

(1957) 01 MP CK 0040

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Case No. 1 of 1956

Badrul Shama

APPELLANT

Vs

Custodian of Evacuee Property and Another

RESPONDENT

Date of Decision : 12-01-1957

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 27
Constitution of India, 1950 — Article 226

Citation : AIR 1957 MP 32

Hon'ble Judges : Samvatsar, J;Dixit, J

Bench : Division Bench

Advocate : M.A. Khan, for the Appellant; K.A. Chitale and N.C. Behl, for the Respondent

Final Decision : Dismissed

Judgement

Samvatsar, J.—One Haji Mohammad, S/o, Haji Suleman, now deceased, was owner of a concern known as "British India Motor Car Company" and carried on business at 66, Maharani Road, Indore. Besides the business, he also owned considerable movable and immovable property including four houses described in para. 1 of the petition. Haji Mohammad died sometime during the year 1949, leaving behind several heirs including the petitioner.

2. On 21st September, 1949, the Custodian of Evacuee Property found that Haji Mohammad, S/o. Haji Suleman was an evacuee within the meaning of Ordinance No, 56 of 1949 and notified his business, viz., "British India Motor Car Company" to have vested in the Custodian.

3. By a further notification dated 21-11-1949 he also notified the four houses described in para. 1 of the petition to be evacuee property and to have vested in the Custodian.

4. On 13-10-1949 the petitioner Badrul Shama and her sister Rabia Banu submitted objections to the Custodian against the property left by Haji

Mohammad being declared an evacuee property. The precise contention raised by them was that Haji Mohammad had died on 14-6-1949 and on the date of the aforesaid notification his property was vested in his heirs and could not be deemed to be evacuee property.

5. The Custodian commenced inquiry into the objections but on 26-4-1952 he transferred the case for further inquiry to the Deputy Custodian. The Deputy Custodian thereupon continued the proceedings and by his order dated 27-10-1952 rejected the claim made by the petitioner and her sister Rabia Banu.

6. The petitioner preferred an appeal against the order of the Deputy Custodian but the appeal was dismissed by the Custodian, Evacuee Property, on 14-5-1954. She preferred a revision application which too was dismissed by the Custodian, General Evacuee Property, by his order dated 9th December, 1954.

7. On 14-5-1954 when the Custodian rejected the petitioner's appeal against the order of Opponent No. 2 dated 27-10-1952, he passed a separate office-order by which he directed the Field Inspector to ascertain the date on which Haji Mohammad died and the names of his heirs who were Indian Nationals. The matter was however not investigated in pursuance of this office-order as such an inquiry was felt unnecessary in view of the changed legal position.

8. The petitioner failed to obtain any redress from the Custodian and the authorities appointed under the Administration of Evacuee Properties Act. She therefore filed this petition on 2-1-1956 for a writ of certiorari to quash the order of the Custodian.

9. The grounds on which the validity of the order of the Custodian is challenged are as follows:

(i) that Haji Mohammad, S/o. Haji Suleman, died on 14-6-1949 and therefore he could not be declared to be an evacuee nor his property could be notified to be evacuee property on 21-9-1949 or at any time subsequently thereto; that the Custodian had acted illegally and without jurisdiction in issuing the notification dated 21-9-1949 and passing the order dated 27-10-1952;

(ii) that the legality of the action taken by the Custodian under Ordinance No. 56 of 1949 and Central Ordinance No. 27 of 1949 had to be determined in the light of the provisions contained in the Act No. 31 of 1950 which was retrospective in operation; that it was necessary for the custodian to take proceedings as required by Section 7 of the Administration of Evacuee Property Act and that in the absence of such an inquiry, the property of Haji Mohammad could not and did not vest in the Custodian;

(iii) that Haji Mohammad was not an evacuee but was an Indian National and hence the Custodian had no jurisdiction to declare his property to be the evacuee property;

(iv) that the Custodian, Evacuee Property, had initiated proceedings u/s 6 of the

