
(1960) 03 MP CK 0017

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 97 of 1956

Mohammad Hussain

APPELLANT

Vs

S.S. Joshi, Asst. Custodian of Evacuee Property and Another

RESPONDENT

Date of Decision : 05-03-1960

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 7, 7A

Citation : AIR 1961 MP 30 : (1960) JLJ 819 : (1960) 5 MPLJ 1197

Hon'ble Judges : V.R. Newaskar, J

Bench : Single Bench

Advocate : M.A. Khan, for the Appellant; S.L. Dubey, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

V.R. Newaskar, J.

This is a petition under Article 226 of the Constitution for quashing the notice issued for declaring petitioner's brother Kurban Hussain as evacuee and his 1/5th interest in the house properties in Jaora as evacuee properties as also for quashing the order dated 8-2-1956 passed by the Assistant Custodian Evacuee Property consequent upon the notice aforesaid and that of the Custodian dated 17-9-1956.

Petitioner's case is that his brother Kurban Hussain had left for Rawalpindi long before 1-3-1947 after taking share of his property inherited by him from their father Abdul Hussain, that however the opponent Asstt. Custodian of Evacuee Property, Madhya Bharat, Indore after issuing notice dated 9-3-1955 u/s 7 of the Administration of Evacuee Property Act declared Houses No. 671 in Boharbakhhal and No. 1240 in Bazazkhana Jaora as evacuee property, by his order dated 8-2-1956, that thereupon the petitioner preferred appeal to the Custodian challenging the validity of such declaration but that the appeal was dismissed on 17-9-1956.

The petitioner seeks to assail the afore-said notice dated 9-3-1955 as well as orders dated 8-2-1956 and 17-9-1956 on the following grounds:

- (1) Mr. S. S. Joshi who acted as Asstt. Custodian was not duly appointed.
- (2) No notice could have been issued by the Asstt. Custodian on 9-3-1955 in view of the provisions of Administration of Evacuee Property Amendment Act No. 42 of 1954.
- (3) No declaration could have been made on any ground except those mentioned in Section 7A after 7-5-1954.

As regards grounds Nos. 1 and 2 Mr. Khan the learned counsel for the petitioner did not press these grounds in view of the decisions of this court in Civil Miscellaneous Petition No. 40 of 1956 and other cases.

The only ground pressed is ground No. 3. As regards this ground, the learned Custodian in his appellate decision observed:

"My attention has been drawn to Article 7(a) and it has been argued that as Kurban Hussain had not left India on or after the 1st date of March, 1947 his property could not be declared to be evacuee property.

It has been argued that Kurban Hussain's case is covered by Section 2(d)(ii) of the Administration of Evacuee Property Act, 1950, but the same having been deleted by virtue of amendment Act, 1954, it was illegal to declare his property to be evacuee property.

To my mind this construction does not stand to reason. Firstly I have not been shown any enactment withdrawing from the scope of the definition of "evacuee" any person, who is covered by Section 2(d)(ii).

Secondly, explanation I of Section 4 of Act No. 42. of 1954 clearly expounds that a person shall be deemed to have been resident in Pakistan on the 7th day of May 1954, within the meaning of Clause (b) of the first proviso if he was ordinarily residing in Pakistan before that date. This would clearly bring the case of Kurban Hussain within the pale of Administration of Evacuee Property Act."

It is clear from the terms of Section 7-A, which contains a non-obstante clause and overrides "anything contained in the Act" to the contrary, that no property can be declared as evacuee property after 7-5-1954 except in two cases, one being where the proceedings are pending for declaring any such property as evacuee property and the other, where a person has left India for Pakistan subsequent to 1-3-1947 on account of setting up of Dominions of India and Pakistan or on account of disturbances or the fear of disturbances. No case was pending against the evacuee Kurban Hussain on 7-5-1954 and the only possible ground for issuing notice u/s 7 of the Act against him is that referred to in the second case. Now the question which really called for consideration before the Custodian was whether Kurban Hussain had left India for Pakistan after 1-3-47 on account of the setting up Dominions of India and Pakistan or on account of

civil disturbances or fear of such disturbances.

The leaving India should no doubt have been for permanent stay or residence as held by the Supreme Court in *The State of Bihar Vs. Kumar Amar Singh and Others*, and any change of domicile is not required. The portion of the finding of the Custodian, quoted above, indicates that he was prepared to assume the fact that Kurban Hussain had been living in the territory now forming part of Pakistan since prior to 1-3-1947 and such living of his though it might not involve change of domicile, was of somewhat permanent character. The Custodian however felt that by that circumstance alone he could not have lost his rights in his father's property. He also seems to have assumed that declaration u/s 7 could be made for his being an evacuee under Clause 2(d) (ii).

This approach of the learned Custodian is obviously erroneous. The question was not whether he had lost his right in his father's estate or not. It was whether any ground other than one indicated in Section 7A of the Administration of Evacuee Property Act could justify the Asstt Custodian to start proceedings u/s 7 on 9-3-1955 i.e. after 7-5-54. Obviously on his finding that could not have been done, as the ground referred to in Section 2(d)(ii) or (iii) of the Administration of Evacuee Property Act became unavailable after 7-5-1954. For these reasons the notice dated 9-3-1955 and subsequent action of declaration by the Asstt. Custodian on 8-2-1956. as also the confirmation of that action by the Custodian in appeal by his order dated 17-9-1956 are all without jurisdiction and void,

It is contended on behalf of the opponents that the petitioner has no right to challenge the propriety of such declaration. But this contention has no substance as the petitioner has been required by notice to show cause. He was one of the persons in possession as a co-owner. He has a right to show cause why the proposed action should not be taken. He had done so but his objection to the proposed declaration was turned down by both the authorities and particularly by the appellate authority on the ground which is not legally tenable and Kurban Hussain was declared evacuee and his interest in the two items of property as evacuee property.

On the facts found or assumed to exist the action was without jurisdiction.

The petition is therefore allowed and the notice dated 9-3-1955 and the orders dated 8-2-1956 and 17-9-1956 are hereby quashed. The petitioner is entitled to his costs from the opponents. Counsel's fees shall be taxed at Rs. 50/-.