

(1971) 03 DEL CK 0004

In the Delhi High Court

Case No : Civil Writ Appeal No. 12D of 1962

Om Parkash and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-03-1971

Acts Referred:

Citation : (1971) ILR Delhi 780

Hon'ble Judges : S.N. Shankar, J

Bench : Single Bench

Advocate : S.N. Chopra, S.S. Chadha, R.K. Upadhaya and B. Dayal, for the Appellant;

Judgement

S.N. Shankar, J.

(1) By this petition under Art. 226 of the Constitution, the petitioners have prayed that the orders dated August 9, 1961 and December 6, 1961, passed by the Deputy Cus

(2) The dispute related to a property situated in Aligarh. Sometimes in April, 1908 it was purchased by one Shri Ram and two other persons, Mohammad Ahmad and Sayaid Hussain (hereafter referred as "the Muslim owners"). Shri Ram had one-half share and the other half belonged jointly to Mohammad Ahmad and Sayaid Hussain. Shri Ram died leaving a son Balram. On January 6, 1925, the property was partitioned between Balram and the Muslim owners. After the partition, the Muslim owners constituted a Wakf-ul-Aulad in respect of the portion of the property that fell to their share by a deed of Wakf dated. May 6, 1925 registered on May 7, 1925. The Wakf property has been referred to in the petition and in the various orders of the Department as "Jamaji-ka-pech" and this property alone is the subject matter of this petition. The share of Balram was later purchased by the petitioners but nothing turns on that in this petition.

(3) The deed of Wakf appointed "mutawallis" and also named the beneficiaries entitled to receive shares from the income of the Wakf property. After the

partition of the country, their "mutawallis" appointed under the deed as well as most of the beneficiaries named therein migrated to Pakistan. The Wakf property, Therefore, vested in the Custodian under provisions of Sec. 11 of the Administration of Evacuee Property Act, 1950 (hereafter called "the Act"). After obtaining the sanction of Shri H. C. Asthana, Deputy Custodian General, U.P. Lucknow. acting as Custodian General in pursuance of the powers delegated to him, by deed of sale dated February 8, 1960, the Wakf property was sold by the Custodian, U.P. in favor of the petitioners for Rs. 57004.80. By the impugned orders, the Deputy Custodian General has set-aside this sale. The petitioners have, Therefore, come up with this petition with the above prayers.

(4) Respondents I to 3 have not appeared to contest the petition. The Departmental files are also not available. The brief summary of relevant facts as they emerge from the copies of orders filed by the petitioners is, Therefore, set out to facilitate the decision of this petition.

(5) After the sale of the property in favor of the petitioners, Udey Singh Jain Girls Inter College and Paras Ram Sachdev of Mahabir Dall Mill, above-referred, respondents filed revisions questioning the sale. They were tenants in occupation of different parts of the Wakf property. Their contention was that the property had been under-valued while fixing the sale price and that the Department itself had originally valued it at Rs. 71,000 and they were prepared to pay this price. They also said that prior to the sale in favor of the petitioners they had offered to purchase portions of the property in their respective occupations. from the Custodian but they were informed by the Department at that time that the property was Wakf property and could not be sold. Shri H. C. Asthana, Deputy Custodian General who had given permission for the sale of this property, dealing with these revisions in his order dated July 15, 1960 (Annexure P. 6) recorded that these facts had not been brought to his notice when his permission for the sale of this property was obtained. He also observed in this order that at that stage, the petitioners had claimed the transfer of the property on the basis of an agreement entered by them with the Wakifs but whereas the Wakifs in the deed of Wakf were two, the agreement of the petitioners was with one of them only and this fact was also kept back from him. At the time when the permission of Shri Asthana for the sale of this property was obtained, consent of the two non-evacuee beneficiaries for the sale was put up to him and on the basis of this consent he granted the permission.

(6) He has said in the order that in addition to the two non evacuee beneficiaries who had given their consent there were other non-evacuee beneficiaries and an institution by the name of Dar-ul-Alam was also entitled to charity in terms of the deed of Wakf. As for the price at which the property was sold, the order stated that the reserve price of the property fixed by the Department was in fact Rs. 71,256.00 but it had been reduced by 20 per cent on the recommendation of the Managing Officer and on his statement that there were no other offers for this amount. It is clear from the order that Shri Asthana, in these circumstances,

was inclined to set aside the sale but it appears that he had no other firm offer in hand except that the institution Dar-ul-Alam was stating that they would be prepared to purchase the property for Rs. 71,000.00. He Therefore, observed as under:

"Before any step for the cancellation or setting aside of the sale in favor of the opposite party is taken, it is necessary to have a genuine offer before me. The case of Darul Ulum has some force because he can be considered to be a beneficiary and he should have the preference. If Darul Ulum who has now also put in an application in this case deposits Rs. 75,000.00 within one month, the matter shall be considered. The opposite party is directed not to make any constructions and if he does, he shall do at his own risk."

