CIVIL WRIT

Before Eric Weston, C.J., and Harnam Singh, J.

SARDARNI GURDIAL KAUR,— *Petitioner,*

versus

THE STATE,—*Respondent.*

1951

Sept. 27th

Civil Writ No. 40 of 1951

Punjab Requisitioning of Immovable Property (Amendment and Validation) Ordinance (IV of 1951)—Validity of and date of promulgation—Punjab General Clauses Act (I of 1898), Section 3—Applicability to the Ordinance—Evidence Act (I of 1872), Section 41—Judgment declaring an Act ultra vires*—Effect thereof—Power of Legislature to amend and validate Act held* ultra vires*—East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (XLVIII of 1948), Section 9 (2)—Public Purpose—Jurisdiction of Courts to determine.*

Held, that the Punjab Requisitioning of Immovable Property (Amendment and Validation) Ordinance (IV of 1951) is *intra vires* the powers of the President and cannot be impugned on the ground that it validates an Act which had been declared *ultra vires* by the Punjab High Court. A judgment declaring an Act *ultra vires* is not a judgment of the nature set out in Section 41 of the Evidence Act. Its effect is not that the impugned Act never existed or has ceased to exist, but only that so long as the judgment is not overruled the Courts within the States of Punjab and Delhi would decline to recognize the impugned Act.

Held further, that Section 3 of the Punjab General Clauses Act is applicable to an Ordinance promulgated by the President under clause (I) of Article 213 of the Constitution and the Ordinance IV of 1951, must be taken to have come into force on 3rd of August 1951, when it was first published under the authority of the President.

Held also, that where a finding has been come to by the requisitioning or acquiring authority that the requisitioning or acquisitioning is for a public purpose, the Civil Courts have no jurisdiction to enquire into that matter or to examine the nature of the purpose.

The requisitioning of property to rehabilitate persons whose lands had been taken over by the Government for

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the construction of the new capital of the State, or to provide residential accommodation to a Lecturer or Principal of a Government College, or to a Subordinate Judge, is a public purpose.

Petition under Article 226 of the Constitution of India, praying as under :—

(a) That the respondent be called upon to show cause under what authority of law and in the exercise of what powers the petitioner is being deprived of her property, viz., lands measuring 615 Bighas 1 Biswas situated in Village Dhirpur, Tehsil Kharar, District Ambala.

(b) That this Hon'ble Court may be pleased to hold that the action of the respondent which will result in depriving the petitioner of her lands mentioned above, is ultra vires *and in violation of the fundamental rights of the petitioner, etc.*

TEK CHAND and H. L. SARIN, for Petitioner.

S. M. SIKRI, Advocate-General, for Respondent.

ORDER

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WESTON, C.J. On the 17th of July 1951, a Bench of this Court, of which I was a member, declared the Punjab Requisitioning of Immovable Property Acts, 1947 and 1948, *ultra vires* of the Government of India Act, 1935, on the ground that by those Acts permissible requisitioning of property was not required to be for a public purpose. To meet this decision the Punjab Requisitioning of Immovable Property (Amendment and Validation) Ordinance, 1951, has been promulgated on the 3rd of August 1951, by the President exercising under Article 356 of the Constitution the powers of the Governor. This Ordinance made under clause (1) of Article 213 of the Constitution amends sections 2 and 3 of the East Punjab Requisitioning of Immovable Property (Temporary Powers) Act, 1948, in the following manner :—

In subsection (1) of section 2 of the Act, after the words " requisition any immovable property " the

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words " for a public purpose " are, and are deemed always to have been, inserted. In subsection (1) of section 3 of the Act, after the words " acquire such property " the words " for a public purpose " are and are deemed always to have been, inserted. By clause 4 of the Ordinance provision is made for validation of requisitions and acquisitions made before the commencement of the Ordinance. It is provided that a presumption shall exist that every such requisition or acquisition was made for a public purpose, and this presumption is to exist notwithstanding any judgment, decree or order of any Court. By clause 5 of the Ordinance provision is made for restoration of proceedings in which any requisition or acquisition has been found to be invalid on the ground that the Act under which the requisition or acquisition was made did not contain a specific provision that the requisition or acquisition should be for a public purpose. I understand that this Ordinance has since been replaced by an Act in similar terms made by the President under powers conferred by section 3 of the Punjab State Legislature (Delegation of Powers) Act, 1951 (XLVI of 1951).

