
(1974) 12 MAD CK 0014
In the Madras High Court

Rabia Bai

APPELLANT

Vs

The Custodian of Evacuee Property and Others

RESPONDENT

Date of Decision : 13-12-1974

Acts Referred:

Administration of Evacuee Property (Central) Rules, 1950 — Rule 22

Citation : (1975) ILR (Mad) 19 : (1975) 88 LW 539 : (1975) 2 MLJ 138

Hon'ble Judges : S. Natarajan, J

Bench : Division Bench

Judgement

S. Natarajan, J.—These appeals arise out of Writ Petitions Nos. 1259 of 1971 and 1260 of 1971 respectively, wherein the petitioner-appellant sought writs, one of certiorari to quash the orders of the first respondent relating to the transfer of certain cash balances belonging to an evacuee by name Abdul Gani Jan Mohamed and the notification of the second respondent in connection there- with and the other, a writ of mandamus to direct the first respondent to recall the moneys of the said evacuee and the sale proceeds of his property from the second respondent and return a sum of Rs. 2,40,000 with interest thereon. Hamaprasada Rao, J., declined to grant either of the writs, though he held that the petitioner was entitled to the money claimed by her from out of funds, if any, possessed by the Custodian and her right to secure a refund still survived.

2. This unfortunate case has a long history, but most of the facts are not in controversy. On 29th April, 1949, the appellant, a permanent citizen of India, purchased an item of property, to wit Gani Market situate at No. 20, Godown Street, Madras-1, for a sum of Rs. 2,40,000. Admittedly, the property belonged to one Abdul Gani Jan Mohamed who had left for Pakistan soon after partition and the sale transaction was negotiated through his power of attorney agent. Some delay was encountered in the registration of the sale deed in connection with the production of Income Tax clearance certificate of the vendor. But, ultimately, the sale deed was registered on 11th August, 1949. Ordinance XII of 1949 was promulgated on 13th June, 1949 and it was extended to Madras on

23rd August, 1949. Ordinance XII of 1949 was repealed by Ordinance XXVII of 1949 which, in turn, was repealed by the Administration of Evacuee Property Act (Central Act XXXI of 1950). As may be seen from the facts above, the sale deed Was registered even before Ordinance XII of 1949 was extended to Madras. Notwithstanding this feature, the sale required confirmation by the Custodian of Evacuee Property u/s 40, as Act XXXI of 1950 had retrospective effect. An application by the appellant to the Assistant Custodian for confirmation was rejected and further agitations to the appellate and revisional authorities were equally unsuccessful. Lastly, the appellant resorted to the Supreme Court in appeal, but in *Rabia Bai Vs. The Custodian-general of Evacuee Property*, , the Supreme Court declined to interfere, stating that want of good faith in the vendor was, by itself, sufficient to refuse confirmation of sale.

3. Even during the pendency of her appeal before the Supreme Court, the appellant, by way of abundant caution, had recourse to Rule 22 of the Administration of Evacuee Property (Central) Rules, 1950 (hereinafter referred to the Rules) for registration of her claim for the return of the sale consideration of Rs. 2,40,000 and the claim was registered by the Assistant Custodian on 1st October, 1954. After the dismissal of the appeal by the Supreme Court, the appellant reiterated her claim for refund, but was sent a reply dated 1st August, 1966 that Rule 22 of the Rules had been deleted by Act XCI of 1956 and consequently, no claim by a third party was sustainable.

4. The appellant then filed Writ Petition No. 1901 of 1968 before this Court praying for a direction to the respondents to return to her the sale amount together with interest. During the pendency of the writ petition, the appellant, placing reliance on *Raja Bhanupratap Singh Vs. Assistant Custodian Evacuee Property U.P.*, , made attempts before the respondents, to have her claim considered u/s 10 (1) read with Sections 10 (2) and 10 (2) (n) of Act XXXI of 1950 and Rule 22 of the Rules. But they were all of no avail. Finding that the respondents were projecting a new plea to refuse refund to her, viz., that on account of the proceedings under Act XLIV of 1954, the first respondent was not possessed of funds from out of which he could make the refund, the appellant felt that the ground of attack in her writ petition should be widened so as to assail the orders passed under Act XLIV of 1954 and therefore, withdrew Writ Petition No. 1901 of 1968 and came forward with the two writ petitions under appeal.

