

(1960) 07 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 57-D of 1958

Ram Das T. Chugani

APPELLANT

Vs

Custodian General of Evacuee Property, India and Another

RESPONDENT

Date of Decision : 25-07-1960

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 24
Constitution of India, 1950 — Article 226

Citation : AIR 1961 P&H 366

Hon'ble Judges : Shamsheer Bahadur, J; I.D. Dua, J

Bench : Division Bench

Advocate : Bhagwat Dayal and Yogeshwar Dayal, for the Appellant; R.S. Narula and Dina Nath Bhasin, for the Respondent

Final Decision : Allowed

Judgement

Dua, J.—This Letters Patent Appeal is directed against an order of a learned Single Judge of this Court dismissing the writ petition filed by the appellant. The facts giving rise to the controversy briefly stated are these:

2. The petitioner-appellant is said to have entered into an agreement with Ch. Mohd. Yusaf on 28th of December, 1948, agreeing to exchange properties mentioned therein. The properties were to be transferred within a period of one month from the date of the agreement. This deed bore a stamp of Re. 1/- only. It may be stated here that the petitioner originally belonged to Sindh, now in Pakistan, and Ch. Mohd. Yusaf originally belonged to Delhi and has since migrated to Pakistan.

It is clear that this agreement to exchange their respective properties was entered into because on account of the partition of the country in 1947 the petitioner was desirous of coming away to India and Mohd. Yusaf wanted to settle down in Pakistan. It appears that no registered deed of exchange was executed as was contemplated by the agreement dated 28th December, 1948, but instead we find another document signed both by Ch. Mohd. Yusaf and the

petitioner Ram Dass T. Chugani in which after reciting that in the agreement dated 28th of December, 1948, it had been specifically agreed between the parties that the contemplated exchange deed would be executed between them, but as, on account of the possibility of some inter-dominion arrangement with respect to concession in the matters of stamp-fees and registration of exchanges of properties by evacuees and refugees, the contemplated deed of exchange was not executed, the parties confirmed the exchange of their respective properties.

It was also expressly mentioned in this document that when some decision is arrived at by the Inter-Dominion Conference regarding stamp and registration fees, the parties bound themselves to execute the transaction accordingly.

3. On 6th of November, 1949, the petitioner applied to the Custodian of Evacuee Property for Confirmation of the above exchange. This prayer was, however, disallowed by the Additional Custodian of Evacuee Property, Delhi, in the following words:

"I cannot allow individual sales."

An appeal was preferred against this order with the Custodian General who by means of a detailed order dismissed the appeal holding that an application for confirmation of a transfer presupposes a completed transfer and an agreement to exchange or sell does not constitute a transfer at all. Such a transaction, according to the learned Custodian General, passes no title and creates no interest in the subject-matter of the agreement; it merely gives the party, in whose favour it is made, an actionable claim or a right to maintain a suit for a specific performance. It was expressly found that there had till then been no transfer of the property in question in favour of Ram Dass T. Chugani.

This order is dated 31st of May, 1950. It appears that in the meantime the appellant came to know of a case of one Kundan Lal whose transaction was confirmed on the ground of hardship. The appellant asked for inspection of Kundan Lal's file but the permission was refused. Inspired by the instance of Kundan Lal, the appellant then applied to the Department of the Custodian of Evacuee Property for referring the matter to the Ministry of Rehabilitation, through the Custodian General, recommending his case to be a hard one so that the matter of confirmation of exchange of properties may be favourably reconsidered by the said Ministry. This was forwarded by the Additional Custodian, Shri Rameshwar Dayal who had on 28th of February, 1950, refused relief to the appellant on the ground that he could not allow individual sales. We do not know as to what happened to this revision and indeed the Counsel has given us no information on this point.

It, however, does appear that on 13th of June, 1955, some letter was written by the appellant to the Custodian General to which on 7th of July, 1955, a reply was sent stating that the matter was still under consideration. The appellant seems to have then applied to the Custodian General for review of his order dated 31st May, 1950. By now, Shri Shankar Saran had become the Custodian General in

place of Shri Achhru Ram.

It was contended on this review petition that there was an error in the order dated 31st of May, 1950, and that the transaction in question was such as should have been confirmed. This review petition was, however, disallowed with the observation that the fact that there was no completed transaction did not entitle the claimant to have the order dated 31st of May, 1950, reviewed. The further representation to the Government of India brought no better luck to the appellant. It is in these circumstances that a writ petition was filed in this Court on 4th May, 1956, which was disallowed by Bishan Narain J. on 11th August, 1958.

4. Before the learned Single Judge it was argued on behalf of the petitioner-appellant that the transaction of exchange was transacted orally after the 28th of December, 1948, and before the 26th of January, 1949. The learned Single Judge, however, observed that the plea of oral transaction had never been taken before the Custodian nor had any evidence for this purpose been produced before him. After going through the application for confirmation dated 6th November, 1949, and through the grounds of appeal, revision and review filed by the appellant, the learned Single Judge came to the conclusion that in those documents the petitioner's Case was that the transfer had been effected by means of the two documents dated 28th of December, 1948, and 26th of January, 1949, with the result that it was too late now to set up the plea of an oral contract of sale for the first time in proceedings under Article 226 of the Constitution.

