
(1951) 08 MP CK 0002
In the Madhya Pradesh High Court
Case No : First Appeal No. 24 of 1953

Amtubai Kamruddin	Vs	APPELLANT
Daudbhai Akbarali and Others		RESPONDENT

Date of Decision : 09-08-1951

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 28, 46, 50, 7
Civil Procedure Code, 1908 (CPC) — Section 9
Evidence Act, 1872 — Section 115

Citation : AIR 1959 MP 13

Hon'ble Judges : T.C. Shrivastava, J; P.V. Dixit, J

Bench : Division Bench

Advocate : G.M. Chafekar, for the Appellant; K.A. Chitale and Fakruddin, for the Respondent

Final Decision : Allowed

Judgement

T. C. Shrivastava, J.—This first appeal has been filed by the plaintiff against the dismissal of his suit by the Additional District Judge Indore on a preliminary point that it was not maintainable in view of the provisions in the Administration of the Evacuee Property Act (hereinafter referred to as the Act).

2. The property in dispute belonged to one Hakim Mohammad Hussain. He died leaving his brother's daughter Amtubai the plaintiff, his widow Mst. Allrakhi (defendant No. 6) and other relations who were impleaded as defendants 1 to 5. The suit was for partition of the estate left by Mohammad Hussain and separate possession thereof. The Deputy Custodian General of Evacuee Properties has been also impleaded as defendant No. 7 as he is in possession of suit properties on behalf of one Moulvi Taiyab Ali who claims to be a devisee under a will executed by the said Mohammad Hussain. Moulvi Tiyyabali migrated to Pakistan sometime in 1947.

3. The suit was filed on 28-7-48. The property was declared evacuee property on or about 27-9-49. The custodian was impleaded on 17-2-51. Defendants 3 and 4

who are legatees under the will in favour of Taiyabali have migrated to Pakistan and were also declared evacuees.

4. The defendant No. 6 had filed an objection before the Deputy Custodian for release of certain properties and it was allowed in respect of House No. 20 on the ground that it was given to her under the will in favour of Taiyabali. All the defendants and the plaintiff have filed objections before the Deputy Custodian challenging the will and these are pending for disposal. The Deputy Custodian objected to the continuation of the suit on the ground that it was barred u/s 46 of the Act and this plea has been upheld.

5. Before we consider the questions of the tenability of the suit, we may briefly refer to the provisions of the relevant Ordinances and Acts. The first legislation in the series is the Ordinance No. 56 of 1949 promulgated by the Madhya Bharat Government on 9-8-49. Then followed Ordinance Nos. 27 of 1949 and 4 of 1950 issued by the Government of India and ultimately the central Act No. 31 of 1950 was enacted. There is provision in all these legislations to protect actions taken. We need only refer to the provisions of the first Ordinance and the Act of 1950.

6. Ordinance No. 56 of 1949 defines evacuee property to mean "any property in which an evacuee has an interest or which is held by him under a deed of trust or other instrument." Clause 5 provides for the vesting of all evacuee property in the custodian. The custodian has to issue a notification under Clause 6 detailing the properties so vesting in him and any person claiming any right or interest in the property can then file an objection under Clause 8 before the custodian. The custodian decides the objection after enquiry according to rules either rejecting it or accepting it. The party aggrieved by the rejection of his claim can file an appeal under Clause 30 but subject to the decision of the appeal, the earlier decision is final. Sub-clause 6 of Clause 30 provides that the decision cannot be called into question in any suit, application or execution proceeding. Lastly, we have Clause 31 barring jurisdiction of Civil Courts as below :

"31 -- (1) Save as otherwise expressly provided in this Ordinance, no civil court shall have jurisdiction :

(i) to entertain or adjudicate upon, any question whether any property is or is not evacuee property or whether an evacuee has or has not any right or interest in any evacuee property; or

(ii) to question the legality of any action taken by the Custodian; or

(iii) in respect of any matter which the Custodian is empowered by or under this Ordinance to determine."

7. In Act 31 of 1950, the definition of "evacuee property" is differently worded but the change is not material for the purposes of the present case. The scheme of vesting has been altered. Under the Ordinance the vesting was automatic and the objections by claimants follow; but under the Act, the claimants are heard first and then a declaration about vesting follows. Thus, Section 7 provides that

where the custodian is of opinion that any property is evacuee property, he causes a notice to be issued to persons interested.

