
(1984) 12 AHC CK 0053
In the Allahabad High Court
Case No : Second Appeal No. 643 of 1976

Gyasuddin

APPELLANT

Vs

Allah Tala Waqf Mausuma and Another

RESPONDENT

Date of Decision : 20-12-1984

Acts Referred:

Citizenship Act, 1955 — Section 9(2)
Citizenship Rules, 2009 — Rule 30
Civil Procedure Code, 1908 (CPC) — Section 83
Criminal Procedure Code, 1973 (CrPC) — Section 145, 146
Defence of India Rules, 1962 — Rule 133V(1)
Guardians and Wards Act, 1890 — Section 29
Specific Relief Act, 1963 — Section 34

Citation : AIR 1986 All 39

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : S.A. Khan, for the Appellant; S.K. Varma and R.H. Zaidi, for the Respondent

Final Decision : Partly Allowed

Judgement

B.D. Agarwal, J.—This is defendant's appeal.

2. According to the case of the plaintiff, one Mehendi Hasan was the owner of the property in dispute specified in the plaint besides other land. He died nearly twenty-four years prior to the suit instituted on Sept. 6, 1968, leaving as his heir the son, namely, Hadi Hasan. The death of Hadi Hasan took place in the year 1964. Part of the property had dilapidated during his lifetime; the property in dispute, it is alleged, was being made use of for purposes of Majlis during Moharram and Chehlum and for taking out Tazia on Chehlum. Hadi Hasan himself lived in Basti, where he was employed; the property is situated in Ghazipur. He had a wish that the property in question be dedicated for use as Imambara. Subsequent to his death the widow Srimati Ummad Laila executed a registered deed of waqf dated July 5, 1965, for self and her minor son Shah Shahid Hasan.

She herself is the mutawalli under the waqf. The management was looked after on her behalf by Karam Abbas and on his death by his son, namely, Akhtar Husain through him the suit was instituted. In or about Dec., 1965, the defendants trespassed over the disputed land and raised certain constructions without authority. Karam Abbas, aforesaid, initiated proceeding u/s 145, Code of Criminal Procedure. Preliminary order was made on Jan. 3, 1966 followed by attachment dated Jan. 4, 1966. Upon reference the Munsif found on Aug. 24, 1968, that the defendants had been in possession within two months preceding the preliminary order. At this stage the plaintiff brought the suit on Sept. 6, 1968, claiming the relief for permanent injunction and demolition of the wall unauthorisedly raised on part of the disputed land by the defendants.

3. For the defendants it was asserted that the property in dispute did not belong to Mehendi Hasan or his son. The title of the plaintiff to sue was disputed asserting that there had been no valid waqf created by Srimati Umme Laila. Hadi Hasan left two sons and three daughters besides the widow, who were the co-heirs. All of them had migrated to Pakistan and are nationals of that country. The defendants have been in possession in their own right. There was no will executed by Hadi Hasan nor was he competent to do so.

4. In the rejoinder filed for the plaintiff it was pleaded that Srimati Umme Laila had been a citizen of India and that she went to Pakistan by the end of the year 1966, and that Shah Shahid Hasan is the only son alive. Since he was a minor on July 5, 1965, he did not join himself in executing the waqf, which was executed by the mother for and on his behalf.

5. The trial Court recorded the finding that Hadi Hasan had title to the property in dispute. The majlis used to be held in part of this property. Srimati Umme Laila was competent to make the waqf including for and on behalf of her minor son. It was up to the sons and daughters, who have migrated to Pakistan, to raise objection on this score in case the mother was not competent to make the waqf in relation to their right, title or interest in the property, but no objection had been raised. Hadi Hasan had made a will in this behalf and on this account also, it was observed, the waqf is not open to challenge. Srimati Umme Laila has, it was found, gone to Pakistan with no intention to return back. Her children have also gone over there and it is from that place that she had sent a mukhtarnama in favour of Akhtar Husain. With these findings the suit was decreed for injunction and demolition on March 24, 1972. In appeal filed by the defendants the decree was affirmed by the lower appellate Court dated March 22, 1976.

