
(1961) 04 MP CK 0025
In the Madhya Pradesh High Court
Case No : C.M.P. No. 37 of 1958

Bubab Bai Sharaf Ali and others	Vs	APPELLANT
Assistant Custodian of Evacuee Property, Indore and another		RESPONDENT

Date of Decision : 28-04-1961

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 2(d)(ii), 7

Citation : (1962) J LJ 283 : (1962) MPLJ 53

Hon'ble Judges : V.R. Newaskar, J; H.R. Krishnan, J

Bench : Division Bench

Advocate : M.A. Khan, for the Appellant; Balwantsingh, Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Newaskar, J.

This is a petition under Article 226 of the Constitution and is directed against the Custodian and Assistant Custodian, Evacuee Property, Indore.

The petitioners are four in number. Petitioners Nos. 1, 3 and 4 claim to be the joint owners of House No. 1/163 situated in Kasaiwada and No. 689, Chowk Bazar of Shajapur while petitioner No. 2 claims to have an interest of a mortgagee thereon. The circumstances in which the petitioners seek to quash the orders of the opponents with reference to the above mentioned house are as under.

The house initially belonged to one Sharafali who died leaving behind his widow, daughters and sons. Three of his sons namely Alimohammad, Abbas and Fida Hussain were, on credible information, believed to have migrated to Pakistan. Notices were issued by the Assistant Custodian Evacuee Property u/s 7 of the Administration of Evacuee Property Act on 1-4-1955. The petitioners objected to the declaration of the said property as evacuee property. However the Assistant Custodian by his order dated 19-2-1956 declared the aforesaid three sons of

Sharafali as evacuees u/s 2(d)(ii) of the Act and their property as evacuee property. Appeal preferred by two of the petitioners named Hatimali and Rubabhai against the order of Assistant Custodian dated 19-2-1956 was dismissed on 29-9-1956. A revision petition was preferred against this decision to the Deputy Custodian-General Evacuee Property who by his order dated 4-1-1957 held that in view of the Evacuee Property Amendment Act No. 42 of 1954 the three sons of Sharafali could not have been declared as evacuees and their property could not have been declared evacuee property after 7-5-1954 u/s 2(d)(ii) of the Act. The Deputy Custodian-General however observed:-

It is, however, to be noted that according to the evidence led and the findings given, the above mentioned persons went before 1947 to Karachi and were carrying on business there at the date of partition. They would, therefore, be residing in West Pakistan at that time. They would be evacuees according to the present definition as given in section 2(d)(ii) and if there were corresponding provisions under the old Madhya Bharat Law, then the property can be taken to have automatically vested. This aspect of the case has not been examined and the petitioners' plea is that they had no opportunity of meeting the same. I would accordingly accept this revision petition and send back the case to the Assistant Custodian with the direction that the petitioners may be allowed to file written statements raising such objections as they may like and the case may then be disposed of according to law.

On remand an objection was raised on behalf of the petitioners before the Assistant Custodian that Ordinance No 27 of 1949 was ultra vires the powers of Governor-General of India so far as the erstwhile Madhya Bharat Region was concerned. This objection was not considered on the ground that it was outside the ambit of enquiry permitted by the Deputy Custodian-General in his order of remand. The Assistant Custodian then referred to Ordinance No. 56 of 1949 which came in force in the Madhya Bharat Region on 9-8-1949 and remained in force until it was repealed by Ordinance No. 27 of 1949 on 18-10-1949. According to him by section 2 of Ordinance No. 56 of 1949 Alimobammad and Fidahussain sons of Sharafali were evacuees they having become residents of Karachi since last 20 years and that their property automatically vested in the Custodian Evacuee Property under clause 5 of the Ordinance and the same continued so to vest u/s 8(2) of the present Act. He accordingly declared by his order dated 31-10-1957 that steps in respect of the management of the properties would be taken u/s 8 of the Act. An appeal preferred against that decision was rejected by the Custodian by his order dated 2-4-1958 on the ground that it was incompetent. The reason given for the rejection of the appeal was that the valuation of the property as given by one of the appellants was Rs. 6,000 and this could be taken into account in determining its valuation. As it exceeded Rs. 2,000 appeal did not lie to him. Notice thereafter was issued u/s 6 of the Evacuee Interest (Separation) Act of 1951 by the competent officer and as the petitioners did not prefer any claim in respect of the said property, the entire property including the petitioners' interest was, therefore, declared as vested in

the Custodian free of all encumbrances and liabilities by order of the competent officer dated 7-10-1958. The petitioners however had filed the petition on 6-8-1958.