Objections are filed and enquired into and then an order declaring the evacuee property is passed. Section 8 provides for vesting the declared property in the custodian. Any person aggrieved by the order of the custodian rejecting his objection can prefer an appeal u/s 24 which corresponds to Section 30 of the Ordinance. Section 28 gives finality to the orders of the custodian by providing that it "shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceeding." The wordings of this section are materially the same as Sub-clause (6) of Clause 30 of the Ordinance. Section 46 creates a bar of jurisdiction as below :

"46. Save as otherwise expressly provided in this Act, no civil or revenue court shall have jurisdiction :

(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or

(b) to entertain Or adjudicate upon any question whether any person is or is not an intending evacuee; or

(c) to question the legality of any action taken by the Custodian General or the Custodian under this Act; or

(d) in respect of any matter which the Custodian General or the Custodian is empowered by or under this Act to determine."

8. Shri Chafekar for the appellant contends that the factum and validity of the will are not questions dealing with the point whether a particular property is or is not evacuee property, and therefore the matter is within the jurisdiction of the civil Court. He contends that the jurisdiction of civil courts is not taken away even if the decision has the effect of taking away the property from the custodian in whom it is vested.

He relies for support of his arguments on the decision in M.B. Namazi Vs. Deputy Custodian of Evacuee Property and Others, ; Khalil Ahamad Khan Vs. Malka Mehar Nigar Begum and Others, and Narendar Kumar and Others Vs. Custodian General of Evacuee Property in India, "P" New Delhi and Others, Shri Chitale for respondent No. 6 has supported the appellant.

9. So far as the provisions in the Ordinance and Act are concerned jurisdiction of the civil courts appears to us as clearly barred. We refer to the provisions in the Act only as the corresponding clauses in the Ordinance are almost identical. Decision of the claims of objectors is a matter with which the custodian is entrusted u/s 7 of the Act and an appeal is provided against the decision u/s 24. Further, a finality is given to the decision by Section 28.

The argument that the enactment cannot affect the rights of persons who are not evacuees is not tenable in view of the wordings of Section 7, which requires all

persons interested in the property to have their claims decided by the custodian. The Act provides a complete scheme for the adjudication of such objections and gives a finality to the decisions. - In view of the express provision, it cannot be urged that the legislature could not have intended to give power to the custodian to decide questions of title which are usually intricate in nature.

That is a question of policy and if the legislature thought it fit to give the power to the custodian, there is an end of the matter. It is obvious that such a provision was necessary in the scheme of Act; for otherwise, every decision of the custodian would be a subject of a challenge in a civil Court and the object of the Act in providing for speedy decisions would fail. In this connection we may refer to the following observations in *S.M. Zaki Vs. The State of Bihar and Others*, in para (4-a)

"The Evacuee Ordinance and the Act came into being to meet an unparalleled situation arising in the country on account of the creation of the two Dominions of India and Pakistan. It is common knowledge that during the period and even thereafter there was migration of large population from the Dominion of Pakistan to the Dominion of India and vice versa, and the people who fled from the Dominions left property behind; therefore, some legislation was necessary for the protection of those properties and for the management thereof."

"Such a legislation although in certain cases may work some hardship cannot be said to be an unreasonable legislation placing undue fetters upon the right to manage and hold property. One has to approach this legislation knowing that it is an emergency legislation, "an offspring of emergency, and intended to deal with abnormal and unusual times and conditions."

10. In our opinion Clause (a) of Section 46 applies to the present, case, It prohibits the civil court from adjudicating upon any question whether any property is or is not an evacuee property. This is because the matter has been entrusted for decision to the Custodian. This is not disputed by Mr. Chaphekar, learned Counsel for the appellant. What he disputes is the extent of the scope and operation of Section 46 of the Act and Section 31 of the Madhya Bharat Administration of Evacuee Property Ordinance (No. 56 of 1949).

According to learned Counsel, under the Ordinance any property which was evacuee property vested in the custodian automatically without any determination by him; that it did not empower the Custodian to determine the question whether the property had or had not vested in him, and that therefore, where the title to an evacuee property was disputed, the jurisdiction of the civil court, whether the property was evacuee property and vested in the Custodian, was not barred.

The argument seems to have been suggested by the observations of Agarwala, J., in para 121 of the decision in *Khalil Ahamad Khan Vs. Malka Mehar Nigar Begum and Others*, which would be discussed later. It is fallacious and cannot be accepted. In those cases of property in respect of which there was no express

notification u/s 6 (1) of the Ordinance No. 56 of 1949 and of which no control and possession was taken by the Custodian, it may be said that the general provision u/s 5 (1) of the Ordinance for the vesting of all evacuee property in the Custodian cannot be read as a determination by the Custodian that any particular property was evacuee property.