5. Before Ramaprasada Rao, J., it was contended on behalf of the appellant that after the vesting of the property as evacuee property with the Government, the Custodian had collected appreciable rents and profits arising from the Market for a considerable length of time and had, furthermore, sold the property on 18th January, 1962 for a sum of Rs. 3,10,000 and consequently, the alleged transfer of funds by the Custodian to the Compensation Pool created under Act XLIV of 1954, without an appropriate order from Government u/s 14 (1) (b) of Act XLIV of 1954 and without making provision for the payment of the appellant's claim

for refund which had been registered earlier, was invalid and the order of the Custodian in that behalf should be removed by a writ of certiorari. Pausing here, for a moment, it may be mentioned that the Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) was enacted to provide for the payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. Section 14 therein enunciated the constitution of a Compensation Pool for the purpose of payment of compensation and rehabilitation grants to displaced persons and Sub-section (1) (b) provided that cash balances lying with the Custodian may, by order of the Central Government, be transferred to the Compensation Pool. It is with reference to this provision, the respondents contended that the cash balances relating to the vendor of the appellant under the impugned sale of the evacuee property had been transferred to the Compensation Pool. Ramaprasada Rao, J., took the view that, having regard to the scheme of Act XLIV of 1954 and the reflection therein of the policy of the Government to rehabilitate displaced persons and the factual materials placed by the respondents to prove the transfer of the cash balances with the Custodian to the Compensation Pool, it was not open to the appellant to assail the transfer of funds or any orders passed in that behalf and, therefore, the appellant was not entitled to the writ of certiorari sought for. He further held that if no writ of certiorari lies, no writ of mandamus would also lie. In that view, he dismissed both the writ petitions. But, as already stated, he upheld the appellant's claim for refund of the sale price and observed that the appellant was, and still continued to be, entitled to get money from and out of the funds that may subsequently come into the hands of the Custodian.

6. Before advertng to the argument of Mr. V. K. Thiruvengkatachari, learned Counsel for the appellant, it may be pointed out that though, at one time, the respondents disputed the appellant's right to seek refund of money on. two grounds, viz., (1) deletion of Rule 22 by Act XCI of 1956 and (2) transfer of funds from the Custodian to the Compensation Pool, the first of the pleas was not pressed into service in meeting the appellant's case in the writ petitions under appeal. Presumably, this change of attitude was as a result of the decision of the Supreme Court in Raja Bhanupratap Singh Vs. Assistant Custodian Evacuee Property U.P., . Therein, the Supreme Court held that the words used in Section 10 (2) (n) of Act XXXI of 1950, empowering the Custodian to pay to "any other person" any sums of money out of the-funds in his possession, are not restricted to persons who are members of the family of the evacuee and that other persons who are entitled to receive money from the evacuee are also included. It further held that power to pay the debts was derived both under Clauses (m) and (n) of Section 10 (2) and therefore, the -deletion of the provision which authorised the Custodian to pay debts due by the evacuee to any person, from Clause (m) and of Rule 22 setting up the machinery for registration of debts, did not affect the power which is conferred by Clause (n) of Sub-section (2) and also by Sub-section (1) of Section 10. To appreciate the case of the appellant, it is necessary to make reference to Rule 22 of the Administration, of Evacuee Property

(Central) Rules albeit its deletion by Act XCI of 1956, as it was under that Rule the appellant's claim for refund was originally registered by the .Assistant Custodian. The relevant portion of Rule 22 is as follows:

Rule 22--Claims by third parties:

(1) Any person claiming the right to receive any payment from any evacuee or from the property of such evacuee, whether in repayment of any loan advanced or otherwise, may present petition to the Custodian for registration of his claim....