(7) The matter then came up before him again on August 22, 1960. At this stage, Paras Ram Sachdev and Manager, Udey Singh Jain Girls Inter College put in applications complaining that certain properties belonging to them had been wrongly included in the sale-deed executed by the Department in favor of the petitioners. At this stage, Daru-ul-Alam who had made the offer to purchase the property withdrew their offer. The Deputy Custodian General, in terms of his order dated August 22, 1960 (Annexure P. 7) dismissed the revisions as well as the miscellaneous applications filed before him.

(8) It appears that, thereafter, applications were filed before him that the constructions worth thousands of rupees had been raised on the lands comprised in the sale-deed by the tenants with the consent of the Custodian and the permission of "mutawalli", and the constructions so raised should not be the subject matter of sale by the Custodian. By order dated November 21, 1960 (Annexure P. 9) the Deputy Custodian General held that this was a matter that needed enquiry as to the cost of the construction and also as to whether the consent of the Custodian or the permission of the "mutawalli" as alleged had been obtained by the applicants. The Assistant Custodian (Judicial) was directed to make his report on these points. After receipt of the report, he then took up the matter in suo-moto revision. By order dated May 2, 1961 (Annexure P. 10), after setting out the previous history of the case, he held that the sale-deed executed in favor of the petitioners did "include property or materials" which did not belong to the evacuee beneficiaries, and that the sale deed was also "very defective" and deserved to be set-aside. He, however, hesitated to pass the order of cancellation himself because he thought that the Custodian had accorded sanction to the sale and it was proper that the Custodian General/Joint-Secretary may now take the necessary decision. The matter was thus sent by him to the Custodian General but with a firm recommendation that the sale in favor of the petitioners may be set aside.

(9) The matter then came up before the Deputy Custodian General of India, Shri Y. L. Taneja, By order dated August 9, 1961, Annexure P. 11, he in substance said that the "mutawalli" had migrated to Pakistan and, Therefore, all that vested in the Custodian were the rights of the "mutawalli". He further said that

as some of the beneficiaries had also migrated to Pakistan their rights and interests had also vested in the Custodian but both these vestings he held, gave no power to the Custodian to sell the Wakf property with its corpus. It appears from the order that it was urged at the hearing that the sale had been made after obtaining prior permission of the Custodian General and this made a difference. There appeared to be no material for the decision of the factual aspect of the assertion so made. He, Therefore, adjourned the the matter to enable the petitioners to give full and complete particulars of file or files that they wished the Department to produce in support of this assertion. When the matter thereafter came up before him, by his order dated December 6, 1961, Annexure P. 12, he agreed with the petitioners that the sale had been made with the prior permission of the Custodian General, U.P. but held that the Custodian General could only grant permission for the sale of property which was evacuee property and what was not evacuee property could not be sold inspire of the permission.

(10) I have set out the above facts because, as stated earlier, the original files of the Department are not available and unfortunately copies of the orders produced are also not too, clear. The controversy has to be decided in this background.

(11) Shri S. N. Chopra, the learned counsel appearing for the petitioners, has raised the following contentions :

(1)That Shri Y. L. Taneja, being a Deputy Custodian General, had no jurisdiction to hear the revision and set aside the sale. (2) That the impugned orders suffered from apparent errors which vitiated them. (3) That there was no justification for a suo-moto revision and in any case the sale already completed in favor of the petitioners could not be set a side.

re : First Contention :

(12) Section 27 of the Act authorises the Custodian General, on his own motion, to call for the record of any proceeding in which any Custodian had passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and further authorises him to pass such order in relation thereto as he thinks fit. Sub-section (3) of Section 55 of the Act has conferred powers on the Custodian General of India to delegate all or any of his powers under the Act to any Deputy or Assistant Custodian General. By notification dated July 18, 1960, S.O. 1877, in exercise of the powers conferred on him by sub-section (3) of Sec. 55, the Custodian General delegated all powers vested in him under the Act to Shri Y. L. Taneja, Deputy Custodian General with effect from April 1, 1960. Shri Taneja, Therefore, on the dates he passed the impugned orders had full jurisdiction to exercise the powers of the Custodian General u/s 27 of the Act. There is, Therefore, no merit in the submission that Shri Taneja had no jurisdiction to pass the impugned orders in suo-moto revision. re: Second CONTENTION:

(13) I see no error in the impugned orders. It is admitted by the petitioners that the property covered by the sale-deed was Wakf-ul-aulad. Under provisions of the Mussalman Wakf Validating Act, 1913 (Act VI of 1913) such a Wakf is valid and is recognised by law. Under the Mahomedan Law, the moment a Wakf is created, all rights of property pass out of the Wakif and vest in the Almighty. The "mutawalli" constituted by the Wakf has no right in the property belonging to the Wakf. The property is not vested in him and he is not even a trustee in the technical sense. He is a mere Superintendent or Manager. (Sec. Principles of Mahomedan Law, Sixteenth Edition, by Mulla, page 198). The office of the "Mutawalli" is not even hereditary by itself and the "mutawalli" has no power without the permission of the Court to mortgage, sell or exchange the Wakf property unless he is expressly empowered by the deed of Wakf to do so. (Para 207 of the Principles of Mahomedan Law, Sixteenth Edition by Mulla). When the "mutawalli" of the trust in question, Therefore, migrated to Pakistan it is only the rights that he had in respect of the property that vested in the Custodian. Likewise, when some of the beneficiaries named in the trust migrated to Pakistan it is only the rights of those beneficiaries in terms of S. 11(2)(b) of the Act that vested in the Custodian, Nothing was brought to my notice to show that the evacuee "mutawalli" in this case had the authority to sell the corpus of the trust property. No power to sell the corpus of the Wakf property, Therefore, came to vest in the Custodian. The sale effected by him, Therefore, was wholly without jurisdiction. This is what Shri Y. L. Taneja has in effect held.

