

**S. BenjamiN Vs. Ebrahim Aboobaker**

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**Court :** Mumbai

**Decided On :** Aug-24-1954

**Reported in :** (1955)57BOMLR40

**Judge :** M.C. Chagla, C.J. and; Shah, J.

**Appeal No. :** O.C.J. Appeal No. 6 of 1954 and Missceollaneous Petition No. 322 of 1953

**Appellant :** S. Benjamin

**Respondent :** Ebrahim Aboobaker

**Judgement :**

**Tendolkar, J.**

1. This is a petition for an appropriate writ, direction or order restraining the respondent, the Deputy Custodian of Evacuee Property, from giving effect to a notice of demand dated the August 10, 1953.

2. The facts necessary for the determination of this petition are few. By an order dated October 23, 1951, the Assistant Custodian of Evacuee Property notified as evacuee property the following:

Right, title and interest of Shree Husein Aboobakar in the business concern called Nishat Talkies with furniture, fittings and certain machines etc. together with the

tenancy right situated at Grant Road, Bombay.

The case of the petitioner is that he was a partner with Husein Aboobaker and Alimahomed Aboobaker in the said business and that Husein Aboobaker and Alimahomed Aboobaker retired from the partnership and received Rs. 15,000 each in full satisfaction of their share, right, title and interest and he became the sole proprietor of that business. This contention of the petitioner was apparently not accepted by the Custodian and the declaration that I have referred to relating to the evacuee property was made.

3. Now, under Section 8(1)(a) of the Evacuee Property Act any property declared to be evacuee property is deemed to have been vested in the Custodian, in the case of the property of an evacuee as defined in Sub-clause (1) of Clause (d) of Section 2 from the date on which he leaves India for any place outside India. It is common ground in this case that Alimahomed and Husein were declared to be evacuees under Section 2(d)(J) and the Custodian in his affidavit says that they left India in October 1947, and therefore the result of the notification read with Section 8(7)(a) is that the right, title and interest of Alimahomed and Husein in the business of Nishat Talkies vested in the Custodian from October 1947. As a matter of fact, however, the petitioner was conducting this business and in sole management of it; and therefore by a letter dated October 22 addressed to the petitioner's attorneys the Assistant Custodian called upon him to render an account for the period during which he was in possession. It is not necessary to go into the correspondence that followed or the reasons for which no account as such was rendered by the petitioner. The Custodian by the order now impugned states that a sum of Bs. 1,60,000 is 'now due and unpaid,' and demands payment with a threat that the payment would otherwise be enforced and recovered 88 arrears of land revenue. The real question that has been raised on this petition is whether the Custodian has power to determine what is due by the petitioner in respect of his management of the business from October 1947 until the date when the Custodian took possession.

4. Now, a preliminary objection has been raised on this petition on behalf of the Custodian, it being urged that there is an adequate and specific legal remedy

under the Evacuee Property Act, viz. a revision against this order, and therefore an application for a writ should not be entertained. The petitioner challenges the order on the ground that there is want of jurisdiction in the Custodian to determine what is due to him ; but Mr. Kantawala for the respondent points out that that is not sufficient to entitle the petitioner to a writ and unless there is a violation of the fundamental principles of justice a writ should not be granted as there is a provision for a revision. As I will point out later, in the view that I take of this case, the order is contrary to the fundamental principles of justice, and I would therefore entertain the application notwithstanding the fact that there might be another remedy under the Evacuee Property Act.

5. Now, in the first instance the declaration made by the Custodian does not amount to a declaration that the entire business of Nishat Talkies vests in the Custodian as evacuee property. The words 'right, title and interest' are in my opinion incompatible with the whole of the business having been determined to be belonging to Alimahomed and Husein. They are only consistent with one of the two alternative positions, (1) where the nature of the rights of Alimahomed and Husein is in dispute and remains to be determined, or (2) where the nature of the right, title and interest having been determined, it is something less than the whole. There is no doubt that under Section 7 of the Evacuee Property Act the Custodian has a right to determine what is evacuee property, and he could determine whether the whole or a specified part of the business belonged to these two persons. But as the declaration stands, I cannot read it as meaning that the whole of the business belonged to Alimahomed and Husein.