Explanation.--An application under this sub-rule shall lie in respect of a claim for refund of money paid as consideration for the transfer by an evacuee of any property, where such transfer is not confirmed by the Custodian u/s 40 of the Act.

(2) (a) ...

(i) ...

(ii)...

(iii) ...

(iv) ...

(b) Where such claim is of the nature referred to in the "Explanation" to Sub-rule (1) and the Custodian holds that the transfer of the property in respect of which the claim is made was a bona fide transaction, the Custodian may register the claim or such part thereof as has not been satisfied:

Provided that, in the case of a claim of the nature referred to in the Explanation to Sub-rule (1), the claim shall be registered only for that amount of money which is proved to have been paid as consideration for the transfer of the property.

(2-A)

(3) The mere registration of a claim shall not entitle the claimant to payment and the Custodian may for reasons to be recorded refuse payment....

7. It was to this Rule the appellant resorted to have her claim for refund duly registered, and the Assistant Custodian, to whom the application was made, did register the claim on 1st October, 1954. It was long thereafter, the Custodian transferred the funds relating to the evacuee property to the Compensation Pool. Mr. V.K. Thiruvengkatachari's contention was that the object of the Government in enacting Act XXXI of 1950 and Act XLIV of 1954, and the scheme of the Acts themselves was not to deprive legitimate claimants getting back money due to them from an evacuee. In projecting this argument, he not only pointed out the provisions contained in Clauses (m) and (n) of Section 10 (2) of Act XXXI of 1950, but also the framing of Rule 22 under the Rules, and, in particular, the Explanation to Sub-rule (1) of the said Rule, which conferred a right on the vendee of a property from an evacuee to seek refund of money paid as

consideration if the transfer was not confirmed by the Custodian. He further argued that the deletion of Rule 22 by Act XCI of 1956 cannot have any impact over the situation since the claim had already been registered and, though the registration of the claim would not per se confer any right on an applicant to demand refund, yet an applicant, whose claim had been registered, ought not to be left in the lurch by a naive plea that the Custodian had subsequently transferred the funds to the Compensation. Pool and therefore the refund could not be made. To lay stress on his contention that the registration of the claim for refund by the Assistant Custodian was an act binding on the Government, the learned Counsel made reference to the decision in *Secretary of State for India in Council v. Kasturi Reddi* ILR (1903) Mad. 268 : (1903) 12 M.L.J. 453, Therein, this Court held that a grant of land made by an officer was binding on the Crown if the officer was an agent generally or specially appointed by the Governor-in-Council in that behalf and such grant would have the same force as if it had been done by the Governor-in-Council himself. Yet another decision relied on by Mr. Thiruvengkatachari is *Bank Voor Handel v. Hungarian Admmr.* (1954) 1 All E.R. 969, wherein it was held that profits earned by the Custodian of enemy property in the course of his dealings with the properties of an enemy vested with him under the Trading with the Enemy Act, 1939 and the Trading with the Enemy (Custodian) Order, 1939 would not attract the incidence of Income Tax. The Law Lords held that the Custodian Was a servant of the Crown and received the income in the course of his duties and therefore, thee income was immune from tax. The last contention of Mr. Thiruvengkatachari was that, in any event, as pointed out by the Supreme Court in *Raja Bhanupratap Singh Vs. Assistant Custodian Evacuee Property U.P.,* , the deletion of Rule 22 cannot have the effect of absolving the Government of its duty to refund the purchase-money paid by a vendee when the sale transaction was subsequently refused confirmation by the Custodian.