The application before us in Civil Writ No. 40 of 1951, is under Article 226 of the Constitution and is directed against action taken or about to be taken by Government to requisition or acquire land held by the petitioner in Village Dhirpur of the Kharar Tehsil of the Ambala District for the purpose of rehabilitating persons whose land has been acquired in the Chandigarh area for the purpose of construction of the new Capital of the Punjab. The same points are taken in this application as were taken in those applications in which the validity of the Requisitioning Acts of 1947 and 1948 was considered. The present application has now come up for hearing with certain companion applications—Civil Writs Nos 96, 106, 115 and 145 of 1951. The contentions now taken by the learned Advocates who appear for the petitioners in these matters are firstly that Ordinance No. IV of 1951 is *ultra vires* of the powers of the President. This is

claimed to be so on two grounds : (a) that as the Requisitioning of Immovable Property Act, 1948, has been declared invalid no amendment of that Act could be made ; and (b) that as Ordinance No. IV of 1951, although published in Delhi on the 3rd of August 1951, was not published in the Punjab Gazette until the 7th of August 1951, the promulgation of the Act was on this latter date, and as Parliament was in session on the 7th of August, therefore the President had no power to promulgate an Ordinance under Article 213 (1) of the Constitution. Secondly, it is claimed that, assuming the Ordinance to be valid it is for the Courts to determine whether the requisitioning was or was not for a public purpose, and it is claimed that in the particular cases no public purpose could be served by the requisitioning which is to be made or which has been made.

For the argument that no amendment can be made of an Act which has been declared invalid reliance has been placed mainly upon observations made by the Supreme Court of America in *Norton* v. *Snelby County* (1), where it was said (at p. 186) :

> " An unconstitutional act is not a law ; it confers no rights ; it imposes no duties ; it affords no protection ; it creates no office ; it is, in legal contemplation, inoperative as though it has never been passed."

Application of this principle was approved by the Patna High Court in *Kameshwar Singh* v. *Province of Bihar* (2), where Sinha, J., when dealing with clause (6) of Article 31 of the Constitution, the clause which provides for certification by the President of

(1) 30 U. S. S. C. L. Ed. 178 (186).

(2) 1950 A. I. R. (Pat) 417.

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any law of the State enacted not more than eighteen months before the commencement of the Constitution, said :

> "Hence, in order to attract the operation of the clause, the first essential condition is that it must be a valid law of the State. In other words, the certification by the President may cure an irregularity or an illegality in some details of the law in a valid piece of legislation; but it cannot cure a nullity. If the impugned Act was nullity, the certification by the President could not give life to something which was void *ab initio*, and a law which is void *ab initio* is something which was never in existence."

Willis in his Constitutional Law, 1936 Edition, at page 90 after referring to *Norton's case* (1), points out that the statement made therein needs many qualifications. In Sutherland Statutory Construction, 3rd Edition, by Horack, at page 333 it is said :

> "Amendments are frequently used to cure an unconstitutional enactment; but clearly no court will enforce the amendment unless the law as amended is constitutional. Constitutional limitations may be complied with, but not avoided by amendment.
>
> Some courts have indicated that an unconstitutional act is legally non-existent and cannot be given effect by an attempt to amend it."

And again :—

> "In these states to validate an unconstitutional act by amendment, the whole act as amended must be re-enacted."

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(1) 30 U. S. S. C. L. Ed. 178.

At page 335 it is said :

> "Probably a majority of the courts have rejected the theory that an unconstitutional act has no existence, at least for the purpose of amendment. The unconstitutional act physically exists in the official statutes of the state and is there available for reference, and as it is only unenforceable, the purported amendment is given effect. If the law as amended is constitutional, it will be enforced. The amendment need not be intelligible and complete on its subject although that is obviously desirable.
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> This escape from the legal fiction that an unconstitutional act does not exist is sound. That fiction serves only as a too convenient method of stating that an unconstitutional act gives no right or imposes no duties. This conclusion should not be used to determine an issue which was not considered in formulating the fiction. The intent of the legislature in amending an unconstitutional act is just as easily ascertained as it is when it amends a valid act. Amendment offers a convenient method of curing a defect in an unconstitutional act."

I think that this statement represents the true position. The learned Advocate-General has pointed out that this has received recognition by the action of the legislature in making formal repeal of enactments declared to be invalid. By a decision of the Federal Court *Emperor* v. *Benoari Lall Sarma and others* (1), certain provisions of Ordinance No. II of 1942, were declared invalid. This decision of the Federal Court was reversed by the Privy Council (2), but in the meanwhile formal repeal of Ordinance No. II of 1942, had been made by Ordinance No. XIX of 1943. The enactment considered in our judgment of the 17th of July 1951, happened to be a Punjab enactment. Had it been

(1) 1943 A. I. R. (F. C.) 36.
(2) 1945 A. I. R. (P. C.) 48.

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a Central enactment it could hardly have been suggested that by a judgment of this Court that enactment had been erased from the statute book. Our decision would have been in no way binding upon any Court in any other State. It would not be a judgment of the nature of those judgments set out in section 41 of the Evidence Act. The effect of our judgment is not that the impugned Acts never existed or have ceased to exist, but only that so long as the judgment is not over-ruled the Courts in this State will decline to recognise the two impugned Acts. It seems to me there can be no objection to Ordinance No. IV of 1951, on the ground that it validates something which could not be validated. I think, therefore, the first argument against the constitutionality of the Ordinance is not an argument of substance.