6. That, however, is not a matter of much importance at this stage of the proceedings, because whether the interest of Alimahomed and Husein in the business was the whole or something less than the whole, to the extent of such interest the petitioner was admittedly in the management of the business and is undoubtedly accountable to the Custodian as that interest vested in the Custodian, as I have pointed out, from October 1947. The petitioner does not say that he is not so accountable, but what he does say is that the Custodian is not the judge of what is due by reason of such accountability, that he cannot arbitrarily fix the amount that is due and proceed to enforce it as arrears of land revenue under

Section 48 of the Evacuee Property Act. The question, therefore, to consider is whether the Administration of Evacuee Property Act confers upon the Custodian power to determine what is due to him from a party who is accountable to him and to enforce payment of such an amount as he may determine.

7. Reliance has been placed by Mr. Kantawala on behalf of the Custodian on certain sections of the Act to which I will presently refer; but before I do so, I must state that it is a well established rule of construction that in any legislation dealing with rights to the property of a citizen if his normal rights are taken away, they have got to be taken away by specific provisions of an Act or a statute and they cannot be taken away by implication. Keeping this in mind, if one now turns to the provisions on which Mr, Kantawala relies, it is impossible to find in any of these provisions the least support for the plea that the Custodian is the sole judge of what is due to him from a party who is accountable to him. The first section that is relied upon is Section 8 which deals with the vesting of evacuee property in the Custodian. Reliance is placed on Sub-section (4), which inter alia provides that a person in possession of evacuee property shall on demand surrender possession of it to the Custodian. This provision appears to me to have no relevance whatever to determining the quantum of liability of an accountable party. It deals with a situation in which what is declared to be the property of the evacuee is in the possession of a third party. Reliance is next placed on Section 10 which deals with the powers and duties of the Custodian generally, and Sub-section (1) inter alia provides that the Custodian may take such measures as he considers necessary or expedient for the purposes of 'securing' any evacuee property, and what is urged is that determining what is due from a third party on an accountability is securing evacuee property. I am quite unable to uphold any such contention. The securing of property obviously relates to what has been declared to be evacuee property and it does not deal with any accountability at all. After an accountability is crystallised into an amount due, it may be that such a claim may be enforced by the Custodian under the provisions of the Administration of Evacuee Property Act; but the question before me is whether the Custodian can determine what is the extent of that accountability, and this provision for securing the property has, in my opinion, no bearing whatever on that question. Reliance is next placed on Section 10(2)(f) which inter alia provides that the Custodian may require any person to

furnish accounts. Now, the whole of this sub-clause empowers the Custodian to obtain certain information and no more. He may undoubtedly call upon any person to furnish accounts, but this does not confer upon the Custodian any power to determine whether the accounts are right or wrong, or to determine that as a result of the accounts any specific amount is due by the party furnishing the accounts to the Custodian. Reliance is next placed on Section 10(2)(i) which empowers the Custodian to take such action as may be necessary for the recovery of any debt due to the evacuee. Obviously this provision is intended to enable him to adopt all proceedings to recover a debt; but I cannot possibly read this provision as conferring a power on the Custodian to determine what the debt is himself, for it is elementary that a person cannot be a judge of his own rights, and if the Custodian is entitled to a debt from any person, the quantum of that debt cannot be fixed by the Custodian if it is in dispute. The next section that is relied upon is Section 46 which ousts the jurisdiction of the Court in certain matters. That section again throws no light on the question before me, because the matters enumerated therein are matters in respect of which the Custodian has authority to determine. Thus in Sub-clause (a) the question excluded from jurisdiction of the normal Courts is the question as to the existence of evacuee property, in Sub-section (c) as to the legality of any action taken by the Custodian and (d) in respect of any matter which the Custodian General is empowered to determine by the Act. The section, therefore, has no application to cases where there is no power or authority in the Custodian to determine a matter. The last section relied upon is Section 48 which empowers the Custodian to recover any amount due to him as if it were arrears of land revenue. This provides the process for enforcement of a debt, and not a procedure for ascertaining the amount of the debt. Where the debt is ascertained, no doubt the Custodian can enforce it under Section 48 and proceed to recover it as if they were arrears of land revenue ; but this section has nothing to do with determining what the extent of the liability of a third party to the Custodian is.