But where the Custodian has assumed physical possession and control of particular property by express notification u/s 6 (1), and has determined after an enquiry contemplated by Section 7 of the Ordinance upon an objection raised by any: claimant to the property, the question whether specific items of property are or are not evacuee property, then it cannot be argued that there has been no determination by the Custodian that the particular property is evacuee property.

Now, if the Custodian has power to adjudicate upon the question whether any property is or is not an evacuee property, he has by necessary implication the power to decide whether it is or is not vested in him. For, vesting is merely the legal consequence of the property being evacuee property. Again, the adjudication by the Custodian after notice u/s 7 of the Act or after enquiry u/s 8 (1) of the Ordinance No. 56 of 1948 contingent upon objections raised by claimants, upon the question whether any particular property is or is not evacuee property must involve the determination of incidental and material questions as to the execution, validity and effectiveness of any instrument under which the evacuee held the property or the claimant bases his title to it.

There is nothing in the provisions about enquiry contained in the Ordinance or the Act to show that when an instrument or deed is made the foundation of the title of the evacuee or of the claimant then the Custodian shall give effect to it without entering into any question as regards its execution, and validity. Indeed a provision to this effect would have altogether defeated the very object of the legislation on evacuee property.

It is thus plain that the Custodian has jurisdiction to decide in an enquiry u/s 8 (1) of the Ordinance, questions as to the existence and validity of the will in the instant case on which the title of the evacuee was based. Without a determination of this question he cannot decide whether the property in suit is or is not evacuee property. Section 31 (1) of the Ordinance and Section 46 (a) of the Act both therefore bar the jurisdiction of the Civil Courts to determine whether the will under which Moulvi Taiyabali held the property was a valid will.

Here there is no suggestion that no notification u/s 6 (1) of the Ordinance No. 56 of 1949 assuming physical possession and control of the specific property in suit was issued by the Custodian or that no enquiry u/s 8 was held. The plaintiff and the defendant both have filed objections u/s 8 (1) of the Ordinance before the Custodian and they are still pending. In that enquiry, the Custodian will adjudicate on the question about the existence and validity of the will in question. He has exclusive jurisdiction to do so and therefore u/s 31 of the Ordinance and Section 46 (a) of the Act the Civil Court is not competent to

decide the question.

11. Coming now to the decisions relied on by the appellant, reliance was placed on the observation of Rajamannar C. J., in para 17 of the decision in *M.B. Namazi Vs. Deputy Custodian of Evacuee Property and Others*, The learned Chief Justice observed :

"There is, however, one thing about which I am not quite clear. The Ordinance no doubt declares the order of the Custodian declaring any property to be evacuee property as final. That might be so in one sense, i.e., if any property belongs to a person who has been declared to be an evacuee within the meaning of the definition in the Ordinance, then the Custodian's order would be final. But, does the finality amount to an adjudication on title in case there is any dispute? Take for instance the case where a property is declared to be evacuee property on the assumption that it belongs to A who is an evacuee. Does it mean that someone else cannot say that the property really does not belong to the evacuee but belongs to himself who is not an evacuee? I am inclined to hold that the order of the Custodian or the notification u/s 7 of the Ordinance is not final, in case of disputed title."

The observations no doubt lend some support to the contention advanced on behalf of the appellant. But it will be seen that the learned Chief Justice when he prefaced his observations with the remark "there is, however, one thing about which I am not quite clear" expressed an opinion which he did not wish to be regarded as a concluded and definite opinion of his. The observations were made by the learned Chief Justice in passing, as the question whether the jurisdiction of the Civil Court under the Administration of Evacuee Property Ordinance 1949 to adjudicate upon any question whether any property was evacuee property or on any matter which the Custodian was empowered under the Ordinance to determine did not arise for consideration in that case.

Sections 7, 28 and 46 of the Act or the analogous provisions of the Ordinance were not considered there. The jurisdiction of the civil court is barred not merely because of the provision that the order of the Custodian declaring any property to be evacuee property is final but because of the express bar embodied in Section 41 of the Act or in the corresponding provisions of the Ordinance.

