

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**RSA No.361 of 1989 (O&M)
Date of Decision: 11.03.2019**

Kasturi Lal

.....Appellant

Versus

Central Government and others

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. M.L.Saggar, Senior Advocate
with Mr. Rohit Joshi, Advocate
and Ms. Armaan Saggar, Advocate
for the appellant.

Mr. O.P.Dabla, Sr. Counsel for UOI
for respondents no.1 and 2.

Mr. Sandeep Singh Deol, DAG., Punjab
for respondent no.3.

Mr. J.S.Bhatia, Advocate
for respondent no.4.

LISA GILL, J.

Appellant-plaintiff is aggrieved of judgment and decree dated 13.10.1988, passed by the learned Additional District Judge, Gurdaspur, whereby judgment and decree dated 13.05.1986 passed in favour of the appellant-plaintiff by the learned Sub Judge Ist Class, Batala, has been set aside.

Brief facts necessary for the adjudication of the case are that the plaintiff-appellant-Kasturi Lal filed a suit for declaration to the effect that the plaintiff along with defendants no.6 to 11 had become owners of the suit land measuring 6 Kanals and defendants no.1 to 5 had no right, title or

interest in the suit property. It was pleaded that the suit property was allotted in consolidation proceedings in lieu of land measuring 8 Kanal 10 Marlas as described in the jamabandi for the year 1929-30. The land originally belonged to one Abdur Rehman son of Niamat Ali, who had mortgaged this property in favour of Bua Dass son of Kahna Mal vide mortgage deed executed on 20.05.1933 and registered on 22.05.1933 for a sum of ₹925/-. It is further pleaded that after partition of the country in 1947, mortgagor rights vested in the Central Government and Bua Dass continued to be the mortgagee in possession. Plaintiff and defendants no.6 to 11 being the sons and daughters of Bua Dass and being his legal representatives succeeded to the estate of Bua Dass. They acquired mortgagee rights by succession and entered possession of the suit property. The land in question, it is claimed was never redeemed. However, in the jamabandi for the year 1974-75, name of the mortgagee has been removed in an illegal manner. Wakf Board through Virsa Ram is wrongly shown in possession of the property. As the land in question was never redeemed within the limitation period of 30 years, the plaintiff and defendants no.6 to 11 claimed to have become absolute owners of the property by efflux of time. It is further pleaded that defendants no.1 to 3 illegally dispossessed the plaintiff and defendants no.6 to 11 from the land in dispute about 5 to 6 years prior to the filing of the suit. Defendants no.4 and 5 were stated to be in illegal possession of the land in dispute. It was thus pleaded that the plaintiff and defendants no.6 to 11 were entitled for the possession of the land in dispute. Hence the suit for declaration and consequential relief of possession was filed.

Union of India and the State of Punjab, in a joint written

statement filed through the Settlement Officer (Sales) Punjab Rehabilitation Department, admitted that the suit land was allotted during consolidation proceedings in lieu of the land described in the plaint. Preliminary objection was taken regarding maintainability of the suit and jurisdiction in the light of Sections 27 and 36 of the Displaced Persons (C&R) Act, 1954. It was admitted that the land originally belonged to Abdur Rehman who had mortgaged the property in favour of Bua Dass. However, with the migration of Abdur Rehman at the time of partition, the Custodian/Central Government has stepped in his shoes as a mortgagor. Since the mortgage being over 20 years but less than 60 years old, the suit land vested in the custodian free from any encumbrance in terms of Section 9 (2) of the Evacuee Interest (Separation) Act, 1951 (for short, 'Act'). The suit property was claimed to be owned by the Central Government and the Tehsildar Sales, Gurdaspur was fully competent to dispose of the same as per the provisions of law and dispossess any unauthorized occupant thereon. It was denied that the plaintiff or defendants no.6 to 11 ever remained in possession of the suit property.