8. None of these sections, in my opinion, can possibly lend support to what I consider to be an extravagant claim put forward on behalf of the Custodian that jurisdiction has been conferred upon him to determine what is due to him as Custodian by anybody in this world, without recourse to a Court of law, and to

proceed to enforce such a claim by resort to Section 48. It is contrary to the fundamental principles of justice that a man should be the judge of his own cause and should seek to determine what is due to him from somebody else. The Custodian must, as much as any other citizen, resort to a Court of law if a third person disputes his liability to the Custodian and that liability has to be determined. It is not for the Custodian to determine it. If the position were otherwise, it would lead to an extraordinary situation in which normal civil law would become entirely inapplicable so far as the Custodian's rights against a third party are concerned. If the contention of Mr, Kantawala were to be upheld, the Custodian had merely to say that a named amount is due from any individual in the world to an evacuee to proceed to recover it as arrears of land revenue without more. Similarly if he was a Custodian of immoveable property, the Custodian has merely to say what arrears are due from each tenant to proceed to recover those arrears as if they were arrears of land revenue. Such powers which on the face of them would be revolutionary would require very clear and unambiguous language in a statute, and there is no provision in the Administration of Evacuee Property Act which can even be stretched to include any such extraordinary power. In my opinion, therefore, the Custodian was acting beyond jurisdiction and in violation of the fundamental principles of justice in determining that a sum of Rs. 1,60,000 was due to him from the petitioner.

9. I, therefore, make the rule absolute and restrain him by an order and injunction from enforcing the notice of demand dated August 10, 1953, or taking any steps or proceedings in pursuance of that notice.

10. The respondent shall pay the costs of the petitioner.

11. Amin. It is open to the Custodian to determine what is evacuee property and he has also the power to recover such Property. It has been held by this Court that the Custodian could determine a lease granted by himself. The definition of property in Section 2(i) of the Administration of Evacuee Property Act, 1950, is very wide.

M.C. Chagla, C.J.

12. It might be evacuee property but has the Custodian the power to recover it without resorting to a Court of law?]

13. Yes. See Section 7. In the present case the right, title and interest of the evacuee vested in the Custodian. The petitioner was liable to account. Once it is open to the Custodian to determine what is evacuee property, he can also determine what is recoverable from a party liable to account. See. Section 10 which empowers the Custodian to take steps to secure, administer and preserve evacuee property. Under Section 10(2)(f) the Custodian can compel any person to furnish accounts. This would be a step in ascertaining what is due. Under Section 10(i) the Custodian can take steps to recover debts due to the evacuee.

**Shah, J.**

14. That applies only to cases of admitted liability.]

15. Section 10 enables the Custodian to secure evacuee property. One step in securing evacuee property is ascertaining the sums due to the evacuee. The Custodian has admittedly the power to determine that certain property is evacuee property in spite of opposition. The principle of adjudication in that case is the same as in a case where the Custodian has to determine whether a third party owed a certain amount to the evacuee. In a case where a business is declared to be evacuee property it must follow that the amounts due to the business are also evacuee property. It is a necessary corollary of the former declaration. Under Section 48 all sums due to the Custodian under the provisions of the Act can be recovered as arrears of land revenue.

M.C. Chagla, C.J.

16. Under what provision of the Act is this amount due?]

17. Under Section 7. The power to determine what is due to the evacuee is implicit in the power under Section 7 to determine what is evacuee property.

**Shah, J.**

18. Right to recover a debt may be a right to property, but is it property?]

19. The point is that once a debt is due it can be recovered under the provisions of Section 48 without recourse to a Court of law. No separate declaration under Section 7 that the debt is an evacuee property is necessary as that is implied in a declaration that the right, title and interest of an evacuee in a business is evacuee property.

