
(1962) 12 P&H CK 0012
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 205-D of 1958

Haji Ahmed Hasan

APPELLANT

Vs

Officer and Others

RESPONDENT

Date of Decision : 14-12-1962

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10, 17, 17(2), 17(3), 9
Constitution of India, 1950 — Article 226
Evacuee Interest (Separation) Act, 1951 — Section 6, 7, 8

Citation : AIR 1964 P&H 411

Hon'ble Judges : D.K. Mahajan, J

Bench : Single Bench

Advocate : M. Ahmad, for the Appellant; K.K. Raizada and B.C. Misra, for the Respondent

Judgement

D.K. Mahajan, J.—This petition under Article 226 of the Constitution is directed against the order of the Appellate Officer holding that 1/3rd share in the property in dispute being evacuee property can be separated.

2. The facts giving rise to this petition are as follows: One Mohammad Nabi Khan owned House No. 204/A-5 in Sarai Husaini Begum, Moradabad. He died before the partition of the country leaving two sons Baboo Khan and Ali Ahmed Khan and two daughters Sultana Begum and Shahjahah (sic) His son Ali Ahmed Khan was married to one Raisa Bano and from her he had two daughters Kakko and Aisha Begum. During his life-time a certain share in this house had been transferred by Muhammad Babi (Nabip) Khan to his daughters-in-law Raisa Bano The remaining property was inherited by the sons and the daughters according to Mohammedan Law Mst. Raisa Bano died and the property held by her was inherited by her daughters and husband Ali Ahmed Khan In this was Ali Ahmed Khan succeeded to a certain share in the house as the heir of Mst. Raisa Bano and as the heir of his father Mohammad Nabi Khan.

Haji Ahmed Hassan Petitioner filed a suit to recovery of a certain sum of money

against Ali Ahmed Khan. This suit was decreed ex parte on the 22nd of January, 1949. Haji Ahmed Hassan got the share of Ali Ahmed Khan in the house sold in execution of his decree and purchased the same in auction on the 13th December, 1949 and obtained the sale certificate. Thereafter it appears that Ali Ahmed Khan was declared evacuee on the 20th of April, 1952, by the Custodian. Haji Ahmed Hassan filed a suit No. 124 of 1952 for separate possession by partition of his share which he had purchased by auction in the house in dispute. In that suit he impleaded all the heirs of Mohammad Nabi Khan and Mst. Raisa Bano. He also impleaded the Custodian as representing the interest of the evacuees Mst. Aisha Begum and Mst. Kakko. Ali Ahmed Khan was also impleaded more or less as a proper party.

Objections were taken by the Custodian that the property in dispute was a composite property within the meaning of the Evacuee Interest (Separation) Act (No. 64 of 1951). This plea was up-held by the trial Court. On appeal the decision of the trial Court was reversed and the case was remanded for decision on the question of jurisdiction. It may be mentioned that the remand was made on the ground that issue of jurisdiction had not been correctly decided. After remand the trial Court held that the property was not a composite property and therefore the Civil Court had jurisdiction to try the suit. The suit was accordingly decreed and on final decree the Petitioner got possession of the share which on partition fell to him. Armed with the order of the Custodian holding Ali Ahmed Khan as evacuee the. Assistant Custodian, Moradabad, filed an application u/s 6 of the Evacuee Interest. (Separation) Act before the Competent Officer that 1/3rd share of Ali Ahmed Khan in the house be separated. To this application the Custodian made Baboo Khan, Mst Shahjahan Begum and Mst. Sultana Begum as parties. They filed claims to the extent of 3/4th. The competent Officer held that 1/3rd was the share of Ali Ahmed Khan and separated the same. This was thereafter transferred to Baboo Khan who sold it to Sant Lal. Respondent No 3

An application was made to the Competent Officer by the Petitioner on the 17th November. 1955, on the ground that he was the owner of the share of Ali Ahmed Khan in the house by virtue of the auction sale in his favour and the partition decree and the order holding 1/3rd share of Ali Ahmed Khan as composite property was passed be-Kind his back and was of no consequence His claim was that 1/3rd share of Ali Ahmed Khan was not composite property. This application was dismissed by the Competent Officer on the ground that by reasons of the declaration of the Custodian dated the 20th April, 1952, declaring Ali Ahmed Khan as evacuee the necessary consequence was that his share in the house became evacuee property and could be lawfully separated. For this conclusion reliance was placed on Section 8 proviso of the Evacuee Interest (Separation) Act for the proposition that the partition decree was passed ex-parte against Ali Ahmed Khan and, therefore. It was not binding on him. An appeal by the Petitioner against this order to the Appellate Officer was dismissed on the 30th of January, 1958. It is against these orders that the present petition is directed.

