

Azimunnissa and Others

Vs

The Deputy Custodian, Evacuee Properties, District Deoria and Others

Petition No. 56 of 1958

(CJI B.P. Sinha, J.L. Kapur, P.B. Gajendragadkar, K. Subha Rao, K.N. Wanchoo JJ)

26.10.1960

JUDGMENT

KAPUR J. -

This is a petition by six persons under article 32 of the Constitution praying for a writ of certiorari for calling the records in which certain orders were passed and for the issue of a mandamus directing the respondents to restore the property in dispute. The following pedigree table will assist in understanding the case :-

Hingan Main | ----- | |Moharram Main Shukrullah
(d. 1945) | | | ----- | | | | | Abdul Bashir Nasir Nazir Majid |
Razzaq Ahmad Ahmad Ahmad | ----- | |Khuda Bux Noori Mian =
Rehmat | Bibi (d. 1953) | | | ----- | | | | | Azimunnissa Khatoon Bibi
Taghma Bibi (d) | = Maqbool = Abdul Barkat | | Ahmad | | ----- | | | |
Shamsun Nisa Khudaija Bibi | ----- | | | |
| | |Lutf Ahmad Md. Ahmad Aiysha Khatoon Qamar-un-Nisa Tehzib-un-Nisa##

The petitioners alleged that the properties in dispute were acquired by Noori Mian and after his death there was some litigation but as a result of a compromise between the members of the family the shares of the contestants were fixed as follows :-

#(a) Rehmat Bibi, Widow ... 0-1-6(b) Taghma Bibi ... 0-1-5(c) Khatoon Bibi ... 0-1-9(d) Azimunnissa ... 0-1-9(e) Shukrullah ... 0-5-4(f) Khuda Baksh ... 0-4-3##

On August 28, 1942, Shakru-ullah created a waqf-alal-aulad in favour of his sons and nominated Abdul Razzaq as Mutwali (Trustee). Shakr-ullah died in 1945. In the year 1947, Khatoon Bibi, one of the petitioners, went away to Karachi and the ostensible reasons stated by her is that she went to look after the ailing sister of her husband who was in Karachi.

On November 22, 1949, a notice was issued to Khatoon Bibi, her manager and servants declaring her to be an evacuee and calling upon her to surrender possession of her property which was described as "Bhatni Noori Chini Mills, zamindari and kashtkari land." Her husband Abdul Barkat filed objections but it does not appear that any order was passed on those objections. On April 17, 1950, the Administration of Evacuee Property Act, 1950 (XXXI of 1950), hereinafter referred to as the Act, came into force. Another notice was issued to Khatoon Bibi by the Deputy Custodian of Evacuee Property, Deoria, on July 5, 1950, to show cause why she should not be declared an evacuee and why all her property be not declared evacuee property. It is alleged that the notice did

not contain any description of the property and was therefore ineffective. This fact is denied by the respondents. In their affidavit it was stated that the property was fully specified and identified and that the notice of July 5, 1950, was by way of abundant caution; the property of Khatoon Bibi had become evacuee property and had automatically vested in the year 1949. Against this notice also Abdul Barkat filed objections but by an order dated March 7, 1951, these objections were dismissed. The order was as follows :-

"Objection dismissed. Admittedly Bibi Khatoon is an evacuee. The notice is hereby confirmed and the property (sufficiently although not thoroughly) described in the notice is hereby declared to be evacuee property".

No appeal or revision was taken against this order. On January 8, 1953, a notice under section 7 of the Act was issued against Bashir Ahmad and Nasir Ahmad and by an order dated December 14, 1955, both of them were declared evacuees and their interests in the properties were declared evacuee property. This order by the Assistant Custodian (Judicial) shows that in the notice the properties were described and it was held that both Bashir Ahmad and Nasir Ahmad were evacuees and their interest in the property was evacuee property but as it was composite property the exact shares were left to be determined by the Competent Officer. An appeal was taken by these two evacuees to the Custodian of Evacuee Property, U.P., but it has not yet been decided.

Proceedings were then taken by the Competent Officer under Evacuee Interest (Separation) Act (64 of 1951), hereinafter called the Separation Act. Notices were issued under section 6 of the Separation Act on February 15, 1954, and the persons to whom notices were issued filed separate claims claiming various shares in the property. The Competent Officer by his order of March 20, 1956, declared the shares of the various evacuees and non-evacuees and also held that as the claimants were not prepared to purchase the shares of the evacuees in the property in dispute the only mode available for partition was by a public auction. He gave directions as to how the property which was the subject matter of waqf-alal-aulad was to be separated. As regards the valuation of the property he referred to the valuation made by the Assistant Valuation Officer and Superintendent, Valuation Office, Khan Market, New Delhi, the former at Rs. 7,41,300 for the construction and lands and the latter at Rs. 14,15,000 inclusive of machinery, lands and buildings and then tentatively fixed the valuation at Rs. 14,15,000 and again referred the matter to the Superintendent, Valuation Office for final valuation. He held Khatoon Bibi's shares to be 0-2-3 and also determined the interest of Bashir Ahmad and Nasir Ahmad and ordered the entire property to be sold by auction. Against this order an appeal was taken to the Appellate Officer. On August 13, 1956, the property in dispute was sold to respondent No. 3 for Rs. 16,05,000. Against this objection were filed by the petitioner Azimunnissa and Abdul Wahid but they were dismissed by the Competent Officer on October 1, 1956. Against this order a revision was taken to the Appellate Officer but both of them were dismissed on October 24, 1957. In the meanwhile the petitioners, on September 27, 1956, filed a petition under Art. 226 in the High Court of Allahabad in which they attacked the validity of the proceedings taken under the Act and also the order of the Competent Officer ordering sale. Some of the points raised by the petitioners were decided in their favour but the petition was dismissed because the petitioners had been guilty of laches as they had slept over their rights for five years and had applied to the High Court when no further notices could be issued under the Act and as no proper action was taken by the petitioners as regards the various orders passed. Against this judgment of the Allahabad High Court in *Azimunnissa & Ors. v. Assistant Custodian* (A.I.R. 1957 All 561.) and against the order of the Appellate Officer, the petitioners applied for special leave to this court but both these petitions were dismissed on February 10, 1958.

The petitioners have now come to this court under Art. 32 for a writ of certiorari (1) to quash the order of the Assistant Custodian, Deoria, dismissing the objections of the petitioner Khatoon Bibi on March 7, 1951; (2) to quash the order of the Competent Officer dated March 20, 1956 and of the Appellate Officer dated October 24, 1957 and (3) for quashing the sale proceedings ending in the sale of the property dated March 13, 1956 and (4) for a mandamus directing the respondents to restore the property to the petitioners.

Three questions were raised on behalf of the petitioners : (1) that the property was not composite property within the Separation Act; (2) the shares of Khatoon Bibi and of Bashir Ahmad and Nasir Ahmad were not validly declared to be evacuee interest under the various provisions of law and therefore the provisions of the Separation Act did not apply; (3) section 10(a)(iii) of the Separation Act in so far as it directed the sale of non-evacuee property contravenes arts. 19(1)(f) and 31 of the Constitution and was therefore unconstitutional.

The decision of the case mainly depends upon the decision as to whether the property in dispute was composite property. Under section 2(d) of the Separation Act composite property has been defined :

Section 2(d) "composite property" means any property which or any property in which an interest has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act 1950 (XXXI of 1950) and -

(i) in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not being an evacuee."

and "evacuee interest" is defined in section 2(e) as :

Section 2(e) "evacuee interest" in relation to a composite property, means the right, title and interest of an evacuee in that property."

Therefore if it is established that any interest in the property has been declared to be evacuee property or has vested in the Custodian under the Act then the whole will be composite property. For the determination of the question whether any portion of the property in dispute was evacuee property it becomes necessary to refer to the provisions of the various laws which were passed in regard to evacuee property. The property in dispute is situate in what was the United Provinces and the first legislation in that province as it then was, was the United Provinces Administration of Evacuee Property Ordinance, 1949 (U.P. Ordinance No. 1 of 1949), which was promulgated on June 24, 1949. In this Ordinance evacuee and evacuee property had the definition which has been continued in the later Ordinances and Acts. By section 5 of the Ordinance all evacuee property situate in the United Provinces automatically vested in the Custodian and any person in possession of such property was deemed to be holding on behalf of the Custodian (section 6(2)). As Khatoon Bibi was an evacuee under section 2(c) of the U.P. Ordinance her property automatically vested in the Custodian under section 5. But the validity of this Ordinance was successfully challenged by the petitioners in the Allahabad High Court in *Azimunissa v. Assistant Custodian* (A.I.R. 1957 All 561.). The ground for the challenge was that there was no entry in the lists in the Seventh Schedule of the Constitution Act, 1935, dealing with evacuee property and there was no public notification by the Governor General as required by section 104 of the Constitution Act, 1935. This Ordinance, i.e., U.P. Ordinance 1 of 1949 expired on August 23, 1949.

On June 13, 1949, the Governor General promulgated the Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance XII of 1949 and it was extended to U.P. on August 23, 1949, by Ordinance XX of 1949 after a resolution was passed by the U.P. Legislature under section 103 of the Constitution Act. Section 5 of the former provides for the vesting of property of the Custodian as follows :-

Section 5(1) "Subject to the provisions of this Ordinance all evacuee property situate in a Province shall vest in the Custodian for the Province.

(2) Where, immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any corresponding law in force in that Province immediately before such commencement, the evacuee property shall, on the commencement of this Ordinance, be deemed to have vested in the Custodian appointed for the Province under this Ordinance".

Section 8 of Ordinance XX added section 41 to Ordinance XII of 1949 which was the saving provision.

Thus under section 5 in spite of the expiry of the U.P. Ordinance the property of Khatoon Bibi was deemed to have vested in the Custodian under the provisions of Ordinance XII do 1949. But this Ordinance (XII of 1949 as amended by Ordinance XX of 1949) suffered from the same constitution defect as the U.P. Ordinance 1 of 1949. On August 25, 1949, item 31-B relating to "evacuees" was added to the concurrent list by the Government of India Act (Third Amendment) Act of 1949 and thus this constitutional vacuum was filled up. On October 18, 1949, the Governor General promulgated the Administration of Evacuee Property Ordinance (XXVII of 1949). It repealed Ordinance XII of 1949. Section 7 of this Ordinance provided for declaration of evacuee property and section 8 for vesting of evacuee property in the Custodian. The relevant portions of section 7 are :-

Section 7(1) "Where the Custodian is of opinion that any property is evacuee property within the meaning of this Ordinance, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property".

Section 8 "Any property declared to be evacuee property under section 7 shall vest in the Custodian.

(2) Where immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any law repealed hereby, the evacuee property shall, on the commencement of the Ordinance, be deemed to have vested in the Custodian appointed or deemed to have been appointed for the Province under this Ordinance, and shall continue to so vest".

These provisions were materially different from that in the previous Ordinances as there was no automatic vesting in the Custodian.

Thus any vesting under Ordinance XII of 1949 was deemed to be under Ordinance XXVII of 1949

as if the latter had been in force in the date of the vesting. By section 4 of the Administration of Evacuee Property (Amendment) Ordinance IV of 1950, section 8 of Ordinance XXVII of 1949 was substituted by a revised section section 8. The relevant portion of this section provided :-

Section 8(2) "Where immediately before the commencement of this Ordinance, any property in a province had vested as evacuee property in any person exercising the powers of a Custodian under any law repealed hereby, the property shall, on the commencement of this Ordinance be deemed to be evacuee property declared as such within the meaning of this Ordinance and shall be deemed to have vested in the Custodian appointed or deemed to have been appointed for the Province under this Ordinance, and shall continue to so vest.

Provided that where, at the commencement of this Ordinance, there is pending before the Custodian for any province any claim preferred to him in respect of any property under section 8 of the Administration of Evacuee Property Ordinance, 1949 (XII of 1949), or under any other corresponding law repealed hereby, then, notwithstanding anything contained in this Ordinance or in any other law for the time being in force such claim shall be disposed of as if the definitions of 'evacuee property' and 'evacuee' contained in section 2 of this Ordinance had become applicable thereto."

Under this provision of the Ordinance the effect as to vesting was that it was deemed to be under this Ordinance.

On April 18, 1950, the Administration of Evacuee Property Act, 1950 (XXXI of 1950), which has been referred to as the Act was passed by the Parliament. It repealed Ordinance XXVII of 1949. The definitions of evacuee and evacuee property are the same as in Ordinance XXVII. Section 7 of the Act and section 8 also are in the same terms. The provisions regarding vesting of evacuee property in the Custodian were also same as in the amended section 8 of Ordinance XXVII. Section 58 deals with repeals and savings.

Therefore the consequence of section 8(2) was that property vested under Ordinance XXVII was deemed to be vested under the corresponding provisions of the Act.

On February 27, 1960, the Act was amended by the Administration of Evacuee Property (Amendment) Act 1 of 1960. Sub-section (2-A) was added to section 8 which was in the following terms :-

(2-A) "Without prejudice to the generality of the provisions contained in sub-section (2) all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in or the invalidity of, such law or any judgment, decree, order of any Court, be deemed for all purposes to have validly vested in that person, as if the provisions of such law had been enacted by Parliament and such property, shall, on the commencement of this Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly, any order made or other action taken by the Custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken ".

The argument raised on behalf of the petitioner was that U.P. Ordinance 1 of 1949, Central

Ordinance XII of 1949 and Central Ordinance XX of 1949 was invalid as the legislative competence of the Governor and of the Governor-General in regard to evacuee and evacuee property matters was wanting; and all that sub-section (2-A) of section 8 added by Act 1 of 1960 did was to save any vesting which purported to have taken place under Ordinance XXVII but it did not purport to cure any invalidity due to constitutional incompetence and that the law made without constitutional authority could not be validated. Reference was made to *Saghir Ahmad v. The State of U.P.* ([1955] 1 S.C.R. 707, 728.) where at page 728 the following statement from Cooley's Constitutional Limitations, Vol. 1, page 384 (note) :-

"A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be reenacted"

was held to be sound law.

Reference was also made to *M. P. V. Sundararamier & Co. v. The State of Andhra Pradesh* ([1958] S.C.R. 1422, 1469.) where a distinction was drawn between the unconstitutionality due to incompetency of the Legislature and disregard of constitutional prohibitions.

The respondents in reply contended that there was no defect in the notice issued to Khatoon Bibi and her property was properly and sufficiently described therein and that Act 1 of 1960 validated the vesting and removed all defects and invalidity, if any, arising as a result of the deficiencies in the various laws operating on her case.

The first notice to Khatoon Bibi was under Ordinance XXVII dated November 22, 1949, against which her husband Abdul Barkat filed objections but evidently no order was passed on it. The second notice which was given on July 5, 1950, sufficiently specified the property. Against this notice objections were again raised by Abdul Barkat but were dismissed by the order dated March 7, 1951, and no further appeal or revision or any other proceeding was taken against that order and any defects and deficiencies whether of law or otherwise cannot now be raised. It was specifically stated in that order that the property was sufficiently, though not thoroughly, described and that property was declared to be evacuee property. The appellants contested the correctness of the fact that the property was properly described and referred to the judgment of the Allahabad High Court in *Azimunnissa v. Assistant Custodian* (A.I.R. 1957 All. 561.) (p. 568, para 10) which indicates that there was no description of the property. In the view that we are taking this controversy loses its vitality.

The second plea taken by the respondents was that by the insertion of section 8(2A) in the Act by Act 1 of 1960 retroactive effect was given to the provisions of the Act and the vesting of any evacuee property which purported to have been vested as evacuee property in the Custodian was validated notwithstanding any defect in or invalidity of such law and on the commencement of that Act (Act 1 of 1960) the property which purported to have vested in the Custodian was deemed to have been evacuee property declared as such within the meaning of the Act and any order made or action taken by the Custodian must be deemed to have been validly taken.

The word "purport" has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable; *Dicker v. Angerstein* ((1876) 3 Ch. D. 600, 603.). Purporting is therefore

indicative of what appears on the face of it or is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable, section 8(2-A) by giving a retrospective effect of section 8(2) of the Act makes the vesting as if it was vesting under section 8(2) of the Act and therefore the attack on the ground of invalidity cannot be sustained. By section 5 of U.P. Ordinance 1 of 1949 the property of Khatoon Bibi who became an 'evacuee' under section 2(c) and her property 'evacuee property' under section 2(d) was vested in the Custodian of Evacuee Property of the province of U.P. That Ordinance was allowed to lapse. By Central Ordinance XII of 1949 as subsequently amended the vesting of evacuee property was deemed to be under that Ordinance, which in its turn was repealed under section 55 of Ordinance XXVII of 1949 which was a valid piece of legislation. By section 8(2) of that Ordinance the vesting under the previous Ordinance was deemed to be under that Ordinance as if it was in force on the date of the vesting. Ordinance XXVII of 1949 was repealed by the Act which contained provisions as to vesting in section 8(2), which was similarly worded as the corresponding provision of the Ordinance and therefore by a fiction of law the original vesting was to be treated as if the Act was in force when the first vesting took place. The High Court of Allahabad in Azimunnissa's case (A.I.R. 1951 All. 561.) held the vesting to be invalid because upto the time of Ordinance XII of 1949 and even Ordinance XX of 1949 legislative competence was lacking, and even by the deeming provisions in section 8 (2) of Ordinance XXVII of 1949 or Act XXXI of 1950 there was no valid vesting, because the original vesting was bad. We think it unnecessary to decide as to whether the deeming provisions of section 8(2) of the Act or of Ordinance XXVII of 1949 was sufficient to give validity to the vesting. Section 8(2-A) as introduced into the Act, in our opinion, makes the vesting valid, because it gives validity to the vesting which purported to have taken place as a result of Ordinance XXVII of 1949 even though it was only apparently so and was not so in law, because that is what 'purport' implies.

The effect of section 8(2-A) is that what purported to have vested under section 8(2) of Ordinance XXVII of 1949 the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate (1) what purports to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under section 8(2) of Ordinance XXVII of 1949 or section 8(2) of the Act which repealed the Ordinance; (3) makes the decrees and judgments to the contrary of any court in regard to the vesting ineffective; (4) makes the property evacuee property by its deeming effect; and (5) validates all orders passed by the Custodian in regard to the property. Because of the retrospective effect given to the Act and the validating effect of Act 1 of 1960 Saghir Ahmad's case ([1955] 1 S.C.R. 707.) would have no application. In the view we have taken the other question does not survive and the share of Khatoon Bibi must be held to be evacuee property validly vested in the Custodian. Therefore the property in dispute does fall within the definition of composite property as given in section 2(d) and cannot be held to be invalid.

It was then argued that by the sale of the property non-evacuees had been illegally deprived of their property and therefore section 10, cl. (a) contravenes the provisions of Arts. 31 and 19 (1)(f). This contention is equally unsubstantial. The relevant provision of section 10 is as follows :-

"Notwithstanding anything to the contrary in any law or contract or any decree or order of a Civil Court or other authority, the competent officer may, subject to any rules that may be made in this behalf, take all such measures as he may consider necessary for the purpose of separating the interest of the evacuees from those of the

claimants in any composite property, and in particular may, -

(a) in the case of any claim of a co-sharer or partner, -

(i) direct the Custodian to pay to the claimant the amount of money assessed in respect of his share in the composite property or deposit the same in a Civil Court having jurisdiction over such property and deliver possession of the property to the Custodian and the claimant may withdraw the amount in deposit in the Civil Court; or

(ii) transfer the property to the claimant on payment by him of the amount of assessed in respect of the share of the evacuee in the property; or

(iii) sell the property and distribute the sale proceeds thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property; or

(iv) partition the property according to shares of the evacuee and the claimant and deliver possession of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively."

Thus the alternatives open to the Competent Officer were four : Of these (1) the payment by the Custodian of the money value of the share of the non-evacuees to the non-evacuees; and (2) the payment of the Custodian by the non-evacuees of the money value of the share of the evacuees were not available to him. The former in this case was neither claimed nor could the Custodian be expected to pay such a large sum of money to the non-evacuees. The order of the Competent Officer of March 20, 1956, shows that the non-evacuee co-shares were not prepared to pay to the Custodian the money value of the shares of the evacuees. Of the remaining alternatives the third alternative was the partitioning of the property but that also was not possible in the present case because of the nature of the composite property which comprised of a sugar mill which in the very nature of things could not be partitioned. Consequently the only available mode of separation was the one adopted by the Custodian, i.e., by sale of the property and division of the sale proceeds. In the circumstances the action of the Competent Officer could not be termed unreasonable or violative of Art. 19(1)(f) nor does it violate Art. 31 because it cannot be said to be deprivation of the non-evacuees of their property without the authority of law.

In the result this petition fails and is dismissed with costs.

Petition dismissed.

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