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placed on the words "before the expiration of the period" and that these words must be interpreted only to mean before the expiry of three years, i.e., the period prescribed by II Schedule of the Indian Limitation Act. I regret, I cannot accept this interpretation. If by any local law any particular time is to be excluded for calculating the period prescribed by the Indian Limitation Act, the provisions of the II Schedule of the Act have to be read in the light of the provisions of the said local law and the period prescribed has to be determined after excluding the period which the local law provides for exclusion. It is conceded that if calculation of the period of limitation is made in this way, the acknowledgement of liability must be deemed to have been made within the period of limitation. In the result, I find that the acknowledgement contained in the written statement, Exhibit P.B., falls within the ambit of section 19 of the Limitation Act and gives a fresh period of limitation to the creditor for filing a suit.

This appeal, therefore, succeeds and is allowed. The decrees of the two Courts below are set aside and the plaintiff's suit is decreed with costs throughout.

SHAMSHER BAHADUR, J.— I agree.

Shamsher Bahadur, J.

*R.S.*

FULL BENCH

*Before D. Falshaw, G. L. Chopra and A. N. Grover, JJ:*

DURGA PARSHAD,—*Appellant.*

*versus*

CUSTODIAN OF EVACUEE PROPERTY AND OTHERS,—

*Respondents.*

**Execution First Apptol No. 54 of 1952.**

1960

February, 10th

*East Punjab Evacuee (Administration of Property) Act (XIV of 1947) and Evacuee Property (Chief Commissioner's*

*Provinces) Ordinance (XII of 1949)—Whether valid—Constitutionality of a statute—Presumption as to—Extent of—Administration of Evacuee Property Act (XXXI of 1950) as amended by Amendment Act (XXII of 1951)—Section 17—Ambit and scope of—Remedy open to the Custodian to have the sale of evacuee property in execution of a decree set aside—Whether under section 47 of the Code of Civil Procedure (V of 1908)—Limitation for such application—Whether as provided by Article 181 of the Indian Limitation Act (IX of 1908)—Code of Civil Procedure (V of 1908)—Section 11—Rule of constructive* res judicata*—Whether applicable to proceedings under section 17 of Act XXXI of 1950—Change in law—Whether made any difference.*

*Held,* that the East Punjab Evacuee (Administration of Property) Act (XIV of 1947) and the Evacuee Property (Chief Commissioner's Provinces) Ordinance (XII of 1949) were valid legislation so far as land was concerned leaving out such portions as were invalid but which were severable from the rest. The provincial legislatures had the power to enact these laws with regard to land under Entry 21 in List II of the Seventh Schedule to the Government of India Act, 1935.

*Held,* that there is a presumption in favour of the legality of a statute and the Courts will not declare an Act unconsitutional or *ultra vires* unless the repugnancy to the Constitution is clear and beyond doubt. If the language of the enactment is ambiguous and on one construction it would be within the powers of the legislature, the Courts will construe ambiguous expression in such manner as to maintain the validity of the statute if the language will reasonably bear such interpretation. This is an application of the *maxim ut res magis valeat Quam pereat.*

*Held,* that the policy underlying the intention of section 17 of the Administration of Evacuee Property Act and the mandatory nature of the prohibition contained in section 17 (1) make it incumbent to hold that the sale of evacuee property in execution of the decree was wholly null and void.

*Held,* that the Custodian, being the representative of the evacuee judgment-debtor, is entitled to have the sale of the evacuee property, made in execution of a decree, set aside as being null and void by moving an application under section 47 of the Code of Civil Procedure. The proper

article that would govern such an application is Article 181 of the Indian Limitation Act.

*Held*, that the Custodian is debarred by the rule of constructive *res judicata* which is applicable to execution proceedings from challenging the validity and legality of the auction-sales which have been held. There is no force in the argument that the law contained in section 17 of the Administration of Evacuee Property Ordinance No. XXVII of 1949, has been changed by the Administration of Evacuee Property (Amendment) Act, (XXII of 1951), inasmuch as the Ordinance contained the words "in execution of an order of a Court" and did not contain the words "any decree" which were invested by the Amending Act of 1951, and that for this reason the rule of *res judicata* or constructive *res judicata* cannot apply. From the previous history of evacuee legislation, namely, the Act of 1947 and Ordinance No. XII of 1949 and the amendment subsequently made in 1951, it is apparent that the omission of the word decree in section 17(1) of Ordinance No. XXVII of 1949 and of the Administration of Evacuee Property Act, 1950, was due to the reason that the word "order" was not used in the sense it is defined in the Code of Civil Procedure but in a general and omnibus sense which would include a decree of a court. The legislature could never have intended that the exemption contained in section 17 should be confined to sale in execution of an order simpliciter of a court because there were hardly any orders which were executable for which it was necessary to provide the exemption. Either the word "order" was used in a general sense as covering the word "decree" or it was considered that it was unnecessary to insert the word "decree" also, because whenever a sale takes place even in execution of a decree that is pursuant to a separate order which is made by the executing court. In that sense the words used in section 17(1) before the amendment would mean a sale held in execution pursuant to an order of a court. The language employed was not happy but it is the intention of the Legislature that has to be seen and it is not conceivable that the Legislature ever intended to lay down that the exemption should be confined to sales held in execution of orders only as defined in the Code. The amendment as finally made in 1951 in these circumstances, was merely declaratory of the law as it always had been and it is not possible to say that by the amendment the law

was changed and for that reason the principle of consructive *res judicata* cannot be made applicable if on the facts of each case that can be invoked.