20. Maneksha not called upon.

M.H.E.

M.C. Chagla, C.J.

21. This is an appeal against the judgment of Mr. Justice Tendolkar by which he gave relief to the petitioner who sought to restrain the Custodian of Evacuee Property from recovering from him a sum of Rs. 1,60,000 by summary procedure. The facts briefly are that the petitioner, one Alimahomed and one Husein ore brothers and Alimahomed and Husein were declared evacuees in January 1950. These three brothers were carrying on business of running a cinema theatre called Nishat Talkies and the Custodian declared the right, title and interest of Husein and Alimahomed in these talkies as evacuee property. This business was being managed by the petitioner and therefore the Custodian called upon him to furnish accounts with regard to this business. Ultimately the Custodian determined that in respect of the evacuees' right, title and interest in the Nishat Talkies a sum of Rs. 1,60,000 was due and he called upon the petitioner to pay this amount and he gave him notice on August 10, 1953, that if he did not pay this amount he would proceed to obtain the payment of the sum by attachment and sale of property of the petitioner, moveable or immovable, or by other remedies provided by Section 13 of Bombay Act II of 1876 as amended by Section 4 of Bombay Act III of 1900. It is this threat to his property that the petitioner sought to resist by filing a petition in this Court on which Mr. Justice Tendolkar made the order, and the question that arises for our determination is, what are the powers of the Custodian in respect of a debt which might be due to the evacuee.

22. Now, turning to the scheme of the Act, Section 7 gives the power to the Custodian to declare any property as evacuee property. This power can only be exercised after he has given notice to any person interested in the property and also after holding an inquiry. Any property can be declared to be evacuee property, and 'property' is very widely defined in the Act and it is defined to mean property of any kind and includes any right or interest in such, property. The Advocate General is right when he contends that when the right, title and interest of Alimahomed and Husein in the Nishat Talkies was declared to be evacuee property, any sum due in respect of this right, title and interest would also be evacuee property. The result of that would be that under Section 8 the Custodian would have vested in him the right to recover any sum due to the evacuee in respect of this right, title and interest in the Nishat Talkies. But what the Advocate General has to satisfy us about is that in respect of this debt the statute has conferred the power upon the Custodian to recover that debt, first by ascertaining the debt himself and then proceeding to recover it without resort to the ordinary Courts of the land. Now, there is a clear distinction between 'property' and 'right to property', and under Section 8 not only property may vest in the Custodian but also right to property may vest in him. Jurisprudence recognises that there is a difference between property which is in possession or which may be reduced to possession and property which can only be recovered through action. The latter class of property is the right to recover property and is better known as a chose in action or an actionable claim. Therefore, in this case the position might be accepted that the Custodian had the right to recover any sum due to the evacuee in respect of his right, title and interest in the Nishat Talkies. That was a right to sue or a right to realise the debt by an action. But the right to recover the debt is not the same thing as the property or the debt itself. What vested in the Custodian was not any specific property, not any tangible property, but merely a right to recover a debt. The whole of the Advocate General's contention amounts to this that if the right to recover a debt is vested in the Custodian, he has also the right to determine what the debt is and then to recover that debt by summary process without resorting to the ordinary Courts of the land. It may be that this particular Act, which is a very special Act, may confer such drastic power upon the Custodian, but we have to be satisfied that there is such a power before we can

permit the Custodian to recover a debt otherwise than by the ordinary procedure known to law.

