
(1971) 08 AHC CK 0001
In the Allahabad High Court
Case No : Special Appeal No. 419 of 1966

Assistant Custodian General, Evacuee Property, U.P., Lucknow and Others APPELLANT

Vs

Ali Abbas and Others RESPONDENT

Date of Decision : 27-08-1971

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10(2)

Citation : AIR 1972 All 141 : (1971) 41 AWR 737

Hon'ble Judges : S.N. Dwivedi, J;Gopi Nath, J

Bench : Division Bench

Advocate : N.D. Pant, for the Appellant; R.H. Zaidi, for the Respondent

Final Decision : Allowed

Judgement

Gopi Nath, J.—These two Special Appeals have been filed against an order of a learned Single Judge, dated 12-11-1965, allowing a Writ Petition. The Assistant Custodian General, Evacuee Property and the Assistant Custodian are the appellants in Special Appeal No. 419 of 1966 and Prasadi Singh and others are the appellants in Special Appeal 725 of 1965. These appellants The Writ Petn. was filed by Ali Abbas and four others. They challenged an auction sale held by the Assistant Custodian, Evacuee Property. The auction was held in respect of the one half share interest of one Mohammed Zaki in the plots auctioned.

2. Mohammad Razi and Moham-mad Zaki were brothers, Mohammad Zaki migrated to Pakistan. His interest in the plots in dispute was declared evacuee property and vested in the Custodian. The Custodian decided to dispose of the property. Mohammad Zaki's interest in the property, i. e. his half share in a number of plots, was accordingly auctioned and sold to Prasadi Singh and others for a sum of Rs. 9,500/- on 30-11-1959. Ali Abbas and four others who were the sons of Mohammad Razi filed an objection to the auction sale. Their case was that the plots in dispute were waqf property and were not the personal property of Mohammad Razi and Mohammad Zaki that hence the property did not become

evacuee property and could not be sold by the Custodian. The objection was dismissed by the Assistant Custodian on 11-8-1959. A revision filed against that order was dismissed by the Assistant Custodian General on 6-11-1959. The petitioners prayed for the quashing of the auction sale held on 30-11-1958 and the two orders passed by the Custodian authorities dated 11-8-1959 and 16-11-1959 by means of the Writ Petition.

Two points were raised before the learned Single Judge: viz.,

(1) that the property in dispute was waqf property and did not become an evacuee property by the migration of Mohammad Zaki to Pakistan; and

(2) that the auction sale was invalid as it was held in violation of the provisions of Section 10(2)(o) of the Administration of Evacuee Property Act (hereinafter referred to as the Act).

Section 10(2)(o) of the Act reads:

"... .. (2) the Custodian may, for any of the purpose aforesaid,

(a)

(o) transfer in any manner whatsoever any evacuee property notwithstanding anything to the contrary contained in any law or agreement relating thereto;

Provided that the Custodian shall not sell any immovable property or any business or other undertaking of the evacuee except with the previous approval of the Custodian General."

The contention was that the auction sale in the instant case was held without the previous approval of the Custodian General and it was accordingly bad in law.

3. The learned Single Judge negatived the first contention regarding the property in dispute being waqf property. He upheld the second contention that the auction sale was held in contravention of the provisions of Section 10(2)(o) of the Act. He accordingly allowed the petition.

4. The challenge to the auction sale on the ground of the violation of Section 10(2)(o) of the Act was never raised by the petitioner-respondents before the authorities below. But since it arose out of admitted facts of the case the learned Single Judge gave effect to it.

5. The auction sale in the instant case took place on 30-11-1958. The sale price having been deposited by the appellant Prashadi Singh and others the sale certificate was issued in their favour and they got possession over the disputed plots in November, 1959. It has been asserted on behalf of the appellants Prashadi Singh and others that they are still in possession of the plots in dispute. It is relevant to state here that in the counter-affidavit of Parmat-ma Saran Saxena a clear and categorical statement was made in paragraph 30 that the applicant and his father did not at any time express the desire to purchase the

evacuee's share and refused to avail of the opportunity to purchase it when offered. In paragraph 19 of the rejoinder affidavit there is only a general denial of this assertion in the following words:--

"The allegation made in paragraphs 25 to 35 of the affidavit (which means the counter-affidavit) are denied.