Ordinance No. 56 of 1949 and had dealt with the case relating to objections raised by the petitioner upto 26-4-1952; that he subsequently transferred the proceedings for further inquiry to the Deputy Custodian and the Deputy Custodian passed final order on 27-10-1952; that the Custodian had no power to transfer the case to the Deputy Custodian and the inquiry held by the Deputy Custodian under the authority of this transfer order was itself without jurisdiction; that on 21-11-1949 the Deputy Custodian issued a notification purporting to be one u/s 6 (1) of Ordinance No. 56 of 1949 with respect to the immovable property of Haji Moham mad; that this notification was illegal as on the date it was issued, Ordinance No. 56 of 1949 was repealed and Haji Mohammad, S/o. Haji Suleman, the alleged evacuee was dead;

10. The petitioner alleged that on the grounds mentioned above, the action taken by the Custodian was illegal and without jurisdiction; that the petitioner's fundamental right to possess and to dispose of her property is infringed by this action. The petitioner prayed for a writ of certiorari being issued to quash the orders passed by the opponents 1 and 2 notifying the business "British India Motor Car Company" and the immovable property of Haji Mohammad, S/o. Haji Suleman, to be evacuee property.

11. The petitioner has impleaded the Custodian of Evacuee Property and the Deputy Custodian of Evacuee property as opponents 1 and 2 respectively. The Custodian General of Evacuee Property is not made a party.

12. The opponents opposed the petition and contended:

(i) that owing to migration of Haji Mohammad S/o. Haji Suleman outside India after 1st March, 1947, on account of the setting up of the dominions of India and Pakistan, his business concern and all his movable and immovable property automatically vested in the Custodian u/s 5 of Ordinance No. 56 of 1949; that the date or the dates of notification regarding this property was immaterial;

(ii) that three unstamped applications bearing dates 13-10-1949, 31-10-1949 and 11-2-1950 were received by post from Rabia Banu and that these were rejected by the opponent No. 1 on 27-10-1952 on the ground that they were not properly presented; that these applications were barred by time and were also not maintainable on merits;

(iii) that the petitioner filed an appeal against the order dated 27-10-1952 which was dismissed on 14-5-1954 on the ground that the applications as well as the appeal was barred by time; that the petitioner thereupon preferred a revision application to the Custodian General of Evacuee Properties, New Delhi, but that was also dismissed on 9-12-1954; that the business concern of the petitioner and his movable property was sold in March 1953 and the immovable property of the evacuee was allotted to several displaced persons;

(iv) that the property of evacuee Haji Mo-hammad automatically vested in the Custodian under Ordinance No. 56 of 1949 and was deemed to be an evacuee

property declared as such and deemed to have vested in the Custodian under Ordinance No. 27 of 1949 and Act No. 31 of 1950; that the vesting of this property was deemed to have been effected from the date of the migration, of the evacuee to Pakistan and was not affected by his subsequent death;

(v) that the final order which was the operative order in the case is the order passed by the Deputy Custodian General in revision and without impleading him as a party, the petitioner is not entitled to any redress;

(vi) that the impugned order regarding immovable property was passed on 21-11-1949 and 27-10-1952, but the writ application was filed on 2-1-1956; that the writ application was unreasonably delayed and the petitioner was entitled to no relief on this ground alone;

(vii) that the decision of the Deputy Custodian dated 27-10-1952 was confirmed on merits by the Custodian in appeal and by the Deputy Custodian General in revision and the correctness thereof cannot be impeached by a writ proceeding under Article 226 of the Constitution;

(viii) that the petitioner had availed herself of the remedy open to her u/s 16 of the Act No. 31 of 1950 and had applied to the Custodian for restoration of her share in the property of Haji Mohammad. The writ application was under the circumstances misconceived and not maintainable; (ix) that the property of Haji Mohammad, S/o. Haji Suleman vested in the Custodian automatically under Ordinance No. 32 of 1948 and is deemed to be evacuee property vested in the Custodian under Act No. 31 of 1950; there was therefore no necessity to follow the procedure laid down u/s 7 of Act No. 31 of 1950;

