the Custodian so that the property till such time as it is enemy

property cannot be used for such purpose.

17. The Apex Court made serious remarks about the inaction and, or non-action on the part of the custodian.

18. Paragraphs 29, 30 and 31 being relevant herein are quoted below (paras 33 to 35 of AIR):

29. To be just and act in a just manner is writ large in our Constitution and the laws. The legislature is to act in a just manner by enacting just laws

within the framework of the Constitution. The executive is enjoined with a duty to act or apply the laws in a just manner and if on individual or

institution is dissatisfied with the State action in enacting the laws or their implementation he can approach the Court seeking redressal of his

grievances.

30. Unfortunately a dangerous attitude resulting in doing institution damage is developing, that justice is required to be done only by the Courts.

This attitude is betrayal of the Constitution as well as of the laws. Every and any authority working under the statute has to discharge its duties in a

just manner otherwise people will lose faith in the governance.

31. The case in hand is a typical example of such an attitude. It is admitted by the counsel for the appellants that under the Enemy Property Act the

title of the property of an enemy does not vest in the Custodian. The Custodian takes over the enemy property only for the purpose of possession,

control and management. An Indian citizen is excluded from the definition of an "enemy" or "enemy subject" u/s 2(b). The respondent was declared

to be the heir and successor of the late Raja of Mahmudabad. On being so declared the property which came to vest in the respondent who is a

citizen of India ceased to be an enemy property. On a representation filed by the respondent, the appellants recognized this fact and agreed to

release 25% of the property although he was entitled to the whole of the property. No reasons were given for doing so. Still worse the appellants

did not even release 25% of the property. Again no reasons are forthcoming for doing so. When asked by the Court to produce the Cabinet note

put up before the Cabinet in this regard, the appellants refused to do so and claimed it to be a privileged document. When admittedly the title of the

property did not come to vest in the Custodian then as soon as the title in the property came to vest in an India citizen the property ceased to be an

enemy property". The authorities were duty-bound to release the property in favour of the true owner (respondent). Instead of doing it the Union

of India forced the respondent to knock at the doors of the Court. The authorities have deprived the respondent of the possession and enjoyment

of the properties for the last 32 years without any justification. The reasons for doing so as we understand is that the buildings are being occupied

by the Deputy Commissioner. Superintendent of Police and other district officers for their residences as well as for their offices, which they did not

want to give up. This is highly objectionable and unjust. It needs to be deprecated.

19. Ultimately the appeal was dismissed and the property was directed to be handed over to the son as directed by the earlier Courts.

20. In the instant case, the lease was in favour of Bank of Pakistan. Such firm was declared as enemy firm. Under the said Act of 1968, the lease

had expired by efflux of time. Hence, the owner was entitled to an order of divesting u/s 18. We could appreciate the practical difficulty so faced

by the authority as explained in their letter dated March 14, 1967, appearing at pages 38-40 of the paper book. In the said letter the authority

expressed their difficulty to vacate the premises within a short notice. They contended that at least 5 to 8 years were required for performing the

statutory obligation as the custodian had to preserve all books and records of the Bank. We also find from the letter dated April 4, 1967 appearing

at pages 41 and 42 of the paper book that the custodian requested the owners to permit them to retain 2000 sq. feet for the purpose of

discharging their statutory obligations as referred to above. In such circumstances, the appellants or its predecessors did not take any legal action

as against the custodian contemporaneously.

21. Forty years have passed in between. Custodian was not willing to divest the said property. We heard the matter on November 15, 2006 when

we adjourned the matter to enable the learned Counsel appearing for the respondents to take instruction in the matter. On the next adjourned date

learned Counsel expressed his inability to agree to an order of divesting even partially which compelled us to hear the matter on merits.

22. Mr. Roy appearing for the respondents contended the writ petition involved disputed question of facts. We are unable to accept such

contention. The lease admittedly expired by efflux of time. The property admittedly belonged to the owners being the appellants. Hence, there

could be no dispute which could stand to trial.

23. Mr. Roy further contended that decree for eviction could not be passed by the writ Court. Under the provisions of Section 18 of the said Act

of 1968 the respondents were legally obliged to pass an order on the application made by the owners for an order of divesting. We can see no

reason as to why an order of divesting could be refused. The authority cannot, in our view, hold the properties for eternity by paying a paltry sum

as monthly rent and such action of the authority is very much amenable for judicial review in writ jurisdiction.