6. Aggrieved, the defendant No. 1 has preferred this second appeal.

7. Since the dispute raised relates to title to property claimed to be dedicated as waqf and the right asserted to a mutawalli, notice was issued under my order passed on Sept. 21, 1984, to the Shia Central Board, Lucknow, also in view of Section 66(1) of the U.P. Muslim Waqfs Act, 1960, but despite the service thereof no appearance has been put in for or on behalf of the Board.

8. The appellant's learned counsel urged in the first place that the suit giving rise to the second appeal was not maintainable for the relief of permanent injunction because the plaintiff had not sought the relief for possession also. The suit, as mentioned above, was instituted on Sept. 6, 1968, seeking the relief for permanent injunction besides demolition of the wall claimed to be raised unauthorisedly by the defendants in or about in Dec. 1965, over part of the disputed land. The learned counsel relies on Sections 34/41, Specific Relief Act, 1963. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief of injunction without claiming recovery of possession (see *Jemma Vs. Raghu*, : *Masjid Shahidganj v. Shiromani G.P. Committee* AIR 1938 Lah 369 (FB); *Abdul Nabi Sahib Vs. Bajan Sahib and Another*, . Reference was also made to *Dukhan Ram and Others Vs. Ram Nanda Singh and Others*, . On the side of the plaintiff-respondent the learned counsel points to the material fact that the property in question was attached on Jan. 4, 1966, in proceeding initiated u/s 145, Cri. P. C., in which the preliminary order was made on Jan. 3, 1966, and that attachment subsisted when the suit was instituted. Despite the finding recorded u/s 146, Criminal Procedure Code by the Civil Court, therefore, on Sept. 24, 1968, since the possession on the date of the suit was that of the superdar, and in this manner the property was in custodia legis, it is of no consequence that the plaintiff has not in addition claimed the further relief of possession besides seeking injunction by way of restraint against the defendants to obtain release of the property in their favour. In my view these distinguishing features of the case serve adequately to protect the maintainability of the suit on this account. I am supported in this view by the decision of the Division Bench of this Court in *Mahant Indra Narain Das Vs. Mahant Ganga Ram Das and Another*, . In that case a receiver had been appointed during the pendency of an application for mutation. The application was dismissed, whereafter the suit was brought for declaration that the plaintiff was the Mahant of certain temples. On the question being raised that the suit did not lie in view of the proviso to Section 42 of the Old Specific Relief Act corresponding to Section 34 of the New Act. It was held that by reading the proviso along with the main section it becomes clear at once that the further relief contemplated in the proviso is a relief which was available to the plaintiff at the time of the institution of the suit and which he failed to pray for. The proviso does not refer to a relief which it was not at all necessary in view of the relief sought, which may be granted and which alone may serve the purpose in the situation operating when the suit is brought. The Bench took note of the fact that on the date of the institution of the suit though the plaintiff was not in possession of the property, the defendant also was not in possession thereof. The property was in possession of a receiver at the date of the suit, therefore, the plaintiff was unable to seek the relief for possession because the defendant was not in possession. Furthermore the property, being in charge of the receiver appointed by the Court, must be deemed to be in possession of the receiver on behalf of the original owner of the property. The objection on that score was accordingly overruled. This decision has been followed by a learned single Judge in *Jagdish Vs. Rajendra*, . The contention for the appellant in this

behalf may not, therefore, be said to possess force.

9. The other contention of the learned counsel for the appellant is that there could be no valid waqf in respect of the property in question on July 5, 1965, under the registered deed relief on respondents' behalf vide exhibit 1. The reasons submitted in support of this contention are : --

(i) Srimati Umme Laila was not the exclusive owner of the property involved;

(ii) There could be no waqf created by her for and on behalf of the minor son, namely. Shah Shahid Hasan;

(iii) Hadi Hasan had died leaving his heirs one other son too besides two daughters and there could be no waqf made of mushaa or undivided share; and,

(iv) The possession was not conveyed on the alleged execution of the waqf.