*E.F.A. from the order of Shri Rameshwar Dayal Sub-Judge 1st Class, Delhi, dated 12th January, 1952, ordering the sale of the property known as Iqbal Manzil held on 15th November, 1950, in favour of Kartar Chand and Durga Parshad respondents 3 and 4 is declared to be illegal and ineffective and unenforceable at law.*

N. S. BINDRA AND SHRI R. S: NARULA AND SHRI KESHAV DAYAL for the Appellant.

C. K. DEPHTARY, Solicitor-General of India for the Central Government and BAWA SHIV CHARAN SINGH, for the Respondents.

JUDGMENT

Grover, J.

GROVER ,J.—This judgment will dispose of execution First appeal No. 54 of 1952 and the connected cases (Execution First Appeal No. 4-D of 1952, Execution First appeal No. 96 of 1952, Civil Revision No. 211-D of 1956 and Civil Revision No. 212-D of 1956 which have been referred to a full Bench owing to the importance of certain questions which arise for determination. It would suffice to set out briefly the facts in the first case.

In January, 1949 a court at Meerut (in Uttar Pradesh) passed a preliminary mortgage decree in favour of Piyare Lal, respondent No. 2 in the present appeal, against Khan Bahadur Ghulam Hussain in his presence. Some time later the judgment-debtor became an evacuee and on 7th October, 1949 the Custodian of Evacuee Property was informed of the proceedings by the Meerut Court. On 11th October, 1949 the Custodian appeared there in the proceedings relating to the final decree and raised an objection that no decree should be passed on 20th April, 1950, but that failed and a final decree was passed.

The decree-holder got the execution transferred to the Court at Delhi, in July, 1950, the Custodian raised an objection under section 17 of the Administration of Evacuee Property Act, 1950

(which will be referred to as the Act). On 19th August, 1950, a similar objection was raised but these objections were dismissed. The mortgaged property was put to sale in November, 1950, and was purchased by Durga Parshad and Kartar Chand, Durga Parshad being the appellant and Kartar Chand being respondent No. 4. On 16th December, 1950 the sale was confirmed in favour of the aforesaid auction-purchasers and on 3rd January, 1951 the execution court certified the fact of satisfaction to the transferer court at Meerut. On 17th March, 1951, the Custodian applied that possession of the property sold be not delivered to the auction-purchasers. On 28th April, 1951, Section 17 of the Act was amended by the amending Act XIII of 1951 with retrospective effect. On 6th August, 1951 the objections of the Custodian which had been filed in March, 1951, were dismissed. On 29th August, 1951, the Custodian filed another set of objections based on section 17 of the Act as amended. By an order dated 12th January, 1952 the execution court allowed the objections and set aside the sale.

Before stating the first point, which relates to the constitutionality of the East Punjab Evacuee (Administration of Property) Act, 1947 (to be referred to as the Act of 1947), which was extended to Delhi and the Administration of Evacuee Property (Chief Commissioner's Provinces) Ordinance, 1949 (to be referred to as Ordinance No. XII), it is necessary to give a brief history of the Evacuee Legislation from the very beginning. The Act of 1947 received the assent of the Governor-General on 12th December, 1947 and was first published in the East *Punjab Gazette* Extraordinary, dated 13th December, 1947. By section 23 it repealed the East Punjab Evacuees (Administration of Property) Ordinance 1947. It was extended to Delhi and remained in force till it was repealed by section 40 of Ordinance XII. Sub-section (2) of section 40 provided

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that notwithstanding such repeal anything done or action taken in the exercise of any power conferred by the aforesaid Act shall be deemed to have been done or taken in the exercise of the powers conferred by the Ordinance as if the Ordinance was in force on the day when such thing was done. The Administration of Evacuee Property (Chief Commissioner's Provinces) Amendment Ordinance No. XX of 1949 was published in the Gazette of India Extraordinary, dated 23rd August, 1949 and was enacted to amend certain provisions of Ordinance No. XII after compliance with the provisions of section 103 of the Government of India Act, 1935. The amendments were more or less of a formal nature. In August, 1949, the Government of India (Third Amendment) Act, 1949, was enacted by which entry 31-B was added in the Concurrent List III of the Seventh Schedule in the Government of India Act of 1935 as adopted. The entry which was inserted was to the following effect :—

> "Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property."

Then came the Administration of Evacuee Property Ordinance No. XXVII of 1949 (to be referred to as Ordinance No. XXVII). By Section 55 Ordinance No. XII was repealed and by sub-section (3) anything done or any action taken in the exercise of any power conferred by that Ordinance was saved in the same manner as by the previous legislation. Ordinance No. XXVII was followed by the Act which was published in the Gazette of India Extraordinary, dated 18th April, 1950, section 58 of which repealed Ordinance No. XXVII and saved the previous operation of the Ordinance.

In Execution First Appeal No. 54 of 1952 the notification whereby the Custodian assumed possession and control of the property in dispute was

made on 6th May, 1949 and this was apparently done under sub-section (1) of section 6 of the Act of 1947 which was in force on that date. The objection of the Custodian resulting in setting aside of the sale held on 15th November, 1950, in favour of Durga Parshad appellant and Kartar Chand respondent No. 4 was sustained by the executing Court under section 17 of the Act and that could be done only if the property was evacuee property and had vested in the Custodian. It is common ground that if the Act of 1947 and Ordinance No. XII were valid enactments, the property would be evacuee property but if they were consitutionally invalid, then the saving clauses appearing in the various subsequent enactments would be of no avail and as the procedure prescribed by section 7 of Ordinance No. XXVII and the Act had not been followed, it could not be said that the property had been declared to be evacuee property and had vested in the Custodian under section 8 of the aforesaid enactments. According to the learned Solicitor-General, however, if the Act of 1947 was bad but if Ordinance No. XII was valid, then also the property in dispute would be evacuee property.