The Punjab Wakf Board (defendant no.5) filed a separate written statement controverting the claim of the plaintiff. The ownership of Abdur Rehman was not admitted. Vesting of the property in the Custodian/Central Government was also denied by the Wakf Board. Suit property was claimed to be Wakf property vesting in the Punjab Wakf Board.

From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether the land in dispute was allotted in consolidation in lieu of the land bearing khasra nos. 2517 min, 2518 and 2535 as alleged?OPP
2. Whether Abdur Rehman mortgaged with possession the land in favour of Bua Dass son of Kahna Mal vide registered deed dated 22.05.1933?OPP
3. Whether the plaintiff and defendants no.6 to 11 are the heirs of Bua Dass?OPP
4. Whether the suit is properly signed, verified and presented?OPP
5. Whether the suit is not maintainable in view of preliminary objection nos. 1 and 2?OPD(defendant no.4)
6. Whether this Court has no jurisdiction to try the suit?OPD(defendants no.1 to 3).
7. Whether the notice U/S 80 CPC is not legal valid in the eyes of law?OPD
8. Whether the plaintiff has no cause of action to file the suit?OPD
9. Whether the plaintiffs are entitled to the declaration and consequential relief of possession?OPD
10. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the facts and circumstances as well as the evidence on record decreed the suit filed by the plaintiff-appellant while declaring that the plaintiff and defendants no.6 to 11 became owners of the suit property and were entitled to possession thereof from defendants no.1 to 5. Defendant no.4-Wakf Board was not represented at the stage of arguments before the learned trial Court and the suit was decreed *ex parte* against the Punjab Wakf Board.

Appeal was preferred by the State of Punjab, Central Government through the Tehsildar Sales, Gurdaspur and Union of India through the Secretary, Rehabilitation Department, Jaisalmere. A separate appeal was filed by the Punjab Wakf Board. Learned Additional District

Judge, vide judgment and decree dated 13.10.1988 accepted the appeal filed by the State of Punjab and others while dismissing the one filed by the Punjab Wakf Board.

Aggrieved therefrom, present appeal has been filed by the appellant-plaintiff.

It is to be noted that no appeal has been filed by the Punjab Wakf Board.

Learned senior counsel for the appellant vehemently argues that the property in question cannot be treated to be evacuee property merely on the ground that mutation in this respect has been entered. It is argued that as per Section 7(3) of the Administration of Evacuee Property Act, 1950 (for short 'Evacuee Act'), it was incumbent upon the custodian to notify the property in question to be evacuee property. Until and unless such an exercise was undertaken after having issued due notice as per Section 7 (1) of the Evacuee Act, the property cannot be treated as evacuee property. Moreover, possession of the property was given by the Wakf Board to Virsa Ram. This act was illegal inasmuch as the Wakf Board did not have any power to deliver possession to Virsa Ram. At best, it could be the Central Government which could have handed over possession of the property to Virsa Ram.

Learned senior counsel for the appellant argues that evacuee property is further divided into three parts i.e., (i) that which is abandoned, (ii) that which is in authorized possession of others and (iii) where interest in the property had already been created by the original owner before leaving the country at the time of partition and the persons to whom the

interest had been conveyed were in lawful possession thereof. In the present case, the property had been mortgaged in favour of Bua Dass, who was in possession of the property at the time of partition. Therefore, notification under Section 7 of the Evacuee Act, was necessary and there cannot be any automatic vesting of the property. It is further contended that the surplus evacuee properties were transferred to the State of Punjab which are referred to as the package deal properties. Property in question would be dealt with under the Punjab Package Deal Properties (Disposal) Act, 1976. Punjab Wakf Board, it is vehemently urged has no concern with the land. Plaintiff-appellant was illegally and forcibly dispossessed by respondent no.5, who alleged that the property had been released to him by the Punjab Wakf Board. Thus, in every eventuality, it is the plaintiff-appellant who is entitled to be declared the owner in possession of the suit property. It is thus prayed that the present appeal be allowed and judgment and decree dated 13.10.1988 passed by the learned Additional District Judge, Gurdaspur, be set aside while upholding the judgment and decree dated 13.05.1986 passed by the learned Sub Judge Ist Class, Batala.