10. The settled principles relating to the question of waqf are that the property dedicated by way of waqf must belong to the waqf or the dedicator at the time of dedication. The valid objects of a waqf include, among other things, mosques and provision for Imams to conduct worship therein, keeping tazias in the month of Muharram, repairs of imambaras. A mushaa or an undivided share in property may not be dedicated by way of waqf for a mosque or burial ground irrespective whether the property is or is not capable of division. The waqf of mushaa for purpose like a mosque or burial ground is invalid for the reasons that the continuance of participation in anything is repugnant to its becoming the exclusive right of God. A minor is incompetent to dedicate his property by way of waqf. The waqf may be made either verbally or in writing; it may be created by act inter vivos or by will. A Mohammadan may dedicate the whole of his property by way of waqf; but a waqf made by will cannot operate upon for more than one-third of the net assets without the consent of the heirs. A mere declaration of endowment by the owner is sufficient to complete the waqf vide Principles of Mohamedah Law, Mulla (Sixteenth Edition Pp. 168 to 181). I need not cite other authorities since there is no dispute on principle and no conflict is alleged or shown to be involved.

11. Applying these principles to the contentions raised for the appellant in this respect it may be observed that in para 18 of the writ ten-statement there was specific plea raised by the defendants 1 to 3 to the effect that Hadi Hasan died leaving two sons, namely, Sibte Hasan and Shah Shahid Hasan and three daughters namely, Shamim, Nasim and Tasmin, besides the widow as the heirs. The plaint does not assert that the widow and Shah Shahid Hasan were the exclusive heirs upon the death of Hadi Hasan. In para 7 of the rejoinder filed for the plaintiff on March 7, 1969, the averment significantly is that the only son of Hadi Hasan alive is Shah Shahid Hasan. The significant fact is that therein also it is not stated that at the time when Hadi Hasan died in 1964 he left no other heir besides the widow and Shah Shahid Hasan. It is also not pleaded that the other heirs of Hadi Hasan had died prior to July 5, 1965, when the impugned

weqiknama was made. The defendants placed on record certificates specifying the parentage as also the respective dates of birth of these children; vide exhibits A 27 to A 31. P. W. 1, Akhtar Husain, the Mukhtar-e-am and the principal witness on the plaintiffs side was cross-examined at length in this respect. He evaded answer and claimed ignorance on the point that those other children had also migrated to Pakistan and were living therein. Srimati Umme Laila was not examined herself. The finding recorded by the trial Court is that these children have migrated to Pakistan. There is nothing to the contrary held by the lower appellate Court. In face of this material on the record it may not be held that Srimati Umme Laila was competent by herself to make the waqf as she did on July 5, 1965, in respect of the property, which belonged to Hadi Hasan in his lifetime.

12. Assuming as contended for the respondent-plaintiff that Srimati Umme Laila executed the waqf as guardian for and on behalf of Shah Shahid Hasan also and that he was the only child surviving, the waqf would fail still for the obvious reason that the mother is not the legal guardian of property under the Mohammadan Law; vide para 359, Principles of Mohamedan Law; Mulla, Sixteenth Edition page 330. The legal guardians of the property of a minor are the father and the father's father. The Court may no doubt appoint the mother, brother or uncle as guardian of the property of the minor in which case they will have the powers of a guardian appointed by the Court in other respect. A de facto guardian is merely a custodian of the person and property of the minor. The mother, brother, uncle and relations other than the father and father's father are de facto guardians, unless they are appointed executors by the will of the father or father's father, or appointed guardians by the Court; vide para 361 *ibid*. It is not the case of the plaintiff-respondent that she was at any stage, appointed by the Court as guardian for the minor son. A guardian of property appointed by the Court, moreover has no power, without the previous permission of the Court under the Guardians and Wards Act, 1890, to make transfer including by way of waqf. No such permission is claimed to have been sought in the present. It follows, therefore, that Srimati Umme Laila could not be competent to execute waqf as guardian for or on behalf of the minor child and it need not be repeated that for the purpose such as averred in the instant case there could be no waqf of a mushaa or undivided share in the property.