In view of what has been stated above the first question that requires decision is whether the Act of 1947 and Ordinance No. XII were valid legislation. The contention that has been canvassed on behalf of the auction-purchasers is that the aforesaid enactments were wholly void on account of lack of legislative competence. Reference has been made to the entries in the Legislative Lists in the Seventh Schedule of the Government of India Act 1935, and it is urged that there was no such entry under which evacuee legislation as embodied in the Act of 1947 or Ordinance No. XII could be enacted. Admittedly the specific entry with regard to custody, management and disposal of evacuee property was inserted for the first time, as mentioned

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before, in August, 1949 which was subsequent to the enactment and promulgation of the Act of 1947 and Ordinance No. XII. A Division Bench of the Allahabad High Court in *Azizun Nisa and others* v. *Assistant Custodian and others* (1), had occasion to examine the validity and constitutionally of U.P. Administration of Evacuee Property Ordinance (I of 1949), and Ordinance No. XII as extended to U.P. and it was held that both these enactments were *Ultra Vires* the Governor-General. The U.P. Ordinance I of 1949 was declared invalid on the ground that under section 88(3) the Governor could not provide in an ordinance for a matter in respect of which the provincial Legislature could not make a law. The provincial legislature could make laws in respect of the matters enumerated in Lists II and III of seventh Schedule of the Government of India Act. Evacuees as defined in the Ordinance and evacuee property were not included among the matters in the two Lists. Therefore, the Governor could not under section 88 promulgate the Ordinance like the U. P. Ordinance No. I of 1949. The Government of India (Third Amendment) Act of 1949, which added the entry referred to before in List III came into force on 25th August, 1949 and as it had not been given retrospective effect, it did not validate Ordinance No. I. As regards Ordinance No. XII a similar argument was employed to declare it *ultra vires* with reference to the powers of the Governor-General under section 42 of the Government of India Act. He could make an Ordinance only in regard to a matter in respect of which the Central Legislature could make a law. The three Lists in Seventh Schedule did not contain any entry covering "a residuary matter" or "any other matter not enumerated in any other List". Such an entry is now to be found in List I—Union List—of our Constitution but as it did not exist in

(1) A.I.R. 1957 All. 561

the Government of India Act, resort could be had only to section 104 which authorized the Governor General to empower, by a public notification, either Legislature to enact a law with respect to any matter not enumerated in any of the Lists. The Central Legislature could enact a law in respect of evacuees and evacuee property only if it had been empowered by a public notification by the Governor-General but that had not been shown to have been done. The Governor-General was, therefore, incompetent to make an Ordinance regarding them.

It has been contended on behalf of the auction-purchasers that Ordinance No. XII was clearly unconstitutional for the reasons given by the Allahabad Court and that the Act of 1947, was also beyond the legislative competence of the provincial Legislature as there was no such entry in the relevant Lists which empowered the provincial legislature to enact any law with regard to evacuees and evacuee property. In the absence of such an entry resort could be had only to section 104 of the Government of India Act but the Governor-General admittedly never empowered the Provincial Legislature by a public notification to enact a law with respect to the aforesaid matters. The learned Solicitor-General has not been able to show any infirmity in the reasons given by the Allahabad Bench but it is submitted by him that the Act of 1947 as well as Ordinance No. XII were covered by certain entries appearing in the Lists in Seventh Schedule of the Government of India Act. It is pointed out that so far as the land of the evacuees is concerned, legislation relating to it would fall under entry 21 in List II (Provincial Legislative List) which is to the following effect :—

> "Land, this is to say, right in or over land, land tenures, including the relation of

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landlord and tenant, and the collection of rents ; transfer, alienation and evolution of agricultural land; land improvement and agricultural loans; colonization; Court of Wrads; encumbered and attached estates; treasure trove."

It is further, suggested that entries 8 and 9 in List III (Concurrent Legislative List) would also cover the impugned Legislation. As obviously the last two heads cannot cover the Act of 1947 and Ordinance No. XII the Solicitor-General finally placed a great deal of reliance on entry 21 in List II and it has been urged that at least so far as property of the evacuees which was land is concerned the impugned enactments would be valid piece of legislation and if necessary the principle of severability could be invoked. According to him, this argument was not addressed to the learned Allahabad judges. It may be mentioned here that even as regards Ordinance No. XII entry 21 in List II would be relevant in view of the fact that Delhi was Chief Commissioner's PROVINCE, and the Governor-General could exercise legislative powers in such a Province even with regard to any entry in the Provincial List by virtue of section 100(4) read with section 46(3) and 42 of the Government of India Act.

It is comomn ground that the word "land" which is of general import and which in the ordinary legal sense comprehends everything of a fixed and permanent nature would cover the properties which are in dispute. All that is contended on behalf of the auction-purchasers and others who are interested in having the Act of 1947 and Ordinance No. XII declared unconstitutional is that the pith and substance of the impugned legislation cannot be said to be land but evacuees and evacuee

property which are the subject-matter of the aforesaid enactments. There can be no doubt that while interpreting entry 21 it should on ordinary principles receive the widest construction unless by some reason it can be cut down either by its terms or by other parts of the Constitution Act which has to be read as a whole. The rule of construction that a Constitution Act must be interpreted in a broad and liberal spirit has been reiterated time and again. The following passage from the Judgment of Lord Wright, M. R. in *James* v. *Commonwealth of Australia* (1), is almost classical.

> "It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerged. It is not that the meaning of the words changes, but the changing circumstances illustrate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act (i.e., the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted."