This new plea was considered to be a plea of fact in which the above two documents figured only as pieces of evidence but which by themselves did not prove an oral transfer. Holding the decision of the Custodian General dated 31st May, 1950, to be correct according to the pleadings and the case set up before the Department, the writ petition was dismissed.

5. On appeal before us, Mr. Bhagwat Dayal has strenuously contended that the learned Single Judge has placed too strict a construction on the appellant's pleadings before the Departmental Authorities and has also not correctly construed the documents dated 28th December, 1948, and 26th January, 1949. It has been contended that the later document of 26th January, 1949, clearly recites that the parties had thereby confirmed the exchange of properties which, according to the counsel, means that they had already completed the exchange of properties orally, which completed exchange was being confirmed by them by means of this document I regret my inability to agree with this contention.

This document, read as a whole, leaves no doubt in my mind that it was necessitated by the failure of the parties to execute formal deeds of exchange as agreed on 28th December, 1948, and indeed all that they were doing by this document was to confirm the earlier agreement by merely, deleting the condition that the formal exchange deeds would be executed within one month from 28th

December, 1948. Reference to the possibility of some concession in the matter of stamp-fee and registration with respect to documents executed by evacuees and refugees and undertaking to execute the transaction when some decision is arrived at by the Inter-Dominion Conference on the above matter, clearly support the view that I have taken of this document.

6. But this apart, even if I were to hold that the finding of the learned Custodian General that there was no completed transaction of exchange is on the existing record incorrect, I do not think it is open to this Court to interfere with findings of fact of departmental officers. In a recent decision, by the Supreme Court in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, the question of grounds for issuing writ in the nature of certiorari was considered by a Bench of five Judges and B. P. Sinha, J. (as he then was) in a very lucid and instructive discussion laid down the position as follows:

"The High Court appears to have been under the impression that the expression "error apparent on the face of the record" may also be in respect of findings of fact. For example, in Civil Appeal No. 668 of 1957, relating to Jorhat shop, the High Court has observed as follows:

"The appellate Authority further reinforced its suspicion by mentioning that Dharmeshwar, his father and brother are summoned in connection with some complaint, but that was a matter purely extraneous to speak the least and it could have found that the Complaint was filed after the settlement. The complaint had no reference to any offence of smuggling or the like as has been "conceded. These were errors apparent on the face of the record." Later, in the course of the same Judgment, it has been observed as follows:

""This is another instance where I find that the Excise Appellate Authority has misconceived its powers as such and purported to decide the appeal either on errors of record, speculations or on irrelevant considerations, irrespective of all that happened in the earlier stages of the matter. It starts with an apparent error of record when it says that in the judgment of the Excise Commissioner it finds a clear admission that Shri Garela. Kalita, father of Shri Dharmeshwar Kalita, is a suspected smuggler." In fact, there was no such admission. It was held by the Commissioner on the contrary that "the learned Deputy Commissioner and members of the Advisory Committee thought that the major son who bears an excellent character should not be punished for the alleged sin of his father."

These excerpts from the judgment of the High Court are not exhaustive, but only illustrative of the observation that the High Court appears to have treated an error of fact on the same footing-as an error of law apparent on the face of the record. The question, naturally, arises whether an error of fact can be invoked in aid of the power of the High Court to quash an order of a subordinate court or Tribunal. The High Court would appear to have approximated it to art "error apparent On the face of the record" as used in Rule 1 of Order 47 of the Civil

Procedure Code, as one of the grounds for review of a judgment or order; but that is clearly not the correct position. Ordinarily, a mistake of law in a judgment or an order of a court, would not be a ground for review. It is a mistake or an error of fact apparent on the face of the record, which may attract the power of review as contemplated by Rule 1 of Order 47. But is the power of a High Court under Article 226 of the Constitution, to interfere on certiorari attracted by such a mistake, and not the reverse of it, in the sense that it is only an error of law apparent on the face of the record, which can attract the supervisory jurisdiction of a High Court?

"This question, so far as we know, has not been raised in this form in this Court in any one of the previous decisions bearing on the scope and character of the writ of certiorari. It is, therefore, necessary to examine this question directly raised in this batch of appeals, because in each case, the High Court has been invited to exercise its powers under Article 226, to issue a writ of certiorari on the specific ground that the orders impugned before it had been vitiated by errors apparent on the face of the record - errors not of law but of fact."

After considering some English decisions, his lordship summed up the position as follows:-

"So far as we know, it has never been contended before this Court that an error of fact, even though apparent on the face of the record, could be a ground for interference by the court exercising its writ jurisdiction. No ruling was brought to our notice in support of the proposition that the court exercising its powers under Article 226 of the Constitution, could quash an order of an inferior tribunal, on the ground of a mistake of fact apparent on the face of the record."