12. The next case relied on was *Khalil Ahamad Khan Vs. Malka Mehar Nigar Begum and Others*, This is a decision of a Full Bench of five Judges. In that case S. created a wakf of the property and appointed her daughter M. as a Mutawalli. This appointment was later revoked. After S. died, M. filed a suit against the heirs of S. claiming that the revocation was illegal and she continued to be Mutawalli. The suit was decreed. The decision of the civil court was challenged in appeal and while the appeal was pending the Act came in force. M. had by then migrated to Pakistan.

The custodian relied upon the decision of the trial Court to hold that the evacuee M. was entitled to be the Mutawalli of the Wakf properties, a matter which was

challenged in appeal. It was in this context that the five judges held that the appeal was tenable but they gave different reasons for this conclusion. While Kidwai, J. was definite that the matter did not fall under Clauses (a) and (d) of Section 46 of the Act, the other four Judges were anxious to emphasize that they considered the appeal to be tenable for other reasons.

Malik, C. J., Bhargava and Chaturvedi, JJ. observed in para 16 as follows :

16. "A case might arise where, on a person becoming an evacuee the Custodian Judicial may be called upon to decide whether the property belonged to the evacuee, or it was the property of certain others. The Act provides that the Custodian can decide such a dispute and the decision of the Custodian is appealable and finally to the Custodian General.

In a case where the matter has been adjudicated upon in accordance with the provisions of the Administration of Evacuee Property Act, it may not be possible for the courts to interfere by reason of the provisions of Section 46 of the Act, but, in a case where an appeal was filed and was pending from before, and the Custodian has merely taken action on the basis of the judgment of the lower Court, without deciding the matter for himself, that judgment being subject to correction by the Court of appeal, it cannot be said that the judgment of the lower Court became final because the Custodian had taken action on the basis thereof."

Agarwala, J., observed in para 122 as follows:

"I should not, however, be assumed to assent to the proposition that in a case instituted after the commencement of the Act, even after notice u/s 7 of the Act has been published and the Custodian has acquired jurisdiction to decide whether the disputed property is evacuee property, or in other words whether the evacuee is interested in such property as owner or in any other capacity as mentioned in Section 2 (1) read with Section 11, still the civil court can decide substantially the same matter as a question of title. If this were allowed, Section 48 could always be avoided and rendered nugatory."

It thus appears from the view of these four Judges that jurisdiction of a civil court would be excluded u/s 46 if the decision is on a matter which falls within the powers of the custodian and in such a case third parties would be bound by it.

13. Of the cases of the Punjab High Court which were referred to in the course of arguments advanced by the learned Counsel for the parties, the decision in Custodian, Evacuee Property Punjab v. Gujar Singh Custodian, Evacuee Property, Punjab Vs. Gujar Singh and Others, only lays down that the jurisdiction of the civil court to determine whether a particular person was or was not an evacuee is barred. But in this case Weston. C. J., made certain observations in para 15 at p. 163 which unmistakably show that the learned Chief Justice was inclined to take the view that the adjudication by the custodian in an enquiry after notice u/s 7 of the Act or u/s 7 of the East Punjab Evacuee (Administration of property) Act

1947, (similar to Section 8 (1) of the M. B. Administration of Evacuee Property Ordinance 1949) upon the question whether a certain property is or is not an evacuee property is a determination of the question whether the property is or is not vested in him. In *Custodian of Evacuees Property, Punjab and Others Vs. Firm Bihari Lal Parkash Chand and Others, Kapur, J.*, held that a suit for dissolution of partnership and rendition of accounts between the partners, some of whom are evacuees and other non-evacuees, is triable by a civil court and is not barred by Section 46 of the Administration of Evacuee Property Act 1950. In that case there was no question of adjudication by a civil court on any of the matters specified in Section 46 of the Act.

14. The mainstay of the appellant is the decision in *Narendar Kumar and Others Vs. Custodian General of Evacuee Property in India, "P" New Delhi and Others*, That was a case where one Gangadhar Vidhani sold a house to Mst. Sultan Jahan Begum in 1945. The vendee became an evacuee in 1948. Thereupon the house became an evacuee property and vested in the Custodian. In 1949 the sons of Gangadhar Vidhani filed a suit challenging the validity of the sale by their father on the ground that it was without legal necessity and did not affect their rights. The Custodian Evacuee Property was made a defendant in the suit.