13. The respondents' learned counsel submitted that the court may take the view that there was a will created by Hadi Hasan in this respect. Learned counsel frankly admits that there was no waqf created as such by Hadi Hasan in the form of a testament, oral or documentary, or even otherwise. This is the position admitted indeed in the plaint also besides the deed of waqf dated July 5, 1965, which Srimati Umme Laila executed vide exhibit 1. All that is narrated is that Hadi Hasan cherished a wish which he also communicated orally to his wife that the property be dedicated for purposes of use of the imambara. Assuming that this desire or wish on his part existed, it cannot still in itself amount to the creation of a waqf nor may this be said to create a will of the property conferring

thereby title to his widow to the exclusion of others. There is force in the contention for the appellant that it is not a -case of a waqf-bil-wasiyat, that is to say, which conveys the property on the death of the testator to the mutawalli as waqf or even a wasiyat-bil-waqf that is, to a will which makes a gift of the property with a direction to the donee to create the waqf desired (para 184 in Principles of Mohamedan Law; Mulla Sixteenth Edition, page 177). Under the personal law governing the parties a bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator and further a Mohammadan cannot by will dispose of more than one-third of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator (Paragraphs 117/118 *ibid*). No such consent has been pleaded or proved on the plaintiffs behalf in the present case. It is not open, therefore, to claim that upon the death of Hadi Hasan the property devolved on Srimati Umme Laila by a will to the exclusion of other heirs or that there was a waqf created by Hadi Hasan himself through the mode of a testament.

14. Faced with this difficulty which erodes the validity of the alleged waqf relied for the plaintiff-respondent, the learned counsel argued in the alternative that as against the rank trespassers, Srimati Umme Laila is entitled to claim injunction even as being a co-owner of the property. It is urged that even if the alleged waqf were to be ignored and it were also held that there is no will created in her favour and that on the death of her husband she became a co-owner along with the other heirs to the property, she may still in her capacity as one of the heirs claim injunction with respect to this property as against persons having no right, title or interest. There is objection raised for the appellant to this line of argument contending that there is no such case taken in the plaint. A perusal of the plaint would show that it has proceeded throughout on the footing of there having come into being allegedly a waqf created by Srimati Umme Laila and the right to sue has been claimed by her in the capacity as the mutawalli, which has been sought to be exercised through the medium of mukhtar-e-am or karkun, namely, Akhtar Husain, to the reference for the appellant was made also to the terms in which the mukhtarnama was executed by Srimati Umme Laila, which dated March 20, 1967, vide exhibit 5 and is claimed to have been brought into being in Pakistan. This also supports the assertion that the power of attorney conferred is in respect of the rights inhering in the executant in capacity as the mutawalli. In order, however, still that the dispute be finalised and effectively adjudicated, I permitted the respondents' learned counsel to raise argument on the alternative score also without adhering to the letter of pleading and further right made to amount for this purpose the title to the plaint wherein there is description given of the plaintiffs' suing. The law is settled that a co-owner is as much an owner of the entire property as any sole owner of the property is and, thus, as against a trespasser he is entitled to relief including for the eviction without the co-owners being arrayed as parties vide *Hira Lal v. Bhairon* ILR(1883) All 602 ; *Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai*

Motorwala and Others, , Sri Ram Pasricha Vs. Jagannath and Others, ; Dr. Jamaluddin v. Qazi Zamirul Hasan, 1984 ACJ 259 : (1984 ALJ 462). In case, therefore, it could be made out that Srimati Umme Laila is one of the subsisting co-owners of the property in dispute there could be something to be argued for her on the basis of title existing along with that of other co-owners. This too, however, is beset with difficulty as will presently appear.

15. Section 5(1) of the Enemy Property Act, 1968 (as amended by the Central Act XL of 1977), which came into force on September 27, 1977 relied for the appellant provides that notwithstanding the expiration of the Defence of India Act, 1962, and the Defence of India Rules, 1962, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Act with effect from July 10, 1968, shall vest in the Custodian. Power is conferred on the Custodian in view of Section 8 to take or authorise the taking of such measures as he considers necessary or expedient for preserving such property. The argument advanced is that in view of these provisions of property in dispute vests in the Custodian of Enemy Property and hence Srimati Umme Laila cannot claim to exercise right as a co-owner in her individual capacity as is now sought to be asserted on her behalf. The point under consideration is whether the property vested in the Custodian of Enemy Property immediately preceding 10th July, 68. If it did, the vesting would continue still in view of Sections 5/8 of the Act -- it being not the case of the respondent that there was divesting at any stage within the meaning of Section 18 of this Act.