(x) that the Custodian had power to direct the Deputy Custodian of Evacuee Property to hold an inquiry and to pass orders in the case; that the contention that the transfer of the case by the Custodian was without jurisdiction was not raised by her before the appropriate authority and cannot be allowed to be raised for the first time in a proceeding under Article 226 of the Constitution;

(xi) that no inquiry was necessary pursuant to the office-order as the law itself was amended retrospectively and rendered any further adjudication unnecessary; that no fundamental right of the petitioner is infringed or violated and that the petition deserves to be dismissed.

13. On these contentions the following points arise for consideration:

(1) Whether the Custodian General is a necessary party and whether the petitioner cannot be given any relief in his absence?

(2) Whether the petition is unreasonably delayed and this Court should decline to give redress to the petitioner for this reason?

(3) Whether the death of Haji Mohammad, S/o. Haji Suleman on 14-6-1949 was fatal to the proceedings and whether the notifications issued on 21-9-1949 and 21-11-1949 were of no effect?

(4) Whether it was necessary for the opponents to issue a notice as provided in Section 7 of Act No. 31 of 1950 and make inquiry contemplated, by this section?

(5) Whether the notification dated 21-11-1949 was void and inoperative because it purported to be issued u/s 6 of the ordinance No. 56 of 1949 which was repealed before this date?

(6) Whether the order of the Custodian transferring the proceedings to the Deputy Custodian was without jurisdiction and consequent order passed by the Deputy Custodian on 27-10-1952 was therefore inoperative?

(7) Whether the petitioner has applied for separation of her share in the property of the deceased Haji Mohammad. S/o. Haji Suleman and if so, whether the present application is not tenable?

14. At the stage of arguments, Mr. Chitale, learned Counsel for the opponents stated that the sale proceeds of the evacuee Haji Mohammad had been transferred to the account of the High Commissioner for Pakistan pursuant to the Indo-Pakis-tan Agreement and that no relief can be given to the petitioner for this reason also.

15. I shall consider the preliminary points raised first. These are:

(1) Whether the Custodian General is a necessary party and the petition should be dismissed because he is not impleaded in these proceedings and,

(2) Whether the petition is unreasonably delayed and should be rejected as having been filed too late.

16. Dealing with the first point, it should be borne in mind that the order disposing of the objection raised by the petitioner was passed by the Deputy Custodian, Evacuee Property, on 27-10-1952. The petitioner preferred an appeal against that order and when that appeal was dismissed, moved the Custodian General by a revision petition u/s 27 of the Administration of Evacuee Property Act, The Deputy Custodian General examined the merits of the case in his revisional jurisdiction and upheld the order of the Deputy Custodian. It is therefore contended on behalf of the opponents that the final order in the case is the order of the Deputy Custodian General dated 9-12-1954 and the petitioner cannot get any relief ---unless it is made the subject-matter of this petition and challenged before this Court. In other words, it is urged that it is not open to the petitioner to question the validity of the order of the Custodian and the Deputy Custodian unless the order of the Deputy Custodian General, which is the final and operative order in the case is also challenged.

17. Mr. Khan, learned counsel for the petitioner put forward a three-fold argument against this contention. He submitted that the Custodian General had, in exercise of the revisional jurisdiction, not modified the order passed by the Custodian but had simply upheld and maintained it. The learned" counsel contended that the real effective order was the order of the Custodian and as he

had been impleaded and his order had been challenged there could be no objection to the petition being considered on merits. Mr. Khan's second argument was that the Deputy Custodian General has disposed of the revision application on the ground of limitation and had not expressed any opinion on the merits of the case. He also argued that the basic order of the Deputy Custodian was without jurisdiction and if the basic order was knocked down as a nullity, the orders passed in appeal and in revision would automatically fall.