24. It was contended on behalf of the respondents that the writ petition was grossly delayed. We are unable to appreciate such contention of the

respondents. From 1967 onwards the appellants and their predecessors in interest continued to make request for vacating of the said premises.

The respondents wanted seven/eight years time in 1967. Such period expired in the middle of 1970s. Even if the authority is required today to

maintain the statutory books belonging to the Bank it would certainly not require 6000 sq. feet area to the detriment of the appellants.

25. It was further contended that there was no proper application u/s 18 of the said Act of 1968. Such submission is also not tenable as there is no

prescribed format under the said Act for making such application (at least not contended before us by the respondents) and in any event this

repeated representations so annexed to the pleadings would obligate the respondents to take a final decision on the same in accordance with the

provisions of Section 18.

26. Mr. Roy contended that by acceptance of rent subsequent to the expiry of lease, the respondents became tenant under the appellants. We are

unable to appreciate such submission. Even if we hold that by acceptance of rent the tenancy continued such tenancy, in our view, could only be a

tenancy in favour of the Bank and not in favour of the respondents independently. The respondent No. 2, as we have observed earlier, was nothing

but a custodian being a trustee and was not entitled to claim better title and/or title dehors the interest of the lessee Bank or the beneficiary.

27. On the issue of holding over Mr. Mukherjee cited two decisions referred to above. In the case of AIR 1949 124 (Federal Court) the Federal

Court held that even after expiry of the term of the lease if the lessee continues to be in possession Section 116 of the Transfer of Property Act

would have no application. In our view, once a lease expires by efflux of time it is the obligation of the lessee to hand over possession back to the

lessor. If he holds over the property that does not give him any independent right to claim tenancy dehors the deed of lease. Such creation of

tenancy cannot be done by unilateral act.

28. We are also told that Bank of Pakistan was no more interested to retain this property. From their list of overseas branches name of India could

not be found. It is nobody's case that Bank of Pakistan today intends to carry on banking activity in India particularly in Calcutta and that too from

the said premises.

29. The learned single Judge observed that Bank was a tenant of the said property and rents were being regularly paid by the custodian on behalf

of the Bank even after expiry of the lease. Hence, the relationship between the appellant and respondent was that of landlord and tenant under the

tenancy law. With all humility we beg to differ with His Lordship on the reasons as discussed above.

30. His Lordship further observed that the predecessor in interest of the appellants did not raise any objection and issued rent receipt even after

expiry of lease i.e. after April, 1967. This observation, in our view, is also not correct.

31. His Lordship ultimately directed the appellant to approach the authority under the said Act of 1968 presumably for a divesting order coupled

with a direction upon the respondents to dispose of the same by a reasoned order. In our view His Lordship should have approached the problem

from the angle as highlighted above by us and then should have directed the custodian to pass an appropriate order u/s 18.

32. The appeal the therefore succeeds.

33. The judgment and order of the Learned single Judge is quashed and set aside.

34. The appropriate authority u/s 18 of the said Act of 1968 must consider the representations made by the appellants and/or their predecessor in

interest so annexed to the pleadings and pass an appropriate order in accordance with provisions of the said Act of 1968.

35. We, however, make it clear that in case the prescribed authority feels that they still need a portion of the said premises for preservation of the

records of the Bank they may pass a partial divesting order after considering the actual need of the custodian for retention of a part of the

premises.

36. Such divesting order must be a reasoned one.

37. We expect that the authorities would act as expeditiously as possible particularly considering the facts that about more than forty years have

passed after the property was taken over by the custodian.

38. In case prescribed authority ultimately decides to retain a portion of the property they would hand over possession of the balance portion

immediately to the lawful owner of the premises in question upon a valid discharge being made therefor.

39. With regard to the portion if to be retained by the authority the matter should be referred to the Central Hiring Committee for fixation of fair

rent.

40. The appeal is disposed of accordingly without any order as to costs.

41. Urgent xerox certified copy would be given to the parties, if applied for.

Tapan Mukherjee, J.

42. I agree.