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Court : Himachal Pradesh

Decided On : Jun-28-1971

Reported in : AIR1972HP26

Judge : Chet Ram Thakur, J.

Acts : [Constitution of India](#) - Article 13(3), 31(1), 226, 366(10) and 372; ;Cantonments (House Accomodation) Act, 1902; ;Cantonment Act, 1924; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 11

Appeal No. : Civil Writ Petn. No. 10 of 1970

Appellant : Durga Dass Sud and anr.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : R.K. Punshi and; A.S. Bhatnagar, Adv.

Advocate for Pet/Ap. : S. Malhotra, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Chet Ram Thakur, J.

1. This is a petition under Articles 226 and 227 of the [Constitution of India](#) filed by Durga Dass and another. There is a house property known as 'Handley Cross Estate' (Survey No. 114) situate in Kasauli Cantonment. This property was originally known as 'Dovedell' estate No. U 21 and it was purchased by the predecessors-in-interest of the petitioners on 18th July, 1919 for a sum of Rs. 14,000/- vide a sale deed (Annexure A). The present value of the house is stated to be not less than Rs. 75,000/- and the rental value of the same is Rs. 4,422/- per-annum. Under the Army regulations, any land in the Cantonment under the structures had vested in the cantonment or the Government and the structures remained in the ownership of the person who had constructed the same. The site under the land, therefore, was in a way given in grant to the person who had constructed the structure thereon and the Government had reserved to itself the right to resume the grant at any time.

2. It is stated that in 1949, the Military Estate Officer. Delhi Circle. Delhi Cantonment, issued a notice dated 30th April 1949, to the petitioners stating that the Government had decided to resume possession of the land under the said property. The petitioners were required to quit and deliver possession of the property on 1st June 1949 and offered a sum of Rs. 6,000/- on account of the cost of the authorized structures standing on the said land. The said order purported to have been issued under the Bengal Army Regulations. Governor General's Order No. 179, dated 12th September. 1836 and subsequent orders. This action of the authorities was challenged by the petitioners by filing a suit in the Court of the District Judge. Fagehgarh Sahib at Bassi (Pepsu). The suit was contested by respondent No. 1 but the trial Court vide its judgment, dated 30th November 1953, came to the conclusion that the action of respondent No. 1 was wholly illegal. Though the plaintiffs in that suit contended that a sum of Rupees 50,000/- was payable to them as compensation but no final decision was given since the Court came to the conclusion that the notice served on the plaintiffs was defective. The decision as to quantum of compensation was challenged in the High Court of Punjab by the present petitioners and the Division Bench, vide its Judgment. D/- 28-8-1958, in RFA No. 12-p of 1954. (Punj) came to the conclusion that it was unnecessary to record any finding on the quantum of compensation. After the said litigation between the parties wherein it was held that the resumption was not

proper, the petitioners continued to be the owners of the suit property known as 'Handley Cross Estate' and were entitled to continue to receive the sum of Rs. 1,881/4/- per annum as rent for the use and occupation of the property.

3. On 6th November 1969, a notice (Annexure E) was issued in the names of the petitioners and their deceased father, late Shri Jagadhar Mull. It was mentioned therein that the land comprising the site of the property known as 'Handley Cross Estate' measuring 0.97 acre belongs to the Government of India and is held by the addressees on the 'old grant' terms (Governor General's Order No. 179, dated the 12th September 1836) under which the Government is entitled to resume the said land. The petitioners were required to deliver possession on 22nd December 1969 at 11.00 hours to respondent No. 2 or respondent No. 3 as agents of respondent No. 1. It was further stated that in case the addressees of the notice failed to do so all their rights of easements and interests in the said land and buildings thereon shall cease from that date and respondent No. 1 will resume possession of the said property under all powers enabling them to resume possession.

4. By this writ petition the petitioners have challenged the action of the respondents in exercise of powers of the Governor General's Order No. 179, dated the 12th September 1836. It is contended that the order has become a dead-letter having no statutory force at any time. The land and the property of the Cantonment after the Cantonments Act 1924, could only be dealt with in accordance with the provisions of the said Act. It had further been contended that the action of the respondents was hit by the provisions of Article 31 (1) of the [Constitution of India](#). The Governor General's Order No. 179, dated the 12th September 1836, has no statutory force after the commencement of the Cantonments Act. The action of the respondents, therefore, was unconstitutional. Further that if the order may be held to have a statutory force then on receipt of a reply to the notice it was incumbent upon the respondents to constitute the arbitration committee to determine the market value of the building standing on the same land. Even this was not done. Hence the action of the respondents could not be sustained. At any rate, the Governor General's Order No. 179, of 1836 was hit by the provisions of Article 31 (2) of the [Constitution of India](#) inasmuch as it neither fixes the amount of compensation nor specifies the principles on which and the

manner in which the compensation is to be determined. Further the order was bad inasmuch as it provides for resumption and acquisition of the property without there being a public purpose.