18. On the first point, Mr. Khan placed considerable reliance on the decision of the Rajasthan High Court in *Barkatali Vs. Custodian General of Evacuee Property of India*, . That was a case where a Nayab Tehsildar who was neither appointed as Assistant Custodian of Evacuee Property, nor was invested with the powers of Assistant Custodian, declared certain property as evacuee property. In appeal the order was to some extent modified by the Custodian of Evacuee Property, Rajasthan. The petitioner filed a revision application but it was dismissed by the Custodian General. The petitioner thereupon filed an application to the High Court under Article 226 of the Constitution in which he challenged the validity of the order of the Custodian of Evacuee Property, Rajasthan, firstly, on the ground that the initial order passed by the Nayab Tehsildar was without jurisdiction, and secondly, on the ground that the notice served u/s 7 of the Evacuee Property Act was not in conformity with the form prescribed under the law. Both these contentions were upheld by the High Court. It was urged on behalf of the opponents before the Rajasthan High Court that the order of the Custodian of Evacuee property, Rajasthan, had been confirmed by the Custodian General and since the Custodian General has his office in New Delhi and no writ can be issued to him by the Rajasthan High Court, no relief could be given to the petitioner in those proceedings. This contention was held to be untenable. *Wan-choo, C. J.*, laid stress on the fact that the Custodian General had only rejected the revision application and the order of the Custodian, Rajasthan, stood as it was. The learned Chief Justice therefore held that the order really in dispute before the High Court was not the order of the Custodian General but the order of the Custodian, Rajasthan. The learned Chief Justice further observed:

"The matter would have been different if the Custodian General had modified the order of the Custodian, Rajasthan, in any way. In that case, the order of the Custodian General would have been the order in dispute. All that the Custodian General, however, did in this case was to dismiss the revision, and the order of the Custodian, Rajasthan, stood as it was as that order was passed by a person within the territories over which this Court has jurisdiction, and relates to Pali which is also within the jurisdiction of this Court, we are of opinion that we can issue a writ against the Custodian of Evacuee Property, Rajasthan, and the Assistant Custodian of Evacuee Property, Pali."

19. The distinction seems to have been drawn in Rajasthan case by the learned Chief Justice between a case where the authority exercising re-visional powers has modified the order of the subordinate authority and the case where it has

simply confirmed it.

20. The Rajasthan decision has been dissented from by the High Court of Allahabad in *Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others*, ; by the High Court of Saurashtra in *Chhaganlal Nanji Premji. v. Assistant Custodian of Evacuee Property*, (S) AIR 1956 Sau 47 (C) ; by the High Court of Hyderabad in *Salam v. Custodian of Evacuee Property* AIR 1956 Hyd 64 (D); by the High Court of Pepsu in *Joginder "Singh v. Director, Rural Rehabilitation*, (S) AIR 1955 Pepsu 91 (E).

21. *Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others*, was a case in which the first order was passed by the Assistant Custodian, Benaras and an appeal from that order was dismissed by the Additional Custodian, Lucknow. The petitioner filed a revision application which too met with the same fate. He thereupon approached the High Court for a writ of certiorari to quash each of these orders. A preliminary objection to the maintainability of the petition was taken. It was that the orders made respectively by the Assistant Custodian and the Additional Custodian were merged in the order of the Custodian General and as the Custodian General neither resided nor had his office located within the territories in relation to which the High Court exercise jurisdiction, no writ of certiorari can be issued to quash the order made by him. The objection was upheld on the broad principle that the order of the lower tribunal is merged in the order of the superior tribunal and it is the latter order which is the really effective and operative order.

22. In (S) AIR 1955 Pepsu 91 (E), a Division Bench of the Pepsu High Court approved the view taken by the Allahabad High Court in *Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others*, and held that the order of the Assistant Custodian General which was the final order passed in that case u/s 27 of the Administration of Evacuee Property Act, superseded those of the local tribunals and thus really was the order in dispute and further holding that as the Custodian General resided in New Delhi and it had no jurisdiction to quash it, rejected the writ application.