23. Now, the Advocate General first relies upon Section 10(2)(f). Section 10(2) deals with the powers and duties of the Custodian generally, and these powers are to be exercised for the purpose of securing, administering, preserving and managing evacuee property, and Sub-section (2) of Section 10 deals with certain particular powers conferred upon the Custodian and Clause (f) confers upon the Custodian the power to require any person, notwithstanding anything to the contrary contained in any other law for the time being in force relating to the disclosure of any information by a public servant or any other person, to furnish such returns, accounts or other information in relation to any property and to produce such documents in his possession as the Custodian considers necessary for the discharge of his duties under this section. Therefore, under this sub-section the Custodian had the right to call upon the petitioner to furnish him returns, accounts and all information with regard to the Nishat Talkies. But it is difficult to understand where the Advocate General finds the power in this sub-section conferred upon the Custodian on receiving the information and accounts to adjudicate upon what the debt due to the evacuee is. Then the Advocate General relies on Clause (i) of Section (2) which confers upon the Custodian the power to take such action as may be necessary for the recovery of any debt due to the evacuee. Obviously, the action contemplated by this clause is a legal action, and under the ordinary law a debt can only be recovered by filing a suit in a civil Court, proving the debt and getting a decree in respect of that debt. Clause (j) makes it clear that the Custodian is not above the ordinary Courts of the land because it contemplates the Custodian instituting, defending or continuing any legal proceeding in any civil or revenue Court on behalf of the evacuee. Therefore, in our opinion, there is nothing in Section 10 which suggests that the Custodian has been given the power to recover a debt by a summary process without having resort to the civil Courts of the land. Then reliance is placed on Section 48 which provides that any sum due to the State Government or to the Custodian under the provisions of this Act may be recovered as if it were an arrear of land revenue. Now, before the Advocate General can rely on this section he must satisfy us that any sum is due to the Custodian under the provisions of this Act, and the

Advocate General says that after the Custodian ascertained that a sum of Rs. 1,60,000 was due, that was the sum which became due under the provisions of the Act and therefore Section 48 applies and the Custodian could recover that sum as if it were arrears of land revenue. In our opinion, the sum of Rs. 1,60,000 was not due to the Custodian under any provisions of the Act, The only right that the Custodian had under the provisions of the Act was the right to recover the amount. That right was vested in him, but we cannot equate the right to recover Rs. 1,60,000 with the sum of Rs. 1,60,000 itself. We cannot say that because the Custodian has the right to recover Rs. 1,80,000 therefore Rs. 1,60,000 is due to him by the petitioner. It would only be a civil Court of law which could determine what is due to the Custodian by the petitioner, and till that determination is arrived at, it could not be said that any amount is due in law to the Custodian.

24. It is rather instructive in this connection to look at Section 9. That section deals with the right of the Custodian to take possession of tangible evacuee property, and when the Legislature was dealing with tangible evacuee property, it has given drastic power to the Custodian to take possession of such property by taking all necessary steps after giving due notice. But when one tries to find a similar provision with regard to the recovery of a debt due to the evacuee, one looks in vain. Therefore it is clear that whereas the Legislature wanted the Custodian to have summary powers for the recovery of tangible property and it was not incumbent upon him to go to a Court of law to recover possession, in the case of a debt due no such power was conferred upon the Custodian, with the result that he could only recover the debt under the ordinary law which is by going to a civil Court, establishing the debt and getting the Court to pass a decree in his favour. Till that is done, the Custodian has no right to compel the petitioner to pay the sum of Rs. 1,60,000 or any other sum as the debt due to the evacuee.

25. In our opinion the learned Judge was right in the conclusion he came to. The result is that the appeal fails and is dismissed with costs.

Shah. J.

26. The Assistant Custodian having under Section 7 of the Administration of Evacuee Property Act notified as evacuee property the right, title and interest of