5. An application for amendment of the writ petition was also filed so as to implead the Central Research Institute. Kasauli as a respondent and the same was allowed and the Central Research Institute was also made a party.

6. Respondents Nos. 1 and 2 filed their separate return and the respondent No. 4 filed a separate return, whereas respondent No. 3 who is the Executive Officer. Kasauli Cantonment did not file any reply.

7. It is admitted by respondents Nos. 1 and 2 that after 1958 till 1969 the petitioners continued to enjoy the usufruct of the property. The Government or for the matter of that, respondents 1 and 2 had served the petitioners with a notice for resumption of the grant and to make delivery of the possession within a month but thereafter litigation started and the petitioners succeeded finally from the High Court in 1958 and the Government thereafter did not take any action for another 11 years. It was only on the 6th of November, 1969 that the Government again renewed its demand for resumption, vide a notice (Annexure E). The petitioners were required to deliver possession on 22nd December 1969 at 11.00 hours and it was stated therein that the Government was prepared to pay and so offered a sum of Rupees 20,000/- as the value of the authorised structures standing on the said land. The Government actually took possession on 22nd December 1969. So the short question that falls for determination in this writ petition is whether the action of the respondents in exercise of the powers under the Governor General's Order No. 179 of 1836, wherein it was mentioned that the Government had decided to resume possession of the said land and of the building now standing thereon is valid.

8. Annexure 'F' is the copy of the Governor General's Order No. 179, dated the 12th September 1836, and it relates to the occupation of the land and disposal of the premises or buildings Pres. G. G. 25th June 1801. G. O. G. G.. 28th September 1807, G. O. G. G. 5th June, 1813. Para 6 of this order provides for occupancy and it says that no ground will be granted except on the following

conditions which are to be subscribed by every grantee as well as by those to whom this grant may subsequently be transferred:

1st:-- The Government to retain the power of resumption at any time on giving one month's notice and paying the value of such buildings. as may have been authorised to be erected.

2nd. --The ground, being in every case the property of Government cannot be sold by the grantee: but houses or other property thereon situated may be transferred by one military or medical officer to another without restriction, except in the case of reliefs, when, if required, the terms of sale or transfer are to be adjusted by a committee of Arbitration. Para 7 of this order provides for houses claimable for purchase or hire at option of owner only. The submission made by the petitioner's counsel is that this order of the Governor General in Council has not the force of law and in order to emphasis as to what is an existing law and which law has been saved under Article 372 of the [Constitution of India](#), he has invited my attention to Articles 13 (3) (a) (b). 366 (10) and 372. According to his submission this order can by no stretch of imagination be said to be an existing law or having the force of law so as to authorise the respondents to resume the grant and take possession of the houses and that the action is hit by Article 31 (1) and (2) of the [Constitution of India](#).

9. The learned counsellor the respondents contends that the order is an existing law and has got the force of law and that the respondents are prepared to increase the quantum of compensation provided the petitioners approach them. As for respondent No. 4, he has contended that the petition is belated. Further that there are controversial questions of fact involved which required detailed enquiry and the petitioners could not avail of this extraordinary remedy and their remedy is by way of suit. Further that the present petition is hit by the principles of res judicata. The matter was agitated before the Subordinate Judge. Bassi and ultimately decided by the High Court.

10. Article 13 of the Constitution says that 'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such

inconsistency, be void. According to Article 13 (3) (a) 'law' includes any Ordinance. Order, bye-law. Rule. Regulation, notification, custom or usage having in the territory of India the force of law' and Article 13 (3) (b) says that 'laws in force' include laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part there of may not be then in operation either at all or in particular areas.' Article 366 (10) says 'existing law' means any law. Ordinance. Order, bye-law. Rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law. Ordinance. Order, bye-law. Rule or Regulation', and Article 372 speaks about the continuance in force of existing laws and their adaptation. Hence it is obvious from the reading of these articles that law includes any Ordinance. Order, bye-law. Rule. Regulation, Notification, custom or usage having in the territory of India the force of law and that law must be made by a legislature or other competent authority and was not repealed before the commencement of the Constitution and was saved by Article 372 so as to be a valid law.

11. Thus the laws in force are not merely enactments of Legislature but also any regulation or order, Rule or bye-law passed by a competent authority by virtue of statutory powers as is apparent from AIR 1964 SC 1043 (State of Gujarat v. Vora Fiddali Badruddin Mithibarwala). According to this judgment, cited above, the administrative orders which are not traceable to any law made by the Legislature but derive their force from executive authority and are made either for the convenience of the administration or for the benefit of individuals, though the power to make laws as well as these orders was vested in the same authority, it cannot be said to be included in the definition of existing laws and what survives the Constitution and is continued by Article 372 are those laws which could trace their origin to the exercise of legislative power.

