Aniyoth Kunhamina Umma

Vs

Ministry of Rehabilitation and Others

Petition No. 32 of 1959

(CJI B. P. Sinha, J. R. Mudholkar, S. K. Das, N. Rajgopala Ayyangar, A. K. Sarkar JJ)

22.03.1961

JUDGMENT

S.K. DAS, J. -

This is a writ petition under Art. 32 of the Constitution. The relevant facts lie within a narrow compass, and the short point for decision is whether in the circumstances of this case the petitioner can complain of an infringement of the fundamental rights guaranteed to her under Arts. 19(1)(f) and 31 of the Constitution.

The relevant facts are these. The petitioner's husband Kunhi Mossa Haji, it is alleged, carried on a hotel business in Karachi which is now in Pakistan. The petitioner stated that her husband had been carrying on the said business since 1936. It is not in dispute, however, that in the relevant year, that is, 1947, when the separate dominion of Pakistan was set up, the petitioner's husband was in Karachi. The petitioner stated that at the end of August, 1949, her husband returned to Malabar, in India. On behalf of respondent no. 1, the Ministry of Rehabilitation, Government of India, it is averred that the petitioner's husband surreptitiously returned to India without a valid passport in 1953 and was arrested for an alleged infringement of the provisions of the Foreigners Act. On December 7, 1953, Kunhi Moosa Haji transferred in favour of his wife his right, title and interest in seven plots of land, details whereof are not necessary for our purpose. On December 8, 1954, about a year after the transfer, a notice was issued to both the petitioner and her husband to show cause why Kunhi Moosa Haji should not be declared an evacuee and his property as evacuee property under the provisions of the Administration of Evacuee Property Act, 1950, (hereinafter called the Act). The petitioner's husband did not appear to contest the notice, but the petitioner entered appearance through her advocate. By an order dated January 29, 1955, the Assistant Custodian of Evacuee Property, Tellicherry, declared that Kunhi Moosa Haji was an evacuee under the provisions of s. 2(d)(i) of the Act and the plots in question were evacuee property within the meaning of s. 2(f) of the Act. From this decision the petitioner unsuccessfully carried and appeal to the Deputy Custodian of Evacuee Property, Malabar, who affirmed the decision of the Assistant Custodian, Tellicherry, by his order dated July 11, 1955. The petitioner then moved the Deputy Custodian of Evacuee Property, Malabar, for a review of his order under s. 26(2) of the Act. This petition also failed. Then the petitioner moved the Custodian-General of Evacuee Property, New Delhi, in revision against the order of the Deputy Custodian. This revision petition was dismissed by