3. The contention of the Learned Counsel for the Petitioner is two-fold. He contends that the decision in the partition suit, to which the Custodian was a party, operates as res judicata and, therefore, it cannot be held that the property in dispute is composite properly. He further contends that, in any case, the auction sale is now immune from attack by virtue of the provision of Section 17(2) of the Administration of Evacuee Property Act, 1950, and it is of no material consequence that Ali Ahmed Khan is now declared as an evacuee on the 20th of April, 1952.

4. So far as the Respondents are concerned their reliance is mainly on Section 8 of the Evacuee Interest (Separation) Act and Section 17(1) of the Administration of Evacuee Property Act, For this reason it will be proper for facility of reference to quote both the provisions. Section 8 of the Evacuee Interest (Separation) Act is in these terms.

8. Decision by Competent Officer?

(1) On receipt of a statement of claim u/s 7, the competent officer shall, subject to the provisions of Sub-sections (2) and (3), hold an inquiry into the claim in accordance with the procedure laid down in Section 17 and pass an order determining the interest of the Evacuee and the claimant in the property in question and the order shall contain all or any of the following particulars, namely:

(a) the money value of the property;

(b) in any case where the evacuee and the claimant are co-sharers or partners, their respective shares in the property and the money value of such shares;

(c) in any case where the claim is made by a mortgagor, the amount due to the evacuee;

(d) in any case where the claim is made by a mortgagee, the amount due under the claim in accordance with the provisions of Section 9.

(2) Where the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950), has determined that the property in question or any interest therein is evacuee property, the decision of the Custodian shall be binding on the competent officer;

Provided that nothing contained in this sub-section shall debar the competent officer from determining the mortgage debt in respect of such property or any interest therein or from separating the interest of the evacuee from that of the claimant u/s 10

(3) If there is any dispute as to whether a liability is a mortgage debt or not or whether any claim submitted u/s 7 exists, the competent officer shall decide such dispute:

Provided that a decree of a Civil Court (other than an ex parte decree passed

after the 14th day of August, 1947) shall, subject to the provisions of Sections 9 and 10, be binding on the competent officer in respect of any matter which has been finally decided by such decree; and where any matter was decided by an ex- parte decree passed by a Civil Court after the 14th day of August, 1947, the competent officer may decide such matter afresh and on such decision being made, the ex parte decree shall be deemed to have no effect.

Section 17 of the Administration of Evacuee Property Act is as follows:

17. Exemption of Evacuee Property from processes of Court", etc.-

Save as otherwise expressly provided in this Act, no evacuee property which has vested or is deemed to have vested in the Custodian under the provisions of this Act shall, so long as it remains vested, be liable to be proceeded against in any manner whatsoever in execution of any decree or order of any Court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on such commencement and shall be deemed to be void.

(2) Where, after the 1st day of March, 1917, any evacuee property which has vested in the Custodian or is deemed to have vested in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any Court or other authority, the sale shall be set aside if an application in that behalf has been made by the Custodian to such Court or authority on or before the 17th day of October, 1950.

5. In my view it is not necessary to decide the first contention of the learned Counsel for the Petitioner, because on the second contention he has an unanswerable case. Section 17(1) of the Administration of Evacuee Property Act merely nullifies the effect of the decree, order, attachment or injunction or appointment of a receiver in respect of a property which is an evacuee property. Section 17(2), however, goes much further and deals with a case where the evacuee property has been sold in execution of a decree and it puts an embargo on the setting aside of that sale unless an application in that behalf has been made by the Custodian to such Court or authority on or before the 17th day of October, 1950. It is not disputed that the auction sale in this case had taken place in December, 1949. It is also not disputed that no application to set aside that sale was ever made. The only contention advanced by the learned Counsel for the Respondent is that as Ali Ahmed Khan was declared evacuee after the dead line fixed in Section 17(2), therefore, the provision of Section 17(2) will have no application to his case. This argument, however, is without substance it is far from the order of the Appellate Officer dated 30th of January 1950, that Ali Ahmed Khan had migrated to Pakistan much earlier and proceedings to declare him as an evacuee were initiated in 1951. It is nowhere alleged that Ali Ahmed Khan migrated after the 17th of October, 1950, the indications are that he had migrated long before this date. In view of the definitions of evacuee and

evacuee property in the Administration of Evacuee Property Act 1950 the property in question so far as Ali Ahmed's share is concerned was evacuee property and therefore it was incumbent on the Custodian to make an application u/s 17(2) in order to get rid of the sale held in execution of decree against Ali Ahmed Khan. Section 17(2) applies to all auction sales of evacuee properties held before the 17th of October, 1950, and the sale in question was so, held. - Therefore, the sale must stand and if the sale stands then the only conclusion that follows is that Ali Ahmed Khan had no right, title or interest in the property and, therefore, he was merely a proper party to the partition decree and not a necessary party and. therefore, the consideration that the decree against him was ex-parte and can be reopened by the Competent Officer under the proviso to Section of the Evacuee Interest (Separation) Act is futile.

6. For the reasons given above, I allow this petition and quash the order of the Appellate Officer and also that of the Competent Officer. However, f will make no order as to costs in this case.