Later on, the parties arrived at a compromise according to which a declaratory decree was given to the plaintiffs on their depositing Rs, 26,000/- in the court. The plaintiffs then applied to the Assistant Custodian to give effect to the decree. This application was accepted. But subsequently when they applied to the department for the refund of the sums realised as rents from the date on which according to the decree the Custodian ceased to have any interest in the property to the date of the order of the Assistant Custodian accepting their application for giving effect to the decree, the Deputy Custodian held that the decree of the civil court was void for want of jurisdiction. The order of the Deputy Custodian was upheld in revision by the Deputy Custodian General.

Thereupon the plaintiffs filed an application under Article 226 of the Constitution for a writ of certiorari to quash an order of the Deputy Custodian General and the Deputy Custodian. Following the decision of Kapur J., in *Kailash Chand v. Audi, Deputy Custodian General, New Delhi* 57 Pun LR 440 (G) Falshaw, J., held that Section 46 only barred the adjudication by the civil court on the matter whether any particular property was or was not evacuee property and that there was nothing in Section 46 which barred persons from challenging the validity of the sale by which the property passed into the hands of the person who later became evacuee and that the Custodian was not competent to adjudicate upon a question of that kind which could only be decided by an ordinary civil court.

The report of the decision of Kapur J., in *Kailash Chand v. Addl. Deputy Custodian General New Delhi* (G) is not before us. But as pointed out earlier the power of the Custodian to adjudicate upon the question whether any property is or is not evacuee property necessarily gives him the power to determine the execution and validity of any deed or instrument under which the evacuee held the

property or any non-evacuee claimed it as his own.

In the Punjab case the provisions of Sections 7 and 28 of the Act were not considered. If the learned judge meant to hold that the civil courts have jurisdiction to adjudicate upon a question of the kind that was before us even when the claim of a third party to the property has been rejected in an enquiry after notice u/s 7 of the Act, then we must express our respectful dissent.

15. On a proper construction of Sections 7, 28 and 46(a) of the Act we have little doubt that the bar to the adjudication by the court upon the question whether any property is evacuee property also bars the adjudication on the incidental question of the existence, and validity of any deed or instrument on which the finding that the property is or is not evacuee property is based.

16. In the memorandum of appeal, a ground has been taken that the Ordinance and the Act, do not apply to pending proceedings. It is urged that as the suit was filed prior to the Ordinance, the civil court can adjudicate on all matters arising in it. Reliance is placed on the observations of Agarwala, J. in para 122 in Khalil Ahamad Khan Vs. Malka Mehar Nigar Begum and Others, but in that case, the Custodian had not taken any independent decision under the Act himself. He had relied upon a decree which had been challenged in appeal already and according to the learned judge a vested right to appeal had already accrued and could not be taken away except by express words.

Considering that the prohibition in Section 46 relates to "adjudication," we entertain no difficulty in holding that that section applies to pending suits as well. The word "entertain" would be enough to forbid institution of suits after the Act. The use of the word "adjudicate" is obviously intended to forbid adjudication in pending suits. The court has no jurisdiction to perform the act of adjudication after the Act commenced and the section thus applies to pending suits.

17. It is next argued that the Custodian has himself chosen to be made a party in this case and he cannot now contend that the suit is not maintainable. u/s 50 of the Act, the Custodian must be made a party, if he so desires. In fact, it is the duty of the court to give him notice of proceedings and to implead him in fit cases.

The provision is in public interest so that the custodian may fully represent the estate of the evacuee. We do not understand why a custodian who is impleaded in a suit cannot object to the maintainability of the suit on the ground that jurisdiction of the civil court is ousted under a Statute.

18. The trial court rightly held that the question whether the plaintiff and the defendants 1 to 6 have an interest in the property in face of the will in favour of Taiyabali is a matter to be decided by the Custodian. However, it does not follow that the suit should have been dismissed. Assuming that the objection is allowed by the Custodian and the property is released as belonging to objectors, it will still be necessary to work out the relief of partition as asked for by the plaintiff.

The proper course for the court in such cases would be to stay the suit and ask the Custodian to decide the matter before proceeding further, if the plaintiff is entitled to any relief thereafter: see Mohd. Saddiq v. Mohd. Ashfaq, AIR 1954 Punj 87 (H).

19. Accordingly the appeal is allowed. The court shall stay trial of the suit until the objections filed by the plaintiff and defendants 1 to 6 are decided by the Custodian and proceed to dispose of the suit in accordance with law. The costs of the custodian shall be paid by the appellant and the rest of the costs shall be borne as incurred. Order of this court staying proceedings before the Custodian is vacated.