12. The order making the grant and making provision for resumption of the grant and the acquisition of the structure thereon is based on the various orders passed from time to time by the Governor-General. The earliest order is of 25th June 1801. Then it is succeeded by another order of 28th September 1807, then by an

order, dated 5th June 1813 and then by the last order, under which the power is sought to be exercised for resumption of the grant and the acquisition of the house property. There is nothing in this order to show if these orders were made by the Governor General-in-council in exercise of some legislative powers granted to him under some statute. The orders appear purely administrative or executive orders. However, it is a fact that these orders were made by the Governor General-in-council, who at that time was the representative of the King Emperor of India.

The regulations issued from time to time were published under the caption. 'Bengal Regulation'. These regulations in fact were issued for making provision of necessary accommodation for Military Officers near the place of their duties. These regulations contemplated that civilian inhabitants, will be confined to Bazar areas, and that bungalows will be built by Military Officers themselves, who could not transfer them without sanction, it seems that these regulations were never strictly or even partially enforced. Even the most important Rule of registering every grant of land, was waived. The fact was that for the provision of Peace-time amenities in the cantonments, capital was required which could not be attracted without adequate concessions. The result of these concessions 'was that civilians built large number of bungalows in cantonments and spread their business all over. By 1884, some difficulty was experienced by Military Officers in obtaining houses near the barracks occupied by the regiments to which they belonged, or other places of duty, or even within the limits of the Cantonments. The Government appointed a Committee consisting of the Secretaries of the Legislative. Military and Home Department to consider this problem and their deliberations culminated in the production of Bill No. 17 of 1888. The bill was introduced in the Council of the Governor-General of India on 12th October 1888 and its Chapter V was headed 'Immoveable Property in Cantonments'. But subsequently due to some opposition this Chapter was omitted and in 1898. Government introduced the Cantonments (House-Accommodation) Bill, which was passed in 1902 (Act 11 of 1902). In the course of discussion the Hon'ble Mr. Pugh said:

'I think the Bill will put the house-owners in Cantonment in a better position than they are in at present. It will take away a great deal of that uncertainty which at

present besets them, they will have a bill showing clearly the position in which they stand instead of being liable to have Military Regulations made with respect to them at intervals perfectly uncertain, and Military Regulation the scope and result of which also they cannot foresee'.

It was also observed by His Excellency the Viceroy as the President of the Council.

'It was a subject that raised many thorny and difficult questions respecting the rights or the assumed rights of individuals and we all know how readily when a question of property is concerned the bristles of the Englishman, and I think I may say the Indian too, who has perhaps learned a good deal from him are apt to raise'.

13. In the light of the above earlier history, the Cantonments (House-Accommodation) Act 1902 was enacted, which superseded the old Rules, Regulations and Orders as laid down from time to time. The preamble to the Act reads as follows:

'Whereas various conditions, Rules, regulations and orders have from time to time been laid down by or by the authority of the Government, in regard to the grant of land and the occupation of land and houses in cantonments with the object of securing amongst other things, that houses built on such land should be made available when required for the accommodation of Military Officers.

And Whereas, notwithstanding the said conditions, Rules, regulations and orders, difficulties have frequently been experienced in obtaining house-accommodation in cantonments for Military Officers and it is expedient to make better provision for that purpose;

It is hereby enacted as follows:

'This Act remained in force till it was repealed by the Cantonments (House-Accommodation) Act. 1923.'

14. Thus from the aforesaid history as has been taken out from the book of the Cantonment Laws in India by Kidar Nath. M. A. 1937 Edition, the Military Regulations have been superseded or repealed by the Act. 1902 and which was also subsequently repealed by the Cantonments (House-Accommodation) Act. 1923. Hence this regulation under which power is sought to be exercised in resuming the grant and taking possession of the house is not an existing law or law which has the statutory force as it had quite a long time back been superseded and repealed and enacted by the Legislature and thereafter the Cantonment Act. 1924 also has come into existence and there is also a provision for the acquisition of the immovable property in that Act and therefore, in the face of these enactments, this regulation which was however, enacted by the competent authority cannot now be said to have the force of law and it ceased to be law as long back as 1902 and provision now exists in the Cantonment Act. 1924 for acquisition of the property. Besides them there are Cantonment Property Rules. 1925, as also Cantonment Administration Rules. 1927, which also deal with the acquisition etc., of the property within the Cantonment area. Therefore, this law is not an existing law.