To the contrary, learned counsel for the respondents submit that there was no necessity of any notification under Section 7(3) of the Evacuee Act. The property in question automatically vested in the custodian. It is submitted that even in the absence of a notification as contemplated under Section 7(1) of the Evacuee Act, property left behind by the original owner must be deemed to be evacuee property within the meaning of the act by virtue of provisions of Section 8 of the Evacuee Act. It is submitted that arguments raised before this Court are not in consonance with the pleadings

of the plaintiff. Moreover, no cause of action arises in favour of the plaintiff. Mutation (Ex.PX/8) was sanctioned way back in 1970, but the present suit was filed in 1984. It is further argued that if for any reason, whatsoever, Punjab Wakf Board failed to pursue the matter in an appropriate manner, it cannot by itself be a ground to allow this appeal. It is thus prayed that the present appeal being devoid of any merit be dismissed and the well reasoned judgment and decree dated 13.10.1988 passed by the learned Additional District Judge, Gurdaspur, be upheld.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

The following questions of law arise for determination and consideration in this case:-

1. Whether notification under Section 7 (3) of the Evacuee Act was required to be issued before the property in question vested with the Central Government?
2. Whether it was incumbent upon the Central Government to have redeemed the mortgagee before the land vested in it?

It is pertinent to note that as per pleadings of the plaintiff, the land in question originally belonged to Abdur Rehman, who had mortgaged the same to Bua Dass, vide mortgage deed executed on 20.05.1933 and registered on 22.05.1933. Possession of the suit property was claimed to be delivered to Bua Dass. Plaintiff-appellant and defendants no. 6 to 11 claimed to be the legal heirs of Bua Dass. It is specifically pleaded the mortgagor rights vested in the Central Government under various legislations from time to time. The Central Government or their

representatives never redeemed the suit land and the entries as shown in the jamabandis for the year 1974-75, against mortgagee rights, it was claimed was illegal, ultra vires, null, void, ineffective and inoperative qua the rights of the plaintiff and defendants no.6 to 11. The plaintiff-appellant prayed for a suit for declaration to the effect that the plaintiff alongwith defendants no. 6 to 11 had become owners of the land in dispute on account of non-redemption of the mortgage and defendants no.1 to 5 had no right, title or interest in the suit property. Consequential relief of possession of the land was also sought. It is a matter of record that the plaintiff in para no.3 of the plaint has specifically mentioned that mortgagor rights of the property vested in the Central Government. Grievance raised by the plaintiff is that the Central Government, at best, would remain the mortgager and there could not be any automatic vesting of the property in the Central Government and it could not become an absolute owner thereof without seeking redemption in this case and mutation dated 17.08.1970 (Ex.PX/8) whereby it is mentioned that in terms of letter dated 06.07.1963, the Central Government is reflected to be the absolute owner of the property and mortgage stood redeemed was ineffective.

It is relevant to note at this stage that after partition of the Country, an ordinance was promulgated namely The East Punjab Evacuees' (Administration of Property) Act, 1947 and a Custodian General was appointed to take care of the property of the evacuees. Section 2(b) of the said East Punjab Evacuees Act reads as under:-

“‘Evacuee' means a person ordinarily resident in or owning property or carrying on business within the territories

comprised in the Province of East Punjab, who on account of civil disturbances, or the fear of such disturbances, or the partition of the country.-

- (i) leaves, or has since the first day of March, 1947, left the said territories for a place outside India, or
- (ii) cannot personally occupy or supervise his property or carry on business or watch his interests or enforce his rights].

Evacuee property, as per Section 2(c) of the Act, includes all property in which evacuee has any right or interest, but does not include any moveable property in his immediate physical possession. Section 4 of the said Act, deals with the vesting of the evacuee property of the custodian rights and reads as under:-

“Vesting of evacuee property in the Custodian.- All evacuee property situated within the Province shall vest in the Custodian for the purposes of this Act and shall continue to be so vested until the Provincial Government by notification otherwise directs.”