It must further be remembered that under section 100 of the Government of India Act the powers conferred on the Legislatures were "with respect to" the matters enumerated in the Lists in the Schedule and that expression occurs in a similar context in section 51 of the constitution of the Australian Commonwealth. In the judgment of Higgins, J., *The Attorney-General for the State of New*

(1) 1936 A.C. 578 at p 614

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*South Wales, etc.* v. *The Brewery Employees Union of New South Wales; etc.*, (1), the discussion with regard to the ambit and the scope of the power "to make laws with respect to trade marks" is noteworthy. According to him, what was committed to the Federal Parliament was not the class of things called trade marks, but the whole subject of trade marks. The rule regarding giving the widest construction was followed in *United Provinces* v. *Mt. Atiqa Begum and others* (2). It was held that the general descriptive word in item 21 included "the collection of rents" and it was observed that if a provincial legislature could legislate with respect to the collection of rents, it must also be regarded to have the power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to remission of rents. In the *State of Bombay and another* v. *F. N. Balsara* (3), the same rule was followed and it was stated at page 322 that since the enactment of the Government of India Act, 1935, there had been several cases in which the principles which governed the interpretation of the legislative lists had been laid down. One of these principles was that none of the items in each list was to be read in a narrow or restricted sense. In *Thakur Amar Singh ji and others* v. *State of Rajasthan and others* (4), the validity of Rajasthan Land Reforms and resumption of Jagirs Act, 1952, was questioned, Resumption and acquisition were considered to connote two different legal concepts. Reading the provisions of the Act impugned in that case it was held that what was meant by resumption was only acquisition. It was also sought to bring that enactment under entry 18 in List II in the present Constitution of India which is the same as entry 21 in

(1) 6 C.L.R. 469
(2) A.I.R. 1941 F.C. 16
(3) A.I.R. 1951 S.C. 318
(4) A.I.R. 1955 S.C. 504

the Government of India, Act. It was observed by their Lordships at page 520 of that report as follows :—

> "It was argued that the heads of legislation mentiontd in the Entries should receive a liberal construction and the decision in *United Provinces* v. *Mt. Atiqa Begum* (1), was quoted in support of it. The position is well settled and in accordance therewith, "it could rightly be held that the legislation falls also under Entry No. 18. But there being an Entry No. 36 specifiically dealing with acquisition, and in view of our conclusion as the nature of the legislation, we hold that it falls under that entry."

The court has yet to bear another principle in mind. There is a presumption in favour of the legality of a statute and the Courts will not declare an Act unconstitutional or *ultra vires* unless the repugnancy to the Constitution is clear and beyond doubt. If the language of the enactment is ambiguous and on one construction it would be within the powers of the legislature, the Courts will construe, ambiguous expression in such manner as to maintain the validity of the statute if the language will reasonably bear such interpretation. This is merely an application of the maximum *ut res magis valeat Quam pereat* (Rajagopala Aiyanger's Government of India Act, 1935, page 127).

The principles being clear it has now to be seen whether the impugned enactments would be covered by entry 21 so far as land is concerned. The purpose of the legislation was to take over the management and control of the property of that

(1) A.I.R. 1941 F.C. 16 at p. 25(B)

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class of owners who had become evacuees owing to the partition of the country in 1947. In the preamble of the Act of 1947 and Ordinance No. XII a more comprehensive word 'administration' was used. The definition of 'evacuee' as well as of property was given. Provisions were made for the appointment of Custodians and vesting of evacuee property in the Custodians. Certain transactions affecting evacuee property were prohibited and the Custodian was to take possession of such property. He was to have fairly wide powers in regard to its management. The Custodian was further empowered to make enquiry into the claims to evacuee property and decide them. Appellate and revisional authorities were constituted in the event of any appeal or revision being preferred against the orders of the Custodian. Generally speaking, the power of management and control of the property of the evacuees was in many respects similar to the control over the property of the words under the Court of Wards Act. Courts of Wards were expressly mentioned in the illustrative part of entry 21. It is difficult to see how the impugned legislation would not be covered by that entry so far as land belonging to the evacuees was concerned.

If the impugned legislation is valid *qua* the land belonging to the evacuees the question of severability at once arises because, as will be presently seen, the definition of property in both the Act of 1947 and Ordinance No. XII included movable and other kinds of property as well. In *R. M. D. Ghamarbaugwalla and another* v. *The Union of India and another* (1) the following principles on the question of severability laid down by the American Courts were accepted as laying down the correct law and were applied :—

"1. In determining whether the valid parts of a statute are separable from the invalid

(1) 1957 S.C.A. 912

parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it has known that the rest of the statute was invalid. Vide Corpus Juris Secundrum, Volume 82, P. 156 Sutherland on Statutory Construction, vol. 2, pp. 176-177."

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. *Vide* Cooley's Constitutional Limitations, Vol. I, at pp. 360-361 ; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. *Vide* Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion in so thin and truncated as to be in substance different from that it was when

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it emerged out of the legislature then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections (*Vide* Cooley's Constitutional Limitations, Vol. I, pp. 361-362); it is not the form but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as bad as otherwise it will amount to judicial legislation. *Vide* Sutherland on Statutory Construction Volume 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its objection, the title and the preamble to it. *Vide* Sutherland on Satutory Construction, Vol. 2, pp. 177-178."

Taking up the Act of 1947 first the definition in Section 2(e) of 'property' is in the following terms :—

"property" includes any right or interest in movable and immovable property ,in

any shop or business established or any factory or workshop or undertaking or in any debt or actionable claim other than mere right to sue but does not include cash deposit in banks.

'evacuee property' is defined by section 2(c) as including property in which an evacuee has any right or interest but excluding any movable property in his immediate physical possession. If the amplifying words are confined in the above definition to property and the qualifying and other words which refer to property other than land are deleted, then the word "property" can have reference to land as mentioned in entry 21 because the Legislature had competence with regard to that class of property alone. If that is done, most of the relevant provisions of the Act of 1947 shall stand but some of them will have to be struck down as invalid which relate to movables and properties other than land. The learned counsel for the auction-purchasers and decree-holders have not been able to show that the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another and that they are not so distinct and separate that after striking out what is invalid, what remains is in itself not a complete code independent of the rest. In the *R. M. D. Chamarbaugwallas case* (supra) their Lordships applied the principles referred to before in the matter of prize competitions and observed that competions in which success depends to a substantial extent on skill and competitions in which it did not so depend formed two distinct and separate categories. Sections 30, 36 and 38 of the Bengal Money-Lenders Act (10 of 1940) had been held to be invalid and *ultra vires* the provincial legislature by the Federal court in in *Bank of Commerce, Ltd., Khulra* v.