8. On a consideration of the matter, we are clearly of the opinion that the contention of Mr. Thiruvengkatachari is well founded. The power given to the Custodian under Sections 7 to 9 of Act XXXI of 1950 to notify a property as evacuee property and to have the property vested in himself and take possession thereof, is one coupled with duties, one among which is the obligation created u/s 10 (2) (n) to pay any person the sums of money he is found entitled to by the Custodian, out of the funds in his possession. Admittedly, the payment of a sum of Rs. 2,40,000 by the appellant to the evacuee in pursuance of the infructuous sale is not denied or refuted by the respondents. The payment is also not vitiated in any manner as the sale was refused confirmation, not because of want of bona fides in the transferee, but on account of want of bona fides in the transferor. The respondents, are, therefore, under a statutory obligation to refund to the appellant the sale price paid by her.

9. On behalf of the respondents, however, Mr. K. Parasaran argued that the refund of money to the appellant is irretrievably linked with the availability of funds with the Custodian and as, in the instant case, all the available funds, with

the Custodian had been transferred" to the Compensation Pool the respondent cannot be compelled to pay the money to the appellant. In support of this argument, Mr. Parasaran pointed out the words "out of the funds in his possession" occurring in Section 10 (2) (1). Even, with regard to Raja Bhanupratap Singh Vs. Assistant Custodian Evacuee Property U.P., , Mr. Parasaran sought to make a distinction by contending that the direction given to the Custodian was "to settle the claim of the applicant from out of the funds in his possession" and therefore, any direction by the Court to the Custodian for refund of money to a claimant cannot be delinked from the possession of funds by the Custodian. We are clearly unable to appreciate the contention of Mr. Parasaran and sustain the restriction sought to be placed by him upon the right of a lawful claimant not to get refund from the Custodian. The occurrence of the words, "out of the funds in his possession" in Section 10 (2) (1) can only mean the availability of the funds of that particular evacuee against whom or against whose property the applicant for refund has a claim. Even Act XLIV of 1954 which conceived and provided the setting up of a Compensation Pool; did not contemplate transfer of funds in entirety by the Custodian to the Pool irrespective of claims laid against an evacuee or his property. The words used in Section 14 (1) (b) are "such cash balances", and not the total cash or the cash in its entirety. The word, "balance" has a distinct connotation and is always understood as the difference between the debit and credit side of an account or their remainder or the difference- between the amount which two parties owe each other. As a matter of fact, the communication under which the Custodian took umbrage for transferring the funds of the evacuee to the Compensation Pool, made reference to the transfer of only the surplus balances to the Deputy Accountant General, New Delhi. It is significant to note that what could be transferred consequent upon the abolition of the personal deposit account of Custodian to the Compensation Pool can only be surplus funds, and not the funds in their entirety. The word, "surplus" undoubtedly means, that which is left over or remainder of excess over what is required. The Custodian, therefore, had neither the power nor the authority to transfer the entirety of the funds to the Compensation Pool. What can be transferred to the Compensation Pool can only be the remainder or the balance or the surplus, that is, after the Custodian discharges his obligations to claimants who are legitimately entitled to sums of money from the fund or assets of an evacuee. A fortiori it follows that the third respondent was not entitled to direct the Custodian to transfer the entirety of the funds relating to the property of the evacuee, Abdul Gani Jan Mohamed without paying the appellant the sum of money she is entitled to. In such circumstances, we are unable to share the view of Ramaprasada Rao, J., that, for want of funds in the hands of the Custodian, the appellant, though entitled to get a refund of her money, should, for the present, be satisfied with a declaration of her entitlement to the claim and await the collection or accumulation of funds by the Custodian in future.

10. In the view, we have taken, of the matter, it is unnecessary to issue a writ of

certiorari and quash the orders and notifications impugned in Writ Petition No. 1259 of 1971. The claim of the appellant can be effectively met by issuing a writ of mandamus directing the first respondent to refund the sum of Rs. 2,40,000 the appellant is entitled to consequent on the Custodian's refusal to confirm the sale in her favour and to further direct the third respondent to place at the disposal of the first respondent the said sum for the purpose of. refund. Time for payment three months.

11. In the result, Writ Appeal No. 101 of 1973 will stand allowed with costs. Counsel's fee Rs. 250. Writ Appeal No. No. 68 of 1973 will stand dismissed,, without costs.