The abovesaid East Punjab Evacuees Act was repealed on coming into force of the Administration of Evacuee Property Ordinance No. XXVII of 1949 which was replaced by Administration of Evacuee Property Act No. 31 of 1950, which came into force on 17.04.1950. Evacuee and evacuee property as defined under the Evacuee Act reads as under:-

“2(d) “evacuee” means any person –

- (i) who, on account of setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March, 1947, left, any place in a State for any place outside the territories now forming part of India, or
- (ii) who is resident in any place now forming part of

Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any part of the territories to which this Act extends, or whose property in any part of the said territories has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorized person, or

(iii)who has, after the 14th day of August, 1947 , obtained, otherwise than by way of purchase or exchange, any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan, or

(iv)who has, after the 18th day of October, 1949 , transferred to Pakistan, without the previous approval of the Custodian, his assets or any part of his assets situated in any part of the territories to which this Act extends, or

(v)who has, after the 18th day of October, 1949 , acquired, if the acquisition has been made in person, by way of purchase or exchange, or, if the acquisition has been made by or through a member of his family, in any manner whatsoever, any right to, interest in, or benefit from, any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan;

Explanation I.-- For the purposes of sub- clause (iii), the acquisition of any right to, interest in or benefit from any such property as is referred to in that sub- clause by a firm, private limited company or trust of which any person or any member of the family of such person wholly dependent on him for the ordinary necessities of life is a partner, member or beneficiary, as the case may be shall be deemed to be an acquisition by that person within the meaning of that sub- clause.

Explanation II.-- For the purposes of sub- clause (iv), the transfer to Pakistan by any person of any reasonable sum of money in accordance with the rules made in this behalf by the Central Government for the purpose of financing any transaction in the ordinary course of his trade or for the

maintenance of any member of the family of such person shall not be deemed to be a transfer of his assets within the meaning of that sub- clause.

Explanation III.-- For the purposes of sub- clause (v), the acquisition of any right to, interest in, or benefit from, any such property as is referred to in that sub- clause by a firm, private limited company or trust of which any person is a partner, member or beneficiary, as the case may be, shall be deemed to be an acquisition by that person of such right, interest or benefit within the meaning of that sub-clause;

(f) “evacuee property” means any property of an evacuee (whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity), and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947 , by any mode of transfer which is not effective by reason of the provisions contained in section 40, but does not include--

- (i) any ornament and any wearing apparel, cooking vessels or other household effects in the immediate possession of an evacuee,
- (ii) any property belonging to a joint stock company, the registered office of which was situated before the 15th day of August, 1947 , in any place now forming part of Pakistan and continues to be so situated after the said date;”

Section 7 of the Evacuee Act reads as under:-

“7. Notification of evacuee property:--

- (1) Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may, after 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 properly.

- (2) Where a notice has been issued under Sub-section (1) in respect of any property, such property shall, pending the determination of the question whether it is evacuee property or otherwise, be incapable of being transferred or charged in any way, except with the leave of the Custodian, and no person shall be capable of taking any benefit from such transfer or charge except with such leave.
- (3) The Custodian shall, from time to time, notify, either by publication in the Official Gazette or in such other manner as may be prescribed, all properties declared by him to be evacuee properties under Sub-section (1)."

Section 8 of the Act deals with vesting of evacuee property in the Custodian and reads as under:-

"8. Vesting of evacuee property in the Custodian. –

- (1) Any property declared to be evacuee property under Section 7 shall be deemed to have vested in the Custodian for the State-
 - (a) in the case of the property of an evacuee as defined in sub-clause (i) of clause (d) of Section 2, from the date on which he leaves or left any place in a State for any place outside the territories now forming part of India;
 - (b) in the case of the property of an evacuee as defined in sub-clause (ii) of clause (d) of Section 2, from the 10th day of August 1947; and
 - (c) in the case of any other property, from the date of notice given under sub-section (1) of Section 7 in respect thereof.
- (2) Where immediately before the commencement of this Act, any property in a State had vested as evacuee property in any person exercising the powers of Custodian under any law repealed hereby, the property shall, on the commencement of this Act, be deemed to be evacuee property declared as such within the meaning of

this Act and shall be deemed to have vested in the Custodian appointed or deemed to have been appointed for the State under this Act, and shall continue to so vest:

Provided that where at the commencement of this Act there is pending before the High Court, the Custodian or any other authority for or in any State any proceeding under section 8 or section 30 of the Administration of Evacuee Property Ordinance, 1949 (12 of 1949), or under any other corresponding law repealed by the Administration of Evacuee Property Ordinance, 1949 (27 of 1949), then notwithstanding anything contained in this Act or in any other law for the time being in force, such proceeding shall be disposed of as if the definitions of 'evacuee property' and 'evacuee' contained in section 2 of this Act had become applicable thereto.

- (2A) Without prejudice to the generality of the provisions contained in sub- section (2), all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in, or the invalidity of, such law or any judgment, decree or order of any court, be deemed for all purposes to have validly vested in that person, as if the provisions of such law had been enacted by Parliament and such property shall, on the commencement of this Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly, any order made or other action taken by the Custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken.]
- (3) Where any property in a State belonging to a joint stock

company had vested in any person exercising the powers of a Custodian under any law previously in force, then nothing contained in clause (f) of section 2 shall affect the operation of sub-section (2), but the Central Government] may, by notification in the Official Gazette, direct that the Custodian shall be divested of any such property in such manner and after such period as may be specified in the notification.

- (4) Where after any evacuee property has vested in the Custodian any person is in possession thereof, he shall be deemed to be holding on behalf of the Custodian and shall on demand surrender possession of it to the Custodian or to any other person duly authorised by him in this behalf.”

Evacuee Interest (Separation) Act, 1951 was promulgated to provide separation of the interest of the evacuees from those of other persons who had an interest in the property and other related matters.

Sections 3 and 9 of this Act read as under:-

“3. Save as otherwise expressly provided in this Act, the provisions of this Act and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.

9. (1) Notwithstanding anything to the contrary in any law or contract or any decree or order of a civil court or other authority, where the claim is made by a mortgagee, no mortgaged property of an evacuee shall, subject to the provisions of sub-section (2), be liable for the payment of interest at a rate exceeding five per cent per annum simple on

the principal money advanced or deemed to have been advanced.

(2) Where a mortgagee has taken possession on any terms whatsoever of any agricultural land and is entitled to receive profits accruing from the land and to appropriate the same, every such mortgage shall be deemed to have taken effect as a complete usufructuary mortgage period mentioned in the mortgage deed or twenty years, whichever is less, from the date of the execution of the mortgage deed; and if the aforesaid period has not expired and the mortgage debt has not been extinguished, the competent officer shall determine the mortgage debt due having regard to the proportion which the unexpired portion of that period bears to the total of that period.”

This Court in **Illyas and others Vs. Tarlok Chand and others** 2005(1) R.C.R (Civil) 45 while dealing with a similar question, has negated the argument that if notification under Section 7 of the Evacuee Act, was not issued, the property in question could not be treated to be evacuee property. In Illyas's case (Supra), the plaintiffs therein had sought a declaration inter alia on the ground that they were recorded as mortgagees with possession with respect to agricultural land as detailed in the plaint. The custodian was stated to be wrongly entered as mortgagor of the share in the suit property. It was the specific case of the respondent therein that the land in question automatically vested in the custodian free from all encumbrance under Section 9 (2) of the Evacuee Interest (Separation) Act, 1951. In the case of Illyas and others (supra) and others reference was made to the judgment of the Hon'ble Supreme in Haji Omar and others v. Union of India, AIR 1983