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*Kunja Behari Kar and others* (1). However, in *Mohammed Hussain and others* v. *Sajawal Baksh and others* (2), their Lordships considered the question of their severability from the remaining provisions of the enactment and held that the Act could not be held to be wholly void because the invalid provisions were severable from the rest of the Act.

In section 2(f) of Ordinance No. XII "property was defined thus :—

> "Property means property of any kind and includes any right or interest in such property, but does not include a mere right to sue or a cash deposit in a bank."

The definition of evacuee property as contained in section 2(d) was as follows :—

> "Evacuee property" means any property in which an evacuee has any right or interest or which is held by him under any deed of trust or other instrument, but does not include :—
>
> (i) any movable property in his immediate physical possession ;
>
> (ii) any property belonging to a joint stock company, the head office of which was situated in any place now forming part of Pakistan before the 15th day of August, 1947, and continues to be so situated after the said date."

In the definition of property if the words "means property of any kind and" are cut out as also the words "but does not include a mere right to sue or a cash deposit in a bank", then the rest of

(1) A.I.R. 1945 F.C. 2
(2) A.I.R. 1945 F.C. 8

the defining provision is saved. The method of deleting the invalid part was applied by their Lordships of the Supreme Court in *Shri Ram Krishna Dalmia, etc.*, v. *Shri Justice S. R. Tenddka, etc.*, (1), in which clause (10) of a notification issued in exercise of the powers conferred by section 3 of the Commissions of Inquiry Act 1952, was upheld after deleting and severing such part as was outside the scope of the Act and was not covered by the Legislative entries The following observations at page 547 may be referred to with advantage :—

> "Having regard to all these considerations it appears to us that only that portion of the last part of clause (10) which calls upon the Commission of Inquiry to make recommendations about the action to be taken 'as and by way of securing redress or punishment', cannot be said to be at all necessary for or ancillary to the purposes of the Commission. In our view the words in the latter part of the section, (sic) namely, 'as and by way of securing redress or punishment', clearly go outside the scope of the Act and such provision is not covered by the two legislative entries and should, therefore, be deleted."

Deletion of the offending words from clause (10) was considered not to impair the officially of the notification. It was also considered that there was no reason to think that the Government would not have issued the notification without those words which did not appear to be inextricably wound up with the texture of the entire notification. *In the State of Bombay and another* v. *F. N. Balasra* (2), a number of provisions of the Bombay

(1) A.I.R. 1958 S.C. 538
(2) A.I.R. 1951 S.C. 318

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Prohibition Act, 1949, were declared to be invalid and yet it was held that they were not inextricably wound up with the remaining provisions and that the Legislature would not have enacted the Act at all without including that part which was found to be *ultra vires*. It is a matter of common knowledge of which judicial notice can well be taken that the bulk of the property left by the evacuees was land and it cannot possibly be said that the Legislature would not have enacted the valid part if it had known that the rest of the statute was invalid nor can it be said that property like land and movable property do not form two distinct and separate categories. The process of deletion of portions not covered by entry 21 from the provisions of the impugned enactments only illustrates the applicability of the rule of severability. Even without actually deleting any words it can well be said as was done in Balsara's case that the impugned enactments were invalid so far as property other than land is concerned but as regards property in the nature of land, they were valid. Once this conclusion is reached in the light of the principles set out before and the relevant provisions of the Act of 1947 and Ordinance No.XII are held to be valid to the extent indicated above then little difficulty arises in holding that wherever the word "property" is used it will have reference to that kind of property with respect to which the Legislature was competent to legislate and to no other, namely, it would have reference to land only.

It is apparent that even with regard to Ordinance No. XII it would be entry 21 in the Provincial List which will be relevant and there can be no doubt that the Governor-General could promulgate such an Ordinance in Delhi which was a Chief Commissioner's Province by virtue of Section 100 (4) read with section 42 of the Government of India Act. The answer to the first question, therefore, is

that both the Act of 1947 and Ordinance No. XII were valid legislation so far as land was concerned leaving out such portions as were invalid but which were severable from the rest.

The next question that has been raised on behalf of the auction-purchasers will become clear if the provisions of section 17 of the Act are set out prior to its amendment by the Administration of Evacuee Property (Amendment) Act, 1951, which was published in the Gazette of India, dated 28th April, 1951.

"17. *Exemption from attachment, sale, etc.*— (1) Save as otherwise expressly provided in this Act, no property which has vested in the Custodian shall be liable to attachment, distress or sale in execution of an order of a court or of any other authority, and no injunction in respect of any such property shall be granted by any court or other authority.

(2) Save as otherwise expressly provided in this Act, any attachment, or injunction subsisting on the commencement of this Act in respect of any evacuee property which has vested in the Custodian shall cease to have effect on such commencement and any transfer of evacuee property under orders of a "Court or any other authority made after the 1st day of March, 1947, shall be set aside, if an application is made to such Court or authority by or at the instance of the Custodian within six months from the commencement of this Act."

By the amending Act the section was substituted and was to be deemed always to have been substituted by the following section :—

"*Exemption of evacuee property from processes of court, etc.* (1) Save as otherwise expressly provided in this Act, no

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evacuee property which has vested or is deemed to have vested in the Custodian under the provisions of this Act shall, so long as it remains so vested, be liable to be proceeded against in any manner whatsoever in execution of any decree or order of any Court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on such commencement and shall be deemed to be void.