Husein Aboobakar and Alimahomed Aboobakar in the ' business concern' known as Nishat Talkies, it may safely be held that by that declaration not only the property of the Nishat Talkies but all rights which Husein Aboobakar and Alimahomed Aboobakar had in that business were declared evacuee property. What was however vested in the Custodian by the notification was the right inter alia to enforce liability of the respondent to account for the partnership assets and dealings. A liability to account postulates liability to pay the amount which may be ascertained to be due. If in taking accounts of that business it is ultimately found that any amount is due to the two evacuees, the right to recover that amount may also by reason of the declaration be regarded as evacuee property. The right to enforce liability to account for the partnership dealings and assets having vested in the Custodian the right to recover the amount which may be determined to be due may also be regarded as vested in the Custodian by operation of Section 8 of the Act. Under Clause (f) of Section 10(2) it is open to the Custodian of Evacuee Property to call upon any person to furnish returns, accounts or other information in relation to any property which is vested in the Custodian and to produce such documents as the Custodian considers necessary for the discharge of his duties under the Act. That provision enables the Custodian to call upon any person who may be in possession of any documents which relate to evacuee property or the management thereof to produce the same before him. But there is nothing in Clause (f) of Section 10(2) which authorises the Custodian to take an account of the liability of any person who may have documentary evidence or information relating to evacuee property in his possession. The Advocate General argued that the liability to furnish accounts when demanded by the Custodian, not only imported liability to render accounts, but the Custodian was authorised to adjudge or determine the liability of any person who appeared to him to be liable to the estate vested in him and the extent thereof. In my judgment there is nothing in Clause (f) which justifies us in holding that it was intended by the Legislature to impose upon any person under Clause (f) liability for an amount determined to be due by the Custodian on scrutiny of the accounts in respect of any property in respect of which such person is in possession of any documentary evidence or information. Undoubtedly when the property of an evacuee has vested in the Custodian he is entitled to call upon a person who has information or documentary

evidence with regard to that property to disclose the information and to produce that documentary evidence. But the right to call upon a person to furnish information, returns or accounts does not carry with it the right by the Custodian's own adjudication to determine the liability and the extent of the liability of any person in respect of any property which is vested in the Custodian. The Legislature has made a clear distinction between the rights of a Custodian in respect of tangible immoveable evacuee property and incorporeal rights which are vested in the Custodian. When a Custodian makes a declaration that any property is evacuee property, whatever the nature of the property, it vests in him. If the property is tangible immoveable property, the Custodian may under Section 8(4) read with Section 9 take possession of the property, without recourse to a Court of law, but there is no power conferred upon the Custodian authorising him to adjudge liability to a debt and to recover the same. It was urged on behalf of the appellant that when the Custodian determines under Section 7 that a particular item of property is evacuee property and that property vests in him, he is also entitled to determine the extent of the evacuee property, and when the property is a right to a debt, which may be ascertained on taking accounts, the Custodian is authorised in exercise of the power under Section 10(2)(f) to take an account and to determine the extent of liability of any person who appears to him to be liable to the estate, and the Custodian may recover the amount so determined without recourse to a Court of law. It is difficult to see what there is in the Act which enables the Custodian by his own determination to convert a mere right to obtain an account into a conclusive liability for an ascertained debt and to enforce that liability determined by him by executive action. It was urged by the Advocate General that in Clause (i) of Section 10(2) the right of a Custodian to determine the quantum or extent of liability of a person liable to the estate vested in him was implicit. It was submitted that a right to a debt being property the authority to determine the extent of that debt is conferred by Section 7 of the Act, and the right to recover that debt is given by Clause (i) of Section 10(2) and the procedure for enforcement of that debt is provided in Section 48 of the Act. The argument is however founded on the assumption that a right to obtain an account is a debt due to the Custodian. The Legislature not having conferred upon the Custodian power by his own determination to convert a right to obtain an account into a debt due to

the Custodian, it may not strictly be necessary to consider whether the Custodian can enforce liability for every debt due in the manner provided by Section 48 of the Act. It must, however, be observed that a right to recover a debt is a chose in action, and the Custodian must enforce it in the manner provided by law. Clause (i) undoubtedly authorises the Custodian to take such action as may be necessary for recovery of any debt due to the evacuee, but the action which is contemplated to be taken under Clause (i) must of necessity be action which is according to law. It cannot be suggested for a moment that it is open to the Custodian to rush into the house of a debtor of the evacuee and take possession of cash lying in the house of the debtor merely because the property of the evacuee has vested in the Custodian. Section 48 of the Act enables the Custodian to recover any sum due under the provisions of the Act as if it were arrears of land revenue, but before that right can be exercised there must be a sum due' under the provisions of the Act.' It is sufficient for deciding this case to state that there is nothing in the Act which converts a mere right vested in the Custodian to enforce liability for an amount which is undetermined and which cannot be determined without recourse to a Court of law into a sum of money due under the provisions of the Act. I agree therefore with the order proposed by My Lord the Chief Justice.

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