SC 259 to observe that where evacuee property vested in the custodian of the State under any corresponding law prior to coming into force of the the Administration Evacuee Property Ordinance 27 of 1949 or Evacuee Separation Act by reason of the deeming provisions in sub-sections 2 and 2A of Section 8 of the Act, there will be automatic vesting of the property which cannot be reopened after coming into force of the Act. It was further observed by the Court that,

“13. By virtue of the statutory provision, right of mortgagor vested with the custodian. Thus, by fiction of law custodian is mortgagor. The question which now requires to be examined is whether the custodian as a mortgagor was bound in law to seek redemption of mortgage within 60 years as per law of limitation then applicable or by virtue of Section 3 read with 9(2) of the Evacuee Interest (Separation) Act, the mortgage stood extinguished. There is no dispute with the proposition that if at the time of commencement of Evacuee Interest (Separation) Act, a period of 60 years has not expired, the mortgage stood extinguished and a custodian is full owner of the property without encumbrance.

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20. Section 9 of the Evacuee Separation Act has the effect of extinguishing the mortgages in respect of evacuees. An evacuee is one who has left India on or after 1.3.1947. Therefore, though the Evacuee Separation Act came into force on 31.10.1951 but it deals with the mortgage property of the evacuee w.e.f. 1.3.1947 and, therefore, Section 9 will take into its ambit the interest of an evacuee in mortgage property vesting with custodian in terms of Section 9 of the Act w.e.f. 1.3.1947. Any other interpretation would result in an anomalous situation in respect of an evacuee property vesting in custodian w.e.f. 1.3.1947. As per the common law the custodian was bound to seek

redemption of the land within the prescribed period of limitation but after the commencement of the Act i.e. w.e.f 31.10.1951, the mortgage shall stand extinguished. Thus, if the (sic) argument to be raised by the appellant is accepted that custodian will be stepping into the shoes of mortgagor for a period from 1.3.1947 till 31.10.1951. Thereafter, the mortgage debt stood extinguished. Such anomalous result is required to be avoided while interpreting the statutory provisions. Therefore, the provisions of Evacuee Interest (Separation) Act, 1951 would be applicable in respect of an evacuee interest in a mortgage after 1.3.1947 as well.

21. Therefore, no fault can be found with the auction of the land by the defendants on the assumption that the said land vests with the custodian under the aforesaid statutes free from mortgage debt.”

A Division Bench of this Court in **Custodian-General, Evacuee Property and others Vs. Shanti Sarup 1961 AIR (Punjab) 497** while dealing with the question whether omission to comply with the requirements of Section 7(1) of the Evacuee Act dis-entitles the property from being treated as evacuee property held that such an argument is not sustainable in view of the provisions of Section 8 of the Evacuee Act. Earlier Single Bench decision of this Court in **R.L.Aggarwal Vs. Darshan Lal Asaram, AIR1960 (Punjab) 612** which was upheld by a Division Bench of this Court and strongly relied upon by learned counsel for the appellant in the case of Custodian General Evacuee Property's case (supra), was specifically discussed before reaching the abovesaid conclusion.

The property in question thus vested in absolute terms with the Central Government by fiction. Section 7 of the Evacuee Act, it has been held in various pronouncements, applies to properties other than those

which have automatically vested in the custodian. Argument of learned counsel for the appellant that absolute vesting of the property in question on account of executive instructions dated 06.07.1963 and subsequent mutation (Ex.PX/8) de hors any specific provisions of law, is clearly devoid of any merit in the light of the discussion as above.

Keeping in view the facts and circumstances as above, the questions of law as framed are answered against the appellant.

Learned senior counsel for the appellant is unable to point out any illegality, infirmity or perversity in the impugned judgment and decree dated 13.10.1988 passed by the learned Additional District Judge, Gurdaspur which has been rendered after proper appreciation and consideration of the evidence on record.

Present appeal is, consequently, dismissed with no order as to cost.

11.03.2019

's.khan'/'om'

[LISA GILL]
Judge

Whether speaking/reasoned	:	Yes/No.
Whether reportable	:	Yes/No.