(2) Where, after the 1st day of March, 1947, any evacuee property which has vested in the Custodian or is deemed to have vested in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any Court or other authority, the sale "shall be set aside if any application in that behalf has been made by the Custodian to such Court or authority on or before the 17th day of October, 1950."

Reliance has been placed on behalf of the auction purchasers on sub-section (2) of the amended section and it has been contended that the sale could be set aside only if an application in that behalf had been made by the Custodian on or before 17th day of October, 1950, as provided by sub-section (2). The question for determination, therefore, is the true ambit and scope of both the sub-sections of section 17 and to determine the point of time and the procedure for setting aside of the sales of evacuee property which had taken place in execution of any decree or order of a Court.

The legislature had been prescribing a certain period for setting aside of the sale of evacuee property at the instance of the Custodian from time to time. In Section 8(2) of the Act of 1947 all sales, etc., were to be set aside if the application was made within three months of the coming into force of the East Punjab Evacuee's (Administration of Property) (Second Amendment) Ordinance, 1948, or the date of the sale, etc., whichever was later. Section 15(2) of Ordinance No. XII provided a period of three months from the commencement of the Ordinance for making of such an application by the Custodian. Similarly Ordinance No. XXVII provided a period of three months from the commencement of that Ordinance. Then came the Act in which section 17 before the amendment provided a period of six months from the commencement of the Act for making an application with regard to transfer of evacuee property made after the first day of March, 1947. It was this period of six months to which sub-section (2) of the new section which was inserted by the amending Act had reference because that period was to expire on 17th October, 1950. It did not, however, mean that the Custodian became debarred after 17th October, 1950, from applying for setting aside of any sale made in execution of a decree of evacuee property. In execution first appeal No. 4-D of 1952, the sale had taken place in November, 1950, which was after the Act had come into force but before the amendment made in section 17 in the year 1951, but by virtue of the retrospective provisions of the Amending Act it was clearly hit by section 17(1).

The learned counsel for auction-purchasers submit that according to the express language of sub-section (1) of section 17 only the attachment or injunction or order for the appointment of a

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receiver was to be deemed to be void and it could not be said that any sale which had been affected in execution of a decree would be rendered void and nugatory. It is contended that the general scheme of Section 17 of the Act was to make such a sale voidable and not void. This will depend on the mandatory or directory nature of the inhibition against sale of evacuee property in execution proceedings contained in the first part of section 17(1). In *Manilal Mohanlal* v. *Sayed Ahmed* (1), the provisions contained in Order XXI, rules 84, 85 and 86 requiring the deposit of 25 per cent of purchase-money immediately, on the persons being declared as a purchaser, such person not being a decree-holder, and the payment of the balance within fifteen days of the sale, were held to be mandatory upon non-compliance with which it was laid down that there had been no sale at all. In *Merla Ramanna* v. *Nallaparaju and others* (2), where a mortgage decree only authorized the sale of the mortgage rights and not the land which was the subject matter of that mortgage and where the lands were wrongly sold through process of the Court it was held that such sales were void and inoperative. In view of the policy underlying the intention of section 17 of the Act and the mandatory nature of the prohibition contained in section 17(1) it must be held that sale of evacuee property in execution of the decree was wholly null and void. A Division Bench of this Court in *Sheikh Mohd. Din* v. *S. Thakur Singh and Custodian of Evacuee Property* (3), has expressed the view that the purpose of the Act is to keep the evacuee property in tact and safe from any order of a Court or other authority and section 17 prohibits all kinds af sales of evacuee property whether they are ordered for the first time in execution proceedings or take

(1) A.I.R. 1954 S.C. 349
(2) A.I.R. 1956 S.C. 87
(3) 1952 P.L.R. 415

place in pursuance of a direction contained in the decree itstelf.

It has now to be decided how the Custodian could get a sale of evacuee property held in contravention of section 17(1) set aside and the period within which he could move the court for that purpose. Counsel in the present cases, however, agree that an application for the aforesaid purpose would lie under section 47 of the Code of Civil Procedure. The Custodian being a representative of the evacuee judgment-debtor would certainly be entitled to move such an application under the aforesaid provision. In *Merla Ramanna* v. *Nallaparaju and others* (1), also their Lordships held that when a sale in execution of a decree was impugned on the ground that it was not warranted by the terms thereof that question could be agitated when it arose between the parties to the decree, only by an application under section 47. In the same case it was laid down that for the purposes of determining the period of limitation for making such an application, Article 166 of the Limitation Act would only apply when the sale was one which had under the law to be set aside, as for example, under Order XX, rules 89, 90 and 91, Civil Procedure Code, but that Articles had no application when the sale was inoperative and void. Their Lordships expressed agreement with the view of B. K. Mukherjee, J., as he then was, which had been expressed in *Nirode Kali Roy* v. *Harendra Nath* (2), that the proper Article that would govern an application under section 47 to have an execution sale pronounced a nullity would be article 181. Thus when a sale in execution is inoperative and void, an application by a judgment-debtor to have it declared void would be governed by Article 181. It is not denied that the

(1) A.I.R. 1956 S.C.
(2) A.I.R. 1938 Cal. 113

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Custodian moved within the period of limitation prescribed by Article 181 for having the execution sales set aside.

Shri Narotam Singh Bindra who appeared in Execution First Appeal No. 54 of 1952 raised certain other points with regard to the transferee Court having become *functus officio* after it had certified satisfaction to the transferor Court on 3rd January, 1951, but those points were finally not pressed.

