

(1950) 10 PAT CK 0003

In the Patna High Court

Case No : Misc. Judicial Cases No"s. 140 and 170 of 1950

Sayeedah Khatoon and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-10-1950

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 28
Bihar Administration of Evacuee Property Ordinance, 1949 — Section 11, 2
Constitution of India, 1950 — Article 10, 19, 226, 31

Citation : AIR 1951 Patna 434

Hon'ble Judges : Shearer, J; Sarjoo Prasad, J

Bench : Division Bench

Advocate : P.R. Das, Khaleel Ahmed, Balbadra Pd. Singh and Padmanand Jha, for the Appellant; S.C. Chalkravarty and Govt. Advocate, for the Respondent

Judgement

Shearer, J.—These two applns. which have been heard together are applns. under Article 226 of the Constitution. Very elaborate arguments have been addressed to us by Sir Sultan Ahmed, who appears in Support of one of the applns. & by Mr. P. R. Das, who appears in support of the other. Mr. P. R. Das, for instance, invited us to declare that the Bihar Administration of Evacuee Property Ordinance, 1949, was an unconstitutional law. It is, however, quite unnecessary to go into this point or into some of the other points which were raised, & the applns. can be very shortly disposed of. The petnr. in Misc. Judl. Case No. 170 of 1950 describes herself as Kumar Rani Sayeedah Khatoon, wife of Captain Maharaja Kumar Gopal Saran Narayan Singh. Kumar Rani Sayeedah Khatoon landed at the Palam Air Port in New Delhi on 14-5-1950. She was in possession of a permit granted by the High Comr. for India in Pakistan, which entitled her to remain in India permanently. She was, therefore, admitted, & proceeded to Gaya where her husband resides. On 19-5-1950, in accordance with the instructions contained on her permit, she made the permit over to the Sub-Inspector in charge of the police station within the jurisdiction of which the Maharaja of Tikari resides.

2. On 23 7-1950, a notice was served on her by the Sub-Inspector stating that the High Comr. for India in Pakistan had withdrawn her permit & requiring her to return to Pakistan within seven days. It was further stated in the notice that, in the event of her failing to do so, she would be prosecuted. The learned Govt. Advocate has not been as fully instructed as he ought to have been, & is not in a position to tell us exactly what the nature of the prosecution, which was contemplated, was. As will appear presently, it is quite clear that in the appln. which she made for this permit, the petnr. did not make any statement which was untrue. It appears that she originally went to Karachi in the middle of 1948 & at the end of that year, being desirous to pay a visit to her family in India, applied for and obtained a temporary permit. Presumably she did this in order to be able to go back to Pakistan & presumably, in order to obtain such a permit, she stated that she was domiciled in Pakistan. This statement, as will also appear presently, was erroneous & may conceivably have been untrue.

3. I was at first disposed to take the view that the appln. was premature, & it would have been premature if it had been clear that the authorities intended to prosecute her & did not intend to make an order for her deportation until the conclusion of the criminal trial. Sir Sultan Ahmed, for the petn. has, however, pointed out that orders for deportation, which in England can only be made by a Secretary of State, in the case of persons who have migrated to India from Pakistan, be or at any rate are being made by quite subordinate officials including Sub-Inspector of Police. On further consideration I accept the contention of Sir Sultan Ahmed that the order which was served on the petnr. was, in substance, an order for her deportation. It is well settled that, when an order of that kind is served on a person residing in Great Britain or the United States of America, that person, if he can make out a prima facie case that he is a citizen & not an alien, is entitled to a writ of certiorari &, on the return to that writ being made, to a judicial determination of the question of his status. The petnr. contends that she is a citizen of India, & the contention is well grounded. The petnr. was born in India, & is domiciled in India. On marriage, a woman takes the domicile of her husband, & during the continuance of the marriage at least, cannot, by any act of hers, acquire another domicile. That is, & always has been, the British law, & was incorporated into British law from the Canon law which, in matrimonial matters, regulated the conduct of Christians throughout the whole of Western Christendom. It is obvious that to permit a married woman to acquire a domicile distinct from the domicile of her husband would be to undermine the marriage tie &, indeed, render the purpose for which the marriage was contracted no longer capable of performance. I can see no reason to suppose that the position under the Hindu law or under the Muhammadan law is otherwise. Quite certainly the Hindu conception of marriage is that it creates a tie no less inadmissible than was the tie created by the rite of marriage among Christians belonging to the Roman Catholic Church.

4. The Sub-Inspector of Police or whatever superior official, under whose directions he acted, appears to have taken the view that, the petnr. being as

evacuee & having entered India under a permit, which, he erroneously thought, had been improperly obtained, he was bound to make an order for her deportation. An affidavit has been put in by the petnr. in which she states that she went to Karachi to obtain medical treatment under a hakim who had migrated from India to Pakistan in or after 1947. If that was really so, she would not fall under Clause (i) of the definition of "evacuee" contained in Clause (c) of Section 2 of the Ordinance nor would she fall under Clause (ii) as the word "resident" occurring there must be construed as meaning a person who has taken up his or her residence in Pakistan permanently & is not residing there temporarily for any such purpose as obtaining better medical treatment than he or she is, or thinks himself, or herself to be, in a position to obtain in India. I am by no means satisfied of the truth of what is contained in this affidavit &, if I had to act on it, I should have required a supplementary affidavit to be filed giving further & better particulars, such, for instance, as the name of the hakim & the address at which he practised in India & now practises in Karachi. Even, however, assuming that the statements made in the affidavit are untrue & that the petnr. comes within the definition of "evacuee" in the Ordinance, nevertheless, she is also a citizen of India & as such, is entitled to remain in India. Where the wife of a citizen of India goes to Pakistan, then, if, while in Pakistan, she conducts herself in such a manner as to create suspicions as to her loyalty to the Indian Union, she may, on her return to India, be subjected to such restrictions on her movements as Parliament may consider advisable, restrictions, for instance, similar to those which were imposed on the wives of British subjects who, prior to their marriage, has been enemy aliens during the war. Parliament has, however, not yet considered it necessary, so far at least as I am aware, to impose such restrictions.

5. The petnrs. in Misc. Judl. Case No. 140 of 1950 are the three sons of Kumar Rani Sayeedeh Khatoon. These petnrs. are the joint mutwallis of certain wakf property. On 2-10-1949, this property was taken possession of by the Deputy Custodian of Evacuee Property. It is not disputed that the petnrs. are citizens of India, & *prima facie*, therefore, the action taken by the Deputy Custodian was an infringement of their fundamental right to hold & enjoy property. The reason why the Deputy Custodian took the action which he did was that this property belonged originally to Kumar Rani Sayeedeh Khatoon. On 4-5-1946, she executed & registered a deed of wakfnama in respect of it. Under this deed, she appointed herself the mutwalli & appointed the eldest of her three sons as the naib mutwalli, who was in her absence, to manage the property. The deed provided that one-half of the income should be paid to her & that the other, half should be paid in equal shares to her sons. The deed further provided that, on her death or on her relinquishing the office of mutwalli, her three sons should at once become joint mutwallis. On 2-6-1949, Kumar Rani Sayeedeh Khatoon wrote a letter to the eldest of her sons, who was the naib mutwalli, stating that she relinquished her office of mutwalli & also relinquished her right to receive one-half of the income from the wakf property.

6. The Bihar Administration of Evacuee Property Ordinance, 1949, came into operation on 21-6-1949, but was repealed & replaced by Ordinance XXVII [27] of 1949 of the Central Govt. which was subsequently enacted as the Administration of Evacuee Property Act, 1950. (XXI [21] of 1950). The latter Ordinance & the Act gave a more extended meaning to the expression "evacuee property" & brought within the purview of the expression any property which had belonged originally to an evacuee which the evacuee had transferred after 14-8-1947. The Deputy Custodian apparently took, the view that, on 2-6-1949, there had been a transfer of this property by Kumar Rani Sayeedeh Khatoon to her sons. In taking this view, the Deputy Custodian clearly misdirected himself. No transfer of property took place on 2-6-1949. The transfer & the only transfer, of this property which had taken place, took place on 4-5-1946, when the deed of wakfnama was executed. What Kumar Rani Sayeedeh Khatoon did on 2-6-1949, was to resign her office of Mutwalli, & this she was entitled to do by writing under her own hand & was under no obligation to execute & register any deed. I see no reason myself to suppose that she could not similarly renounce her right to a share in the income from the property. But, as she is a citizen of India, it is quite unnecessary to go into this point.

7. The learned Govt. Advocate referred us to Section 28 of the Act & contended that this Ct. had no jurisdiction to interfere. The remedy open to the petnrs. was, Mr. S. K. Mitra suggested, to appeal against the order of the Deputy Custodian General, Mr. P. R. Das, for the petnrs., has invited our attention to two decisions of the H. C. of Australia in which it was held that a statute which took away the right of a citizen to obtain a prerogative writ was void in so far as it was repugnant to Article 75 (v), Australian Constitution Act, 1900 *The King v. Hickman*, 70 comm. L. R. 598 & *The King v. Commonwealth Bent Controller*, 75 comm. L. R. 361. Article 75 (v), Australian Constitution Act, 1900, (Provides that):

"in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction."

Article 226, Indian Constitution, operates in exactly the same way. It is quite clear that under Article 226 it is not merely open to us, but it is our duty, to interfere when, as in these cases, there has been a flagrant & unjustified invasion of the fundamental rights of citizens. The appnls. ought, in my opinion, to be allowed & the rules, which have been issued ought to be made absolute. In Misc. Jud. case No. 140 of 1950 I would issue a mandatory injunction requiring the opposite party forthwith to make over to the petnrs. the property of which three of them are the mutwallis & of which he has wrongly taken possession. The petnrs. are also entitled to their costs.

Sarjoo Prasad J.

8. I agree. M. J. C. 170 of 1950v The petnr. may well be entitled to claim the

domicile of her husband, Captain Gopal Saran Narain Singh of Tikari. It is not clear from the records as to in what form the marriage of the petnr. with the said Captain was solemnised. Sir Sultan Ahmed appearing for the petnr. could not throw any light on the point. It appears, however, that Captain Gopal Narain Singh acknowledges the petnr as his wife, & there is nothing on the record to the contrary. In that view she can claim the domicile of her husband though I am not certain that the petnr does not come within the definition of "evacuee" as given in the Evacuee Property Ordinance subsequently followed by an Act. My learned brother has, if I may respectfully say so, correctly pointed out that if her conduct creates suspicion as to her loyalty to the Indian Union, she may be subjected to such restriction as the Legislature may consider advisable.

9. M. C. J. 140 of 1950 -- M. C. J. 140 of 1950 should be allowed on the short ground that the petnrs who are the joint mutwallis of the waqf property are entitled to be in possession of the property & not the custodian who had no jurisdiction to take possession of the same. It is to be remembered that Kumar Rani Sayeedeh Khatoon, the mother of these petnrs. relinquished her interest as mutwalli of the said waqf-ul-aulad long before the Bihar Administration of Evacuee Property Ordinance (III [3] of 1949) came into force on 21-6-1949. In the circumstances on the terms of the deed these petnrs. became joint mutwallis. These petnrs. are undeniably citizens of India. The genuineness of the letter dated 2-6-1949, under which the mutwalliship was relinquished by Sayeeda Khatoon has not been questioned before us. Therefore, u/s 11 (2) (a) of the Ordinance the "mutwalli" not being an "evacuee" the waqf properties could not vest in the custodian & even assuming that Sayeeda Khatoon herself was an evacuee she had already ceased to be a mutwalli & to represent the waqf property before the Ordinance came into operation. For these reasons the action of the custodian was ultra, vires the Ordinance itself.

10. It is contended by the learned Govt. Advocate that there is a procedure provided under the Ordinance which should have been followed by the petnrs. in order to get redress against any illegal act or conduct on the part of the custodian or the Deputy Custodian. He refers to Sections 24, 25 & 28 of the Ordinance for this purpose. I agree with my learned brother that Section 28 of the Ordinance cannot stand in the way of our exercising the powers which have been vouchsafed to us under Article 226 of the Constitution.

11. But the thing which has caused me most serious concern is whether when a special remedy is provided under a particular statute, we should not leave the petnrs. to follow that remedy instead of seeking to invoke our extraordinary jurisdiction by way of a writ under Article 226 of the Constitution. I am, however, impressed with the argument of Mr. P. R. Das to this extent that in case of flagrant & unjustified invasion of the fundamental rights of a citizen we must act in the exercise of our powers to protect him against injury & give him the relief provided the circumstances of the case are such that otherwise the alternate remedy available to the citizen may not be. equally effectual, convenient &

beneficial & by the time he gets the relief, the citizen may have suffered irretrievable loss & damage. We are informed that in this case the petnrs. did prefer a claim which was dismissed by the custodian & against which an appeal has been presented to the Custodian General in Delhi. But the said appeal has been pending since long & no attempt has been made to dispose of the same ; while in the meantime the petnrs. are being put to great loss & harassment. Particular reference in this connection may be made to the statements in paras. 18 and 19 of the petn. which have not been controverted before us by the learned counsel for the State. P. R. Das rightly contends that in the circumstances of this case there is no other efficacious remedy left to the petnrs. than to apply to this Ct. under Article 226 of the Constitution otherwise irreparable injury was likely to be caused to them. In his petn. he has given details of the various instances of damage caused & apprehended, & those details have not been disputed. For the above reasons I agree with my learned brother that there is pre-eminently a case where mandatory injunction should be issued on the opposite party to make over forthwith the possession of the properties to the petnrs. who are the joint mutwallis of the waqf-ul-aulad.