The main point pressed by Mr. Mohammad Ahmad Khan is that since no action had been taken and nothing had been done either under the Madhya Bharat or Gwalior Evacuee Law there was no vesting and the property had never become evacuee property. Reliance in this connection was sought to be based upon the decision of this Court in *Md. Mughani Khan and Another v. The Custodian Evacuee Property* C.M.P. No. 1 of 1987.

On the other hand the learned Government Advocate contended that since there was automatic vesting under the pre-existing Madhya Bharat Ordinance No. 56 of 1949 which preceded Ordinance No. 27 of 1949. This vesting had been saved by section 8(2) and 8(2)(A) of the present Act.

In my opinion in view of the decision of this Court in *Md. Mughani Khan's* case C.M.P. No. 1 of 1957 the contention of the learned Government Advocate is untenable. In that case the statement of law as contained in the following observations of the Allahabad High Court in *Azizun Nisa v. Assistant Custodian* AIR 1057 All. 561 and those of the Punjab High Court in *Darshan Lal Vs. R.L. Aggarwal and Others*, was quoted with approval:-

Allahabad High Court:-

Section 58 (3) contains a provision similar to that of section 55(3) of the repealed Ordinance but with the important difference that it saves not only the effect of anything done or any action taken under the repealed Ordinance but also its previous operation. Section 55 (3) of the Ordinance No. XXVII, did not save the previous operation of the Ordinance No. 12, repealed by it. The vesting of an evacuee property in a Custodian under Ordinance No. 1 or Ordinance No. 12 amounts to operation of the Ordinance and had it been saved by section 55(3) the vesting would have continued in spite of the repeal, but as pointed out earlier it saved only the effect of anything done or any action taken. That license does not exist in the present Act, and if any property had vested in a Custodian under the Ordinance No. XXVII, it would continue to vest in him in spite of the repeal of the Ordinance. But if the vesting was automatic under the Ordinance i.e. it was the effect of a provision of it and not of anything done or action taken in exercise of the powers conferred by it, it would continue but the property would not become evacuee property within the meaning of the Act. In order that it should become so it would have to be declared to be such and hence section 8(2) was enacted. Nothing was done, and no action was taken by any authority in exercise of the powers conferred by Ordinance No. XXVII and, therefore, it is unnecessary to refer any more to section 58 (3).

Punjab High Court:-

Section 8(2) could have retrospective effect only in such cases in which some

positive action had been taken under the relevant provisions or Borne effective decision had been given; otherwise the provisions of the Act were to apply and there would be no vesting unless a notice u/s 7 has been issued and a declaration has been made.

It is not disputed that prior to 1-4-1955 no action whatever had been taken either under the present Act or before its promulgation either under Central Ordinance No. 27 of 1949 or Madhya Bharat Ordinance No. 56 of 1949 or under any prior State Ordinance or enactment. The effect of this is that in spite of the provisions of automatic vesting in the Madhya Bharat Ordinance, in the absence of any action taken the property did not vest in the Custodian under the Ordinance No. 27 of 1949 which was repealed by the present Act. Under the last mentioned Act as held by the Supreme Court in Ebrahim Aboobaker v. Tek Chand AIR 1963 SC 298 unless there is notice to the person who falls within the definition of evacuee and other interested persons followed by an inquiry as contemplated u/s 7 of the Act there cannot be any declaration regarding his being an evacuee and his property as evacuee property. Now since on 1-4-1955 when the present action was taken none of the alleged evacuees namely Ali Mohammad and Fidahuasain can be declared as an evacuee on the ground mentioned in section 2(d)(ii) by reason of the provisions of Act No. 42 of 1954 which became operative for this purpose from 7-5-1954 the entire proceedings are without jurisdiction and deserve to be quashed.

The provisions of section 8(2-A) are introduced by the Amending Act No. 1 of 1960 with a view to cure possible defects in the matter of vesting under certain Provincial or State Laws. Because it was felt that the validity of such Provincial or State Laws was questionable. It is for this purpose that the words "purports to have vested" have been introduced in the amended provision contained in section 8(2-A) of the Administration of Evacuee Property Act.

The Evacuee Interest (Separation) Act of 1951 will not have the effect of converting a property which could not be evacuee property into a composite property by reason of its own operation apart from the provisions of Act No. 31 of 1950. In the present case the property was not declared as vested and had not vested in the Custodian under Act No. 31 of 1950. The provisions of section 11 of the Evacuee Interest (Separation) Act, therefore, cannot have the effect of depriving the petitioners of their right in the said property.

The petition is, therefore, allowed and the proceedings in question treating House No. 1/163 in Kasaiwada and House No. 689, Chowk Bazar of Shajapur as having vested in the Custodian are hereby quashed including the order of the Assistant Custodian dated 31-10-1957. Petitioners are entitled to costs of this petition. Counsel's fees shall be taxed at Rs. 50.

H.R. Krishnan, J.

I agree.