The observations quoted above lay down in the clearest possible language that a mistake of fact apparent on the face of the record can by no means afford a good ground for quashing an order of an inferior tribunal under Article 226 of the Constitution. A little lower down the same learned Judge has thus stated the legal import of the expression "error of law apparent on the face of the record" :-

"Is it every error of law that Can attract the supervisory jurisdiction of the High Court, to quash the order impugned? This court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England are, therefore, the same. It is also clear, on an examination of all the authorities of this Court and those in England, referred to above, as also those considered in the several judgments of this Court, that the common-law writ, now called order of Certiorari, which was also adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements

of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extra-ordinary jurisdiction".

It is true that as recognised in the reported case the principle underlying the jurisdiction to issue a writ or order of Certiorari is no more in doubt and that real difficulty which frequently arises is in applying the principle to the particular facts of a given case. In so far as the case in hand is concerned, I have not the least doubt in my mind that the finding of the learned Custodian General was essentially one of fact and although I am inclined to agree with his interpretation of the effect of these two documents (and I may mention that before the learned Single Judge it was conceded that these documents do not by themselves amount to transfer), yet even if I were to hold a different view on this point it would be wholly beyond the competence of this Court to interfere with the conclusion under Article 226 of the Constitution.

7. In so far as the question of the appellant's pleadings before the Department of Custodian is concerned, the learned counsel has not been able successfully to show that he had at any stage made out a clear-cut case of completed oral exchange of which confirmation was sought. The only material on which the entire case in support of exchange was based were the two documents copies of which are before us, on the record. It may at this stage also be mentioned that the originals of these two documents were never produced either before the Rehabilitation Department or in the present proceedings.

It is true that the learned Single Judge did not attach any importance to the absence of the originals of these documents but this was due to the fact that it had been conceded before him by the learned counsel that these documents did not, by themselves, amount to transfer. Here again, it may be mentioned that the grievance that pleadings have been strictly construed is also riot open to redress in proceedings for a writ or order in the nature of certiorari.

8. Mr. Bhagwat Dayal has, however, contended that the Additional Custodian had disallowed his application without considering it on the merits because on account of certain secret instructions he felt that he had no power to grant the relief claimed. This, so argues the counsel, amounts to failure to exercise jurisdiction vested in the Additional Custodian. It is true that the learned Additional Custodian has not dealt with the case on the merits as he should have done and that he merely disallowed the appellant's prayer by stating that he could not allow individual sales.

The fact, however, remains that the appellant went up in appeal to the Custodian General and there the learned Custodian General decided on the merits of his claim, that there was no completed transaction of exchange of safe. But then the counsel argues that in fact the appellant had not been given any opportunity to substantiate his claim of a completed exchange with the result that the order of the learned Custodian General is vitiated and deserves to be set aside. I do not

find it possible to uphold this contention. The appellant did not make any prayer before the Custodian General that there was any further evidence in his possession which he wanted to produce in support of his claim. On the other hand, as the order itself shows, the case was argued on the merits and a decision of fact given against the appellant.

9. Again before the learned Single Judge no point was made that the learned Custodian General had wrongly abstained from giving to the appellant opportunity for adducing further evidence in support of his contention. Having omitted to take this point before the learned Single Judge, I do not think it is open to the counsel to agitate this grievance on Letters Patent Appeal.

10. Mr. Bhagwat Dayal in a half hearted manner made a reference to Section 38 of the Administration of Evacuee Property Ordinance No. XXVII of 1949 which provides for a restriction on transfer by evacuees. It is submitted that this section contemplates an enquiry into the application for confirmation of a transfer. The point sought to be made is that in the present case the department did not hold any enquiry.

This is really another way of stating the same argument advanced by the counsel a little earlier, namely, that the Additional Custodian had failed to consider the application on the merits. In this connection it is relevant to bear in mind that the appellant actually went up in appeal against the order of the Additional Custodian and the learned Custodian General exhaustively considered the case on the merits.

It is this appellate order of the Custodian General to which finality attaches under the law and which is in reality and essence being assailed in these proceedings under Article 226, The right given by Section 24 of the Administration of Evacuee Property Act, XXXI of 1950, is very wide and comprehensive. Like all Courts of Appeal exercising general jurisdiction in Civil cases the Custodian General possesses under this section full power and jurisdiction to determine the soundness of all decisions of the inferior authority, as a Court of error, and pass such orders as the contingencies of a given case demand.

It may also be stated here that, as noticed earlier, the appellant did not ask either for a remand or for an adjournment or otherwise for an opportunity to produce further or better evidence in support of his claim and indeed, as observed by the learned Single Judge (and this observation has not been successfully assailed by the counsel) no case of a completed oral exchange was put forward by the claimant at this stage. It may further be stated that the appellant before applying to Shri Shankar Saran, Custodian General, for a review of the order of Shri Achhru Ram, had approached, though unsuccessfully, the latter also, with a prayer for review/revision of his own order.

11. For the reasons given above, this appeal fails and is hereby dismissed, but in the circumstances I would not like to burden the appellant with costs of this appeal.

Shamsher Bahadur, J.

I agree.