Accordingly it appears that the respondents were not interested in purchasing the property at the auction sale. Now that the appellants Prashadi Singh and others have purchased the property they want to deprive them of the same by raising a technical objection. The respondents confined their contest before the authorities below to the ground that the property was waqf property and they claimed no private interest in the same. In any case the objection relating to the sale being invalid on the ground of a violation of the proviso to Section 10(2)(o) of the Act was never raised for nearly two years after the sale, was raised for the first time in the Writ Petition. In the circumstances we would not have permitted the objection u/s 10(2)(o) of the Act to be raised for the first time in the Writ Petition. However, as the learned Single Judge has entertained the objection we will consider the point on merits.

6. The objection related to the auction sale. The learned counsel for the appellant has urged that the previous approval required under the proviso to Section 10(2)(o) of the Act does not relate to the auction stage of a sale as that does not pass any title in the property. The contention is well founded. Title to a property sold at public auction by the Custodian does not pass to the auction purchaser on the date of the auction sale nor on the date of the deposit of the auction money. It passes only when the Custodian executes a registered sale-deed in favour of the auction purchaser where the property is worth Rs. 100/- or more. See *Mazharul Islam and Others Vs. Khacher Bux and Another*, The Division Bench in the aforementioned case further held that in a case of auction sale by Custodian execution of sale-deed is essential if the value of the property is worth Rs. 100/- or more. So it follows that the auction sale is merely an agreement for sale and not a sale. Section 10(2)(o) refers to a transfer by the Custodian and the proviso to the section refers to a transaction which is a sale and is not merely an agreement to sell. There can be no dispute that if after the auction sale the approval of the Custodian General is accorded before the confirmation of sale or before the execution of the sale-deed the transfer would be valid. There is no evidence of the execution or registration of the sale-deed. There is further no plea or evidence that the Custodian General did not accord approval to the sale when the sale certificate was issued. The objection is confined to the auction stage of the sale. In our opinion an auction sale is not invalid for want of prior approval by the Custodian General under the proviso to Section 10(2)(o) of the Act.

7. This was a protracted litigation and the respondents have been trying to put forward untenable claims from the beginning. The appellants Prashadi Singh has spent a substantial amount of Rs. 9,500/- over this property. The auction sale is

being challenged on a technical ground.

8. Learned counsel for the appellant has further urged that the petitioner respondents had no locus standi to move the Writ Petition. This contention is not well founded. Any person whose rights were affected by the auction sale could challenge it. The petitioner-respondents have 1/2 share in the property in dispute and they are entitled to challenge the auction sale.

9. Learned counsel for the respondents has urged that no sale of the half share in the plots in dispute was permissible in law as the evacuee interest in the property had not been separated. It was urged that until the share of the evacuee is actually separated by the competent Officer under the Evacuee Interest (Separation) Act there could be no vesting of the interest of the evacuee in the Custodian. Reference in this regard may be made to Sections 8 and 11 of the Evacuee Interest (Separation) Act. u/s 8 the undefined interest of the evacuee vests in the Custodian. u/s 11 the defined share of the evacuee vests in the Custodian. Thus even if the share of the evacuee had not been separated there was a vesting of the undefined interest of the evacuee in the Custodian after the decision of the Custodian under Administration of Evacuee Property Act. The Custodian was competent to transfer the undefined interest of the evacuee which had vested in it. The auction sale of the one half interest of the evacuee in the property in dispute is accordingly valid.

10. In the result the appeals succeed and are allowed with costs. The order of the learned Single Judge dated 12-11-1965 is set aside and the Writ Petition is dismissed. There shall be only one set of cost to be shared by the appellants in the two appeals half and half.