The last point that was seriously urged and which requires consideration is whether the Custodian was debarred by the rule of constructive *res judicata* which is applicable to execution proceedings from challenging the validity and legality of the auction-sales which have been held. A great deal of reliance has been placed on the observations of Ghulam Hasan, J., in *Mohan Lal Goenka* v. *Bemoy Krishna Mukherjee and others* (1). It may be mentioned that Das, J., as he then was, came to the conclusion that the judgment-debtor was precuded from raising the objection that the Asansol Court, to which a decree passed by the Calcutta High Court on the original side had been transferred for execution, had no jurisdiction to execute the decree on a different ground but Ghulam Hasan, J., applied the principle of constructive *res judicata* Mahajan, J., as he then was, and Bose, J., observed that on either of the grounds stated by the other two learned judges the judgment-debtor was precluded from raising the objection about the jurisdiction of the Asansol Court. The following observations of Ghulam Hasan, J., at page 397 may be referred to with advantage :—

> "The foregoing narrative of the various stages through which the execution proceedings passed from time to time will

(1) 1953 S.C.R. 377

show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution Court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principles of constructive *res judicata* after the property has been sold to the auction-purchaser who has entered into possession. There are two occasions on which the judgment-debtor raised the question of jurisdiction for the first time. He did not, however, press it with the result that the objection must be taken to have been impliedly overruled."

It is further urged that by necessary implication the principle of *res judicata* was applied in *The Custodian of Evacuee Property* v. *Solu Mall and others* (1), by a Division Bench of this Court when the order of the Court below refusing to set aside the sale was sustained on the ground that an adverse decision in a previous application had not been appealed against. It is true that another reason was given that the Custodian had asked for the setting aside of the sale long after the period given in sub-section (2) of section 17 had elapsed but it is said that the main consideration which weighed with the learned judges was the first one.

The learned counsel for the Custodian, however, contends that by the Amending Act of 1951,

(1) I.L.R. 1955 Punj. 1228

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the law has been changed inasmuch as in Ordinance No. XXVII and the Act, as it originally stood, section 17(1) contained the words "in execution of an order of a Court" and did not contain the words "any decree" which were inserted by the Amending Act. If there is a change of law, the rule of *res judicata* or constructive *res judicata* cannot apply. The contention that has been raised is indeed well-founded. It has nevertheless to be seen whether by insertion of the words "any decree" in section 17(1) any change in the law took place. In *Mohammed Din* v. *Thakar Singh* (1), it has been observed that section 17 of the Act provides that the property which has vested in the Custodian is not liable to attachment, distress or sale in execution of an "ORDER" of a Court. The word "DECREE" is not mentioned. In the provisions made under the previous Acts the word "DECREE" was also mentioned. It should be presumed that the Legislature has deliberately omitted the use of the word "DECREE"—Therefore, no exemption is given to a sale of the evacuee property in execution of a mortgage decree. This judgment was, however, set aside by the Letters Patent Bench in *Sheikh Mohd. Din's case* (2), referred to before. It is noteworthy that in section 8(1) of the Act of 1947, it is provided that all property which vests in the Custodian shall be exempt from attachment, distress or sale in execution of the decree of a Civil or Revenue Court or in pursuance of the order of any other authority. In Ordinance No. XII, section 15(1) contained the words "in execution of a decree or order of a court or any other authorities". It appears, however, that when Ordinance No. XXVII was promulgated the material portion relating to the word "DECREE" was omitted in section 17(1) and in

(1) 1950 P.L.R. 8 (Note Section)
(2) 1952 P.L.R. 415

the Act also, as originally enacted, the same omission occurred. Then by the Amending Act of 1951 those words were re-inserted.

According to the learned Counsel for the Custodian the omission was meant to be deliberate, because order and decree have different definitions in the Code and the Legislature must be presumed to know that definition and it deliberately employed the word "order" and left out the word "decree". It is true that the word "decree" is defined by section 2(2) whereas the word "order" is separately defined by section 2(14) as meaning the formal expression of any decision of a civil court which is not a decree. From the previous history of evacuee legislation, namely, the Act of 1947 and Ordinance No. XII and the amendment subsequently made in 1951, it appears, however, that the omission of the word decree in section 17(1) of Ordinance No. XXVII and of the Act was due to the reason which has been suggested by the learned counsel for the auction-purchasers and the decree-holder, viz., that the word "order" was not used in the sense it is defined in the Code but in a general and omnibus sense which would include a decree of a court. There is a good deal of force in the suggestion that the legislature could never have intended that the exemption contained in section 17 should be confined to a sale in execution of an order simpliciter of a court because there were hardly any orders which were executable for which it was necessary to provide the exemption. Either the word "order" was used in a general sense as covering the word "decree" or it was considered that it was unnecessary to insert the word "decree" also, because whenever a sale takes place even in execution of a decree that is pursuant to a separate order which is made by the executing court. In that sense the words used in section 17(1)

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before the amendment would mean a sale held in execution pursuant to an order of a court. The language employed was not happy but it is the intention of the Legislature that has to be seen and it is not conceivable that the Legislature ever intended to lay down that the exemption should be confined to sales held in execution of orders only as defined in the Code. The amendment as finally made in 1951, in these circumstances was merely declaratory of the law as it always had been and it is not possible to say that by the amendment the law was changed and for that reason the principle of constructive *res judicata* cannot be made applicable if on the facts of each case that can be invoked.

In execution First Appeal No. 54 of 1952 the objection petition which was filed on 27th July, 1950, was under section 17(1) of the Act and it was claimed that the property was evacuee property and vested in the Custodian and was exempt from attachment or sale under the law and it was prayed that the execution application be dismissed. Another objection to the effect that the property in suit was evacuee property and was exempt from attachment or sale was raised by an objection petition dated 19th August, 1950. On 19th August, 1950, an order was made by the executing court disposing of the aforesaid objection in the following words :—

> "His next objection is that the property is evacuee property and cannot be sold. This objection was raised by the Custodian before the Court decreeing the suit and must be taken as decided against him."