In *Raghubar Dayal v. Secretary of State*. AIR 1924 All 415 the question about the validity of the Army Regulations also came up for consideration before their Lordships of the Allahabad High Court, in which it was held that the Bombay Regulations in question were statutory enactments made under the powers reserved to the Governor in Council prior to the introduction of the Government of India Act. 1833. The Army Regulations with which they were concerned could not so far as they could ascertain be traced to any statutory origin. The various Rules and orders to which the collective name of 'Army Regulations. India' was subsequently given were all collated and set out in an appendix to the Cantonments (House-Accommodation) Bill which was introduced in the Council of the Governor-General in India for the purpose of making Laws and Regulations of the 4th November. 1898. The appendix is to be found in the Gazette of India of the 5th November 1898 at pages 366 et seq.

15. These orders which were issued from time to time between the years 1789 and 1887 are all set out here and are described in various ways, e g.. General

orders. Extracts from proceedings of the Governor General-in-Council. General Orders by the Commander-in-Chief, Resolutions of the Military Board etc. They cannot in our opinion be treated as Rules having the force of law: they appear rather to be departmental Rules issued with a view to the regulation of administrative business in the Army Department.

15A. The particular Rules which we have to consider in this case, i.e., the Rules regulating the occupation of land and the disposal of premises and buildings were first promulgated by a General Order of the Governor General in Council, No. 179, dated the 12th September 1836, and these Rules were re-published from time to time with amendments and variations till they assumed their present shape in Army Regulations. India 1887, Section 17 (see page 394 of the Gazette of India, Part V of the 5th November 1898).

16. The General Order of B36 imposed practically the same restrictions upon the transfer of houses in cantonments as those which are set up by the plaintiff in the present case. It was expressly laid down that where cantonment land had been built upon, the buildings could not be disposed of to any person not belonging to the Army until the consent of the Officer Commanding the Station had been previously obtained under his hand.

17. The document of grant was not produced in the Court and therefore, the Court could not know as to what were the terms of the grant and when the grant was made. However, insofar as the regulation was concerned it was held that it did not have the force of law. My attention has also been drawn by the learned counsel to AIR 1939 FC 58, United Provinces v. Governor General-in-Council. The relevant portion reads as below:

'The facts in the case are not in dispute and may be shortly summarised. A cantonment is a place in or in the vicinity of which any of His Majesty's regular forces or regular Air forces are quartered and which has been declared by notification to be a cantonment for the purposes of the Acts in that behalf for the time being in force. The administration of cantonment areas, almost from their first establishment has been for obvious military reasons subject to special regulations. The first General Cantonment Act, a consolidating and amending measure, was

passed in 1889 and repealed a large number of existing Acts and Regulations. The Act of 1889 was followed by another Consolidating and Amending Act in 1910 (Act 15 of 1960), and later by the very elaborate Code of 1924, and Act of 292 sections and six schedules (Act 2 of 1924), which superseded all previous legislation and is, though it has not itself escaped amendment, the principal Act relating to the subject which is now in force.'

18. This has been referred to in order to show that all the regulations etc., have been superseded and repealed by different Acts. The first general Cantonment Act, a consolidating and amending Act was passed in 1889 and it was followed by another consolidating and amending Act of 1910 and lastly by the Act of 1924.

19. From this the learned counsel wants that this Regulation No. 179 of 1836, no longer holds good and it has ceased to be an existing law subsequent to the passing of the several enactments one after the other by the Legislature and, therefore, no powers could be exercised under this order which is now a dead letter. In my opinion, the contention of the learned counsel for the petitioners appears to be quite correct.

20. The order was purely an executive order without any statutory sanction behind it and it was not an existing law and no such power for depriving a person of his property could be exercised under an order or a regulation which is not an existing law. Therefore, the action of the respondents is wholly illegal, as it has got no sanction of any statutory law.

21. In so far as the Question of compensation is concerned the petitioners have been offered Rs. 20,000/- by the respondents and that is undoubtedly a matter which cannot be decided in this writ petition as it requires the recording of evidence with regard to the market value, etc., and to that extent the objection of the respondents must prevail.

22. The respondents had taken up an objection that the petition was belated. However, the same has not been pressed.

23. One of the points urged by the respondents in opposing this petition is that it is barred by res judicata, but it may be stated here that in the previous case, the decision of which is alleged to operate as res judicata was not decided on merits, rather the same was decided merely on the ground that the notice as given was invalid and in the High Court also the case was not decided on merits. Therefore, the previous case being not, decided on merits, the same does not operate as res judicata.

24. The result, therefore, is that action of the respondents under non-existing law is invalid and illegal and the same is struck down on that ground and the petitioners, therefore, succeed. The respondents are directed to deliver possession of 'Handley Cross Estate' to the petitioners.

25. The petitioners are allowed costs, assessed at Rs. 200/-.

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