It may be conceded that Ordinance No. IV of 1951 must be regarded as a Punjab enactment, for it was promulgated by the President under clause (1) of Article 213 of the Constitution, and when acting under this Article the President undoubtedly was exercising the powers of the Governor. Section 3 of the Punjab General Clauses Act as amended by the Adaptation of Laws (Third Amendment) Order, 1951, which came into force on the 26th of January 1950, provides :

> "3. Where any Punjab Act is not expressed to come into operation on a particular day, then,—
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> (a) in the case of a Punjab Act made before the commencement of the Constitution,—
> * * * * * * *
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> (b) in the case of a Punjab Act made after the commencement of the Constitution, it shall come into operation on the day on which the assent thereto of the Governor or the President, as the case may require, is first published in the Official Gazette,

and in every such Act the date of the first publication thereof shall be printed either above or below the title of the Act and shall form part of every such Act."

By clause 1 (3) of the Ordinance (No. IV of 1951) it is provided that the Ordinance shall come into force at once. The Ordinance admittedly was published in Delhi under the authority of the President on the 3rd of August 1951 and I do not consider it can be said that it is not expressed to come into force on a particular day. The words " at once " read with the date which appears above the title of the Act as published in the *Gazette of India* can only mean that the Ordinance was expressed to come into force on the 3rd of August 1951. The provisions of the Punjab General Clauses Act are applicable to an Ordinance published under Article 213 of the Constitution, for in section 27 of the Act as now adapted express provision for such application is made. The circumstance that the Ordinance was promulgated by the President having assumed to himself the functions of the Governor of the State under Article 356 of the Constitution would make no difference. Even assuming that promulgation is publication and not signature, I think that Ordinance No. IV of 1951, must be taken to have been promulgated on the 3rd of August 1951, when admittedly Parliament was not in session. The second objection to validity also must fail.

On the question of public purpose being a matter into which the Courts can enquire, reliance is placed upon observations made in a recent Patna decision *Kameshwar Singh* v. *State of Bihar* (1), at page 106 where the question was considered whether the Bihar Land Reforms Act, 1950, an Act according to its preamble " to provide for the transference to the State of the interests of proprietors and tenure-holders in land * * * " was legislation for acquisition for public purposes. This, however, is a matter different from that before us. The question before us is, when

(1) 1951 A. I. R. (Pat.) 91 (106).

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a finding has been come to by the requisitioning or acquiring authority that the requisitioning or acquisitioning is for a public purpose, whether the Courts can enquire into that question. Section 9 (2) of the East Punjab Requisitioning of Immovable Property (Temporary Powers) Act, 1948, in terms excludes the jurisdiction of the Civil Courts to call in question proceedings taken or orders made under the Act. In *Province of Bombay* v. *Khushaldas S. Advani* (1), it was held by a majority of the Supreme Court when considering a similar Requisitioning Ordinance of Bombay that the decision of the Provincial Government as to public purpose required to be served by the requisitioning contained no judicial element in it and therefore there was no scope for issue of a writ of *certiorari*. In my judgment given on the 17th of July 1951, on the validity of the two Punjab Requisitioning Acts I expressed the opinion that if a public purpose had been required to be considered by the requisitioning authority, his decision that a public purpose was to be served by the requisition would be final. I am still of the same opinion.

Assuming that I am wrong in this, in Civil Writ No. 40 of 1951, the purpose of requisitioning was to rehabilitate a number of persons who had been dispossessed of their agricultural lands for the purpose of the construction of the new capital. It could not possibly be disputed that the acquisition of land for the new capital is a public purpose. A considerable number of persons have been dispossessed and their rehabilitation in such manner that they can pursue their ordinary and probably hereditary occupation of agriculture seems to me clearly a public purpose. While it may be unfortunate that the applicant in possession of a large area of land is to be deprived of that land, yet her rights may properly be held subordinate to the necessities of a considerable body of persons. The applicant is not in fact the owner of the lands but has rights of occupation or at the most a life estate in them in lieu of maintenance. In Civil Writ

(1) 1950 A. I. R. (S. C.) 222.

No. 96 of 1951, the purpose of the requisitioning was to give residential accommodation to a Professor of the Government College, Rohtak. The existence of a College must be admitted to be a public purpose, and to provide suitable accommodation for its Professors is equally a public purpose. In Civil Writ No. 106 of 1951, the requisitioning was to give residential accommodation to a Subordinate Judge. This also is clearly a public purpose. In Civil Writ No. 115 of 1951, the requisitioning is for accommodation to the Principal of the Government College, Muktsar. Civil Writ No. 145 of 1951, is again a case where residential accommodation has been requisitioned for a Lecturer of the Government College, Ludhiana.

On all grounds, therefore, the various petitions must fail and the rules granted are discharged. In the circumstances I would make no order as to costs.

HARNAM SINGH, J. I agree.

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