The objections of the Custodian were held to have no force and the warrant of sale was ordered

to be issued. The sale proclamation was ordered to be issued by 25th October, 1950, and sale was ordered to take place on 13th November, 1950. The property was ultimately sold on 15th November, 1950, and as stated in the beginning of the judgment the sale was confirmed on 16th December, 1950. The Custodian filed another set of objections that possession be not delivered on 17th March, 1951, but these were dismissed on 6th August, 1951, after section 17 of the Act had been amended by the Amending Act of 1951. Even at that stage the Custodian did not file any objections under the amended Act and filed them only on 29th August, 1951. The principal argument of the learned counsel for the auction-purchasers is that when the order was made on 19th August, 1950, dismissing the objections of the Custodian, although those objections had been filed under section 17 of the Act, no appeal was taken against that order which became final. It was, therefore, not open to the Custodian to raise the same objections later on owing to the bar created by the rule of constructive *res judicata*. As the contention of the learned counsel for the Custodian that there had been a change of law between the date when the first set of objections was filed on 27th July, 1950, and when the last objections were filed after section 17 was amended on 29th August, 1951, has been found to be untenable, we are constrained to hold that the objections on the grounds contained in Section 17(1) of the Act were not available to the Custodian owing to the applicability of the rule of constructive *res judicata*. It was open to the Custodian to have appealed against the order dated 19th August, 1950, but that was not done. Execution First appeal No. 54 of 1952, therefore, must succeed. The appeal is allowed and the order of the executing court declaring the sale of property known as "Iqbal Manzil" held on 15th

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November, 1950, in favour of Kartar Chand and Durga Parshad, auction-purchasers, to be illegal and ineffective is hereby set aside.

Execution First Appeal No. 4-D of 1952, has been filed by the decree-holder with regard to the same property and that appeal must also be allowed and the order of the executing Court set aside.

In Civil Revision No. 212-D of 1952, the facts may be shortly stated. A preliminary decree was passed on 2nd April, 1948, with regard to the property which was declared to be evacuee property. A final decree was made on 2nd July, 1952. The sale of that property was held on 25th February, 1949, and it was confirmed on 28th March, 1949. On 4th February, 1950, an application under section 17 of Ordinance No. XXVII was made by the Custodian for setting aside the same. This application was dismissed on 6th March, 1950. No appeal or revision having been preferred against that, on 14th December, 1951, after section 17 of the Act had been amended a second application was made by the Custodian for setting aside the sale. This was dismissed on 8th March, 1952, by the Court. The Custodian has filed a petition for revision to this court. This petition must be dismissed for the reasons given in Execution First Appeal No. 54 of 1952, on the ground that the application made on 14th December, 1951, was barred by the rule of constructive *res judicata* as the previous application dated 4th February, 1950, had been dismissed and that order had become final.

In Execution First Appeal No. 96 of 1952, the suit had been instituted on 25th January, 1949, the Custodian having been made a party. On 16th July, 1949, the Custodian took up the plea that the

property was evacuee property but a preliminary decree was passed on 28th November, 1949. An application was made for a final decree on 28th February, 1950, which was passed after notice on 12th June, 1950. On 19th June, 1950, an application was made for sale of the property on which a notice was given to the Custodian but no objections were raised by him. The sale took place on 28th December, 1950. It was confirmed on 3rd February, 1950. The application for setting it aside was made on 23rd June, 1952. It was held by the executing court that it had no jurisdiction to proceed with the sale and the sale must be regarded as nullity. In this case no application for setting aside the sale was made before the Amending Act of 1951 came into force. The only application for setting aside the sale was made on 23rd June, 1952. No question of the applicability of the principle of constructive *res judicata* arises in this case and, therefore, this appeal must fail and is dismissed.

In Civil Revision No. 211-D of 1952, a final decree was passed on 29th June, 1948. The property was put to auction on 1st August, 1950. No notice was sent to the Custodian. The sale was confirmed on 2nd December, 1950, and for the first time an application was made for setting aside the sale on 3rd October, 1951. This application was dismissed on 3rd May, 1952, against which the Custodian has come up in revision. This petition in view of the points that have been decided in Execution First appeal No. 54 of 1952, must succeed as no question of the applicability of the rule of constructive *res judicata* arises. The petition is, therefore, allowed and the order of the learned Subordinate Judge is set aside and it is declared that the sale which had been confirmed was null and void.

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Taking into consideration the nature of the points involved the parties are left to bear their own costs in all the cases.

FALSHAW, J.—I agree.

CHOPRA, J.—I agree.

*B.R.T.*

## CIVIL MISCELLANEOUS

*Before S. S. Dulat and Inder Dev Dua, JJ.*

LAJPAT RAI AND OTHERS,—*Petitioner.*

*versus*

KHILARI RAM AND OTHERS,—*Respondents.*

**Civil Writ No. 1174 of 1959.**

1960

Feb., 10th

*Constitution of India (1950)—Article 226—Petition for issuance of a writ of* quo warranto *against all the elected members of a municipality on the ground that electoral rolls had not been prepared in accordance with the manadatory provisions—Whether maintainable—Alternative remedy by way of election petition—Whether bars petition under Article 226—Municipal Election Rules (1952)—Rule 51(e)—'Material irregularity in the procedure of an election'—Whether includes the defective preparation of electoral rolls—Remedy by way of election petition—Whether equally efficacious, speedy and inexpensive—Petitioner having contested election on the basis of the electoral rolls impugned by him in the petition—Whether entitled to relief—Municipal Election Rules (1952)—Rules 8A to 8K—Electoral Rolls—Meaning, purpose, importance and preparation of—Duty of the officers entrusted with the preparation of, stated.*

*Held,* that a petition for issuance of a writ of *quo warranto* aaginst all the elected members of a municipality on the ground that the electoral rolls had not been prepared in accordance with the manadatory and essential provisions of law is maintainable. The High Court is empowered