23. The High Court of Hyderabad in AIR 1956 Hyd 64 (D) also adopted the same line of reasoning and followed the Allahabad decision in the case of *Hafiz Mohammad Yusuf* in preference to the decision of the Rajasthan High Court in AIR 1354 Raj 214 (A). The learned Judge of the Hyderabad High Court observed:

"Even when the order is confirmed in revisional jurisdiction by the Custodian General, the final order would be that of the Custodian General and it will be difficult for the Custodian, resident within the jurisdiction of the Court to abide by a writ against the wishes of the Custodian General."

24. The question also came up before the High Court of Saurashtra in (S) AIR 1956 Sau 47 (C), In that case the petitioners were holders of a money decree against one Kadarbhai whose property was declared to be evacuee property by the Assistant Custodian. The order of the Assistant Custodian was confirmed in

appeal by the Custodian and the revision application filed to the Custodian General too was dismissed. The petitioners thereupon approached the High Court for a writ to quash the order of the Assistant Custodian.

25. The validity of the order of the Assistant Custodian was challenged before the High Court on the ground that there was no compliance with Section 7 and no notice was issued as required by that section. The High Court upheld that contention and held that it was contrary to the basic principles of justice that the property should be declared to be evacuee property without serving a notice on the person concerned. An objection was however taken that the order of the Assistant Custodian could not be quashed as it had been confirmed by the Custodian General and no writ could be issued to the Custodian General as he was in New Delhi, i.e., outside the territory over which the High Court of Saurashtra can exercise jurisdiction. The contention was upheld. Shah, C. J., who delivered the judgment observed:

"The crux of the question is not whether the Custodian's order is modified or substituted by a new order in revision. Even where the revisional authority dismisses the revision, it does so because it affirms the order of the appellate authority and in that sense the order is the order of the revisional authority. That order is final and it is that order which operates." This is true even Where the revision application is dismissed in limine.

Moreover to grant a writ in this case, on the footing that the Custodian General's order merely dismisses the revision application and confirms the Custodian's order and therefore it is the Custodian's or the Assistant Custodian's order that remains in force would be creating an anomalous position in that whereas on the one hand the writ would prevail, on the other hand the Custodian General's order would still stand."

26. I am in respectful agreement with the view expressed by the majority of the High Courts. In my opinion, it is immaterial whether the Deputy Custodian General had modified the order of the Custodian or had confirmed it. The fact remains that the order of the Custodian is merged in and superseded by the order of the Deputy Custodian General and it is really that order which is in dispute and which must be attacked. So long as that order remains operative, the orders which have merged in it and have been superseded by it, cannot be quashed by a writ of certiorari. The effect of leaving the order of the Deputy Custodian General untouched would be anomalous. The Custodian of Evacuee Property who is subordinate to the Deputy Custodian General and bound to obey his orders, would be confronted with serious problem. He cannot refuse to obey the order of the Deputy Custodian General, nor can he refuse to give effect to the decision of this Court. Such a situation should be avoided by the Court exercising the powers under Article 226 of the Constitution.

27. The petitioner has not impleaded the Deputy Custodian General nor has she prayed for his order being quashed. The petitioner has prayed for a writ of

certiorari to quash the orders of the Custodian and the Deputy Custodian but these orders have been merged in the final order . passed by the Deputy Custodian General and do not independently exist.

28. Mr. Khan then contended that the basic order was a nullity and could not be allowed to stand. Since I have held that the order in dispute is really an order of the Custodian General and the orders of the subordinate authorities do not independently exist, and since the petitioner has not asked for relief against that order, she can get no relief in these proceedings. It is not a case where the basic order can be quashed leaving the ultimate and final order untouched and operative. In my opinion the order of the Dy. Custodian General is the final order and the one that is really in dispute and so long as it remains, no writ of certiorari can be issued to quash the order of the Deputy Custodian or the Custodian of Evacuee Property, Madhya Bharat.