16. Did the property in dispute vest in the Custodian of Enemy Property prior to July 10, 1968, when the Enemy Property Act, 1968 commenced? Rule 133-1(4) of the Defence of India Rules, 1962, defines "enemy property" as meaning any property for the time being belonging to or held or managed on behalf of any enemy as defined in Rule 133-A, an enemy subject or an enemy firm. Rule 133-A(b) defines "enemy" as meaning any individual resident in enemy territory. The expression "enemy territory" as defined in Section 2(d)(1) of the Defence of India Act, 1962, denoted any area which is under the sovereignty of a country committing external aggression against India. According to Rule 133-V(I)(b) the Central Government was empowered to appoint a Custodian of Enemy Property and by order vest or provide for and regulate the vesting, in the prescribed Custodian such enemy property as may be prescribed. The proclamation of Emergency issued in Oct. 1962, was revoked on Jan. 10, 1968. The Defence of India Act/The Defence of India Rules; 1962, expired on July 9, 1968, after six months from the revocation of Emergency as provided in Section 1(3) of the Act. The Enemy Property Act commenced on July 10, 1968. Analogous provisions were made also in the Defence of India Rules, 1971, as may be gathered from Rules 130(b), 138(4) and 151(I)(b) thereof.

17. In exercise of powers under Rule 133V(I)(b), Defence of India Rules, 1962,

the Central Government issued notification vesting certain Enemy Property in the Custodian of Enemy Property. The text of the notification may be found reproduced in Mohammad Israil and Another Vs. Union of India (UOI) and Others, and also by a Division Bench of this Court in Taufiq Kamal v. Custodian, Enemy Property of India, (Writ Petn. No. 6120 of 1971 decided on April 30, 1979). It reads as under : --

"Copy of Government of India, Ministry of Commerce Notification No. 12/2/65 E. Pty., dated the 10th Sept. 1965.

In exercise of the powers conferred by Sub-rule (1) of Rule 133-V of the Defence of India Rules, 1962, the Central Government hereby orders that all immovable property in India, belonging to or held by or managed on behalf of all Pakistan nationals shall, vest in the Custodian of Enemy Property for India with immediate effect.

2. Nothing in this notification shall apply to any such property, belonging to or held by or managed on behalf of such of the Pakistan nationals as are employed in the different Missions of the Government of Pakistan in India."

18. Sri R.H. Zaidi learned counsel for the respondents contends that these provisions do not avail the appellant in the present case and the reasons assigned by him in support of this argument briefly are : --

(a) there is no pleading to this effect;

(b) there is no evidence to establish that Srimati Umme Laila had migrated to Pakistan;

(c) the notification dated Sept. 10, 1965, reproduced above does not cover a case where the alleged migration takes place subsequent to that date; and

(d) the jurisdiction to decide as to whether when or how did Srimati Umme Laila acquire the foreign citizenship or nationality is exclusively that of the Central Government as provided in Section 9(2) of the Citizenship Act, 1955 read with Rule 30 framed thereunder.

19. In reply Sri S.A. Khan, the appellant's learned counsel, has referred, and rightly in my view, to the averment made in para 18 of the written-statement filed in this case. This refers to Srimati Umme Laila having migrated to Pakistan and her children having also gone and settled over there. The maintainability of the suit was also assailed on this ground. It has to be borne in mind at the same time that it is only by means of an amendment in the title to the plaint at the stage of this second appeal that the respondents have contended in the alternative that the suit be treated as for Srimati Umme Laila in her personal capacity. Issue No. 5 was drawn moreover by the trial Court on the pleading of the parties and this was to the effect whether Srimati Umme Laila has migrated to Pakistan? If so, its effect? Evidence was recorded of both sides, including on this issue No. 5. The respondents cannot, therefore, contend that it has been

taken by surprise. In para 4 of the replication filed on behalf of the plaintiff-respondent before the trial Court too it was stated that Srimati Umme Laila had gone to Pakistan, but this was towards the end of the year 1966. The trial Court recorded finding moreover that she had migrated to Pakistan and nothing to the contrary is observed on this aspect by the lower appellate Court. This answers so far as the objection (a) is concerned.