(14) Shri Chopra urged that under the provisions of Sec. 10(2)(c), the Custodian had the power to transfer any evacuee property whatsoever notwithstanding anything to the contrary contained in any law or agreement relating thereto and when after the migration of the "mutawalli" and some of the beneficiaries in this case the trust property vested in the Custodian he had full rights by virtue of this: clause to transfer the property in favor of the petitioners. The submission cannot be accepted. Clause (c) of sub-section (2) of Sec. 10 authorises the Custodian to transfer only "evacuee property" i.e. the property to the extent it had become evacuee property. If an evacuee held a property subject to certain limitations and restrictions, the Custodian continued to hold the property after it vested in him subject to the same limitations and restrictions. He acquired no better or superior title to the property. Clause (c) Sec. 10(2) was thus only an enabling provision. It did not empower the Custodian to do something which he could not otherwise do. This provision, Therefore, does not help the petitioners to clothe the Custodian with the authority to sell if he did not have it otherwise. This is borne out by the special provisions made by the Legislature in the case of trust properties in Section 11 of the Act.

(15) Section 11(1) provides that where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature!, it shall b& lawful for the Central Government, notwithstanding anything contained in the instrument of trust or any law for the time being in force, to appoint, by general or special order, new trustees in place of the

evacuee trustees and the property shall remain vested in the Custodian only until such time as the new trustees are so appointed; and pending the appointment of such new trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling ,as far as possible, the purpose of the trust. This unmistakably shows that the mere vesting of the property in the Custodian was not intended by the Legislature to be the extinguishment of the trust and that the trust was to continue inspire of the vesting in the Custodian. The same is the position in regard to sub-section (2) of Sec. 11 which speaks specifically of "Wakf-alal-aulad". Clause (a) of this sub-section lays down that where the "mutawalli" becomes an evacuee, the property forming the subject matter of the Wakf shall vest in the Custodian but subject to the rights of the beneficiaries under the Wakf who are not evacuees. Sub-clause (b) then provides for the case when some of the beneficiaries alone migrate to Pakistan and lays down that the rights and interests of such of the beneficiaries alone as are evacuees shall vest in the Custodian. No provision in the Act or any other authority of law was brought to my notice to show that after the vesting in the Custodian the trust property lost its character as such so that the Custodian could deal with it as an owner like any other property.

(16) The learned counsel then pointed out that the non-evacuee beneficiaries had agreed to the sale in question in favor of the petitioners and, Therefore, the sale should not have been set-aside. According to copies of the documents filed by the petitioners, it appears to be. correct that the non-evacuee beneficiaries, Tufail Ahmad and Zahida Begam vide their letter, Annexure P. 3, had given their consent to the Custodian to sell the property to the, petitioners for Rs. 57004.80; but their consent does not confer any right or authority on the Custodian to sell the property if he does not have it otherwise, specially when it is on record that there are other non-evacuee beneficiaries who were never a party to the sale. In fact, in such a case the question of consent of the beneficiaries does not at all arise. re : Third Contention :

(17) There is no substance in the grievance that there was no occasion for the Custodian General to cancel the sale. As stated earlier, the Deputy Custodian General in his order dated May 2, 1961, Annexure P. 10, after a consideration of all the facts had come to the conclusion that there had been serious irregularities both in the matter of fixing the sale price of the property as well as in obtaining his permission to sell the property. In this order (Annexure P. 10) he made a positive recommendation that the sale of the property in favor of the petitioners deserved to be set-aside. The Deputy Custodian General of India, in these circumstances, was justified to take up the matter. Besides, Sec. 227 of the Act even otherwise empowered him to look into the matter.

(18) This leaves me with the last grievance of the learned counsel for the petitioners that the Deputy Custodian General was not competent to set aside the sale after the sale deed had been executed. No authority was cited in support of this submission and I do not see why in a case like the present one where the

Custodian had executed the deed of sale in respect of the trust property which he had no right in law to sell, the Custodian General could not invoke his inherent powers of suo-moto revision. The fact that the sale deed had been executed was no bar to the exercise of this jurisdiction of the Custodian General. Reference in this connection may be made to the full Bench decision of the Punjab High Court in *Shrimati Balwant Kaur v. Chief Settlement Commissioner, (Lands)*, 1963 Plr 1141 where it was held that the order of transfer could be reversed by the Chief Settlement Commissioner even where "sanad" had been granted and the sale deed had been executed.

(19) For reasons aforesaid, I see no merit in this petition. The same is, Therefore, dismissed but in the circumstances of this case the parties are left to bear their own costs.