29. There is also another point which disentitles the petitioner to relief in these proceedings and that is, delay on her part in approaching this Court.

30. The Custodian took possession of the property as early as the year 1949. The petitioner thereupon raised objections which were heard and decided against her by the Deputy Custodian on 27-10-1952. The petitioner preferred an appeal which was dismissed by the Custodian on 14-5-1954, A revision application filed before the Custodian General was dismissed on 9-12-1954. The petitioner waited for over a year thereafter and filed the present petition on 2-1-1956. She has not explained the delay. It is not suggested that the material facts were not within her knowledge or that there was any other sufficient reason which prevented her from approaching this Court immediately.

31. Mr. Khan, learned counsel for the petitioner submitted that by dismissing the petition on the ground of delay, the Court will be refusing to exercise jurisdiction which is conferred upon it by the Constitution. But it must be borne in mind that in exercising jurisdiction under Article 226, the High Court is not exercising an ordinary jurisdiction. The jurisdiction conferred upon the High Court by the Constitution is special jurisdiction which is not to be exercised as a matter of course. The party who wants relief from the High Court in these proceedings must, therefore not be guilty of laches.

32. The point is actually covered by two decisions of the Nagpur High Court, Rajnandgaon Bus Service Co. v. Appellate Authority AIR 1953 Nag 80 (F) and Mohammad Nurui Huda v. Kikabhoy AIR 1953 Nag 251 (G). In both these cases a Division Bench of the Nagpur High Court has held that though no period of limitation has been prescribed for an application, yet ordinarily it must be made as soon as any threat to any right is there. In Rajnandgaon Bus Service Co. v. Appellate Authority (P), the impugned order was passed on 16th April, 1951, and its validity was challenged by an application filed on 26th April, 1952. It was held that the petitioner made undue delay and the petition should therefore be dismissed.

33. A similar view has been taken by the High Court of Bombay in *Gandhinagar Motor Transport Society Vs. State of Bombay*, ; by the High Court of Travancore-Cochin in *S. Mahadeva Iyer v. State* AIR 1954 TC 469 (PB) (I) ; and by the Hyderabad High Court in *R. M. Dever v. Hon"ble Home Minister* AIR 1957 Hyd 14 (J). In view of these authorities, the contention of Mr. Khan that the Court should not decline to exercise its powers merely on the ground of delay cannot prevail,

34. The petitioner has approached this Court very late. The action of the Custodian with respect to the property in dispute was taken as far back as the year 1949 and even the objections raised by the petitioner before the Custodian were decided finally on 9-12-1954 by the Deputy Custodian General of Evacuee Property, New Delhi. The present petition was filed on 2-1-1956, i.e., more than twelve months after. The delay in filing this petition has not at all been explained by the petitioner and the petition is liable to be dismissed even on this ground.

35. Both the preliminary contentions raised by the opponents must prevail and the petition must fail on these grounds alone. In this view of the matter it is unnecessary for me to consider the other points raised.

36. The result is that the petition fails and is dismissed. In the circumstances of this case I leave the parties to bear their own costs.

Dixit, J.

37. I am also of the; opinion that this petition must be rejected on the grounds of delay and failure to implead the Dy. Custodian General. The delay has not been satisfactorily explained and has resulted in the transfer of the assets of the evacuee property to the account of the High Commissioner for Pakistan. It seems to me difficult to understand how, when the Dy. Custodian General dealt with the order of the Custodian, M. B., judicially in revision and made an order confirming it, the Custodian's order can be quashed on a writ of certiorari, keeping the order of the Dy. Custodian General intact. It has been held by this Court in *Munshi Nizamuddin v. P. S. Lawale*, 1955 Nag LJ 732: (AIR 1956 Nag 65) (K) that on an application for certiorari both primary and appellate authorities should be impleaded though the judgment may be one of affirmance. Section 27 of the Administration of Evacuee Property Act confers on the Custodian General very wide revisional powers, which are for all practical purposes indistinguishable from those of an appellate authority.