20. As far the objection (c) above mentioned, Rule 133-V(I)(b), Defence of India Rules, 1962, is wide in its terms empowering Central Government to order such enemy property as may be prescribed to vest or provide for and regulate the vesting thereof in the Custodian. The notification dated Sept. 10, 1965, is drawn along the same lines and nothing contained therein restricts, in my view, the application thereof to such property alone as was enemy property on the date of issue of this notification. For so long as the notification is operative it may cover all such immovable property as may acquire the character of the prescribed enemy property even though this is subsequent to Sept. 10, 1965. In this connection Sri S.A. Khan has also cited an unreported decision of this Court in *Taufiq Kamal v. Custodian, Enemy Property of India*, (Writ Petn. No. 6120 of 1971 decided on April 30, 1979) (supra). Therein it was held : --

"Under the notification dated Sept. 10, 1965, issued by the Central Government in exercise of powers conferred by Sub-rule (1) of Rule 133-V of the Defence of India Rules, 1962, properties belonging to or held by or managed on behalf of all Pakistan nationals vested in the Custodian of Enemy Property for India with immediate effect. It was urged that on the day when the aforesaid notification was issued the properties in question did not belong to nor were held by or managed by Pakistan nationals. These properties came to be vested in Pakistan nationals subsequently. Since no fresh notification was issued after that date, the properties in question did not vest in the Custodian of Enemy Property for India. The contention has no merit. The effect of the notification is not confined to the properties which were owned, held by or managed on behalf of Pakistan nationals on the date of the notification. It would equally apply to properties which came to be owned, held by or managed on behalf of Pakistan nationals at any time till the notification remained in force. It was not at all necessary to issue a fresh order under Rule 133-V in respect of each individual or property which came to be owned by a Pakistan national after September 10, 1965."

21. As regards the objection (d) reliance placed by Sri R.H. Zaidi is upon Section 9 of the Citizenship Act, 1955, which reads as follows : --

9. Termination of Citizenship. --(1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th Jan. 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

Provided that nothing in this sub-section shall apply to a citizen of India who,

during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

22. From these sub-sections read conjointly it is clear that the jurisdiction of the Central Government is attracted not only where any citizen of India is alleged to have acquired the citizenship of another country at any time between Jan. 26, 1950 to Dec. 31, 1955 (when the Citizenship Act, 1955 came into force), but also where the allegation is that the citizenship of another country has been acquired by such person at any time subsequent to Jan. 26, 1950. There is no doubt that the appeal in the present gives rise to the question whether Srimati Umme Laila, who was admittedly a citizen of this country on the commencement of the Constitution, acquired the citizenship of Pakistan subsequent thereto. The migration referred to in Article 7 of the Constitution relied by the appellant's learned counsel is one before the commencement of the Constitution on Jan. 26, 1950 (vide *State of Andhra Pradesh Vs. Abdul Khader*, . In *State of Uttar Pradesh and Others Vs. Shah Mohammed and Another*, , the Supreme Court specifically held that the language of Section 9(1) leaves no room for doubt that it would cover all cases where an Indian Citizen has acquired foreign nationality between Jan. 26, 1950 and its commencement "or where he acquires such nationality after its commencement." At page 1237 it was observed that the cases arising may be of three kinds: (1) Indian citizens who voluntarily acquired citizenship of a foreign State prior to the commencement of the Constitution; (2) Indian citizens who voluntarily acquired the citizenship of another State or country between Jan. 26, 1950 and Dec. 30, 1955 and (3) Indian citizens who voluntarily acquired foreign citizenship after the date of commencement of the Act, that is to say, Dec, 30, 1955. As regards the first category they are dealt with by Article 9 of the Constitution. It was held that the second and third category would be covered by the provisions of Section 9 of the Act. If a question arises as to whether, when or how an Indian citizen has acquired the citizenship of another country that has to be determined by the Central Government by virtue of the provisions of Sub-section (2) of Section 9 read with Rule 30 of the Citizenship Rules. This decision was referred to with approval by the Supreme Court recently in *State of U.P. Vs. Mohammad Din and Others*, . (See also *Izhar Ahmad Khan Vs. Union of India (UOI)*, ; *Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another*, . It is true that according to Rule 133-A(b) the expression "enemy" may mean even an individual resident in enemy country, but the provision in Rule 133-V(l)(b) is that the order made by the Central Government for vesting may be in respect of "such enemy property as may be prescribed." In the notification dated Sept. 10, 1965, the reference is to "all immovable property in India belonging to or held by or managed on behalf of all Pakistan nationals." This makes it necessary to ascertain if the person concerned to whom the

property belonged has status of being the Pakistan national because then alone the property that belonged to him may by virtue of the said notification be treated to vest in the Custodian of Enemy Property for India. Seervai in his Treatise on the Constitutional Law, Volume-I (Third Edition) at page 185 deals with the connotation of the expression "national". It is observed that the term "national" is frequently used as synonymous with "citizen". However, the former term has a broader significance than the latter, being applicable to all persons owing permanent allegiance to a State. Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen. (Oppenheim : International Law, Volume-I, 8th Edition, page 642). Therefore, the question whether Srimati Umme Laila, who was at the commencement of the Constitution a citizen of this country, acquired the citizenship of Pakistan has to be determined by the Central Government in accordance with Section 9(2), Citizenship Act/R. 30. The application of the notification dated September 10, 1965, is dependant on the finding recorded thereon.

23. As far objection (b) aforementioned, it would not be proper for the Court to make any observation on the point of assessment of evidence placed on the record relating to this aspect in view of what I have said above concerning the objection (d). Since the issue is yet to be determined by the Central Government, the assessment of evidence need not be gone into.

24. Before I close reference may be made to another contention raised by Sri Khan based upon Section 83, Code of Civil Procedure. The submission is that in view of this provision an alien enemy residing in a foreign country cannot sue in any Court otherwise competent to try the suit. Learned counsel cited AH Jan v. Abdul Jalil Khan AIR 1920 Lah 4 in which it was held that in the context of Section 83 an enemy means a person of whatever nationality, residing or carrying on business in the enemy country. The residence must of course be voluntary one. If a person resides in a hostile country for a substantial period of time he acquires the disability attaching to an enemy during that period. In that case, it may be noticed, the suit was brought during the war declared in Nov. 1914, between Great Britain and Turkey; In the instant case the suit instituted was on Sept. 6, 1968. The proclamation of Emergency had been revoked on Jan. 10, 1968. The period of six months thereafter had also expired at the time when the action was commenced. Thus the position of Srimati Umme Laila could not be classed as that of an alien enemy within the meaning of Section 83, CPC at the relevant time. A distinction along these lines has been drawn also in Sudhendu Nath Banerjee and Others Vs. Bhupati Charan Chakraborty and Others, . The suit was filed by the plaintiff in that case on Nov. 30, 1964. It was not in dispute that when the suit was filed, the plaintiff was in East Pakistan and at that time he was a Pakistan national. When the suit was filed, the plaintiff, it was observed, had his right to start the legal action. The suit could not abate due to the fact that subsequent to the institution thereof East Pakistan assumed the character of enemy territory. The Emergency proclaimed in 1971 in the present case also expired in 1977. The case for these reasons is not covered, in my view, under

the provision contained in Section 83 aforesaid.

25. Having regard to the discussion made in the above the appeal succeeds in part and is allowed accordingly. The judgment and decree of the lower appellate Court are set aside. The case is remanded to the lower appellate Court for decision afresh according to law and in the light of the observations made herein. The appellant shall be at liberty to move within one month the Central Government u/s 9(2) Citizenship Act, 1955/Rule 30 for adjudication on the question whether Srimati Umme Laila acquired the citizenship of Pakistan. The proceedings in the appeal before the lower appellate Court shall on this account remain stayed for six months from this date or such further time as the Court below may reasonably grant in this behalf to enable the decision of the Central Government being obtained. Upon the decision being arrived at by the Central Government, the lower appellate Court shall determine the effect thereof in the light of the notification dated Sept. 10, 1965, issued under Rule 133-V of the Defence of India Rules, 1962. It shall not be open to the parties to reagitate the issues settled herein. In the circumstances the costs incurred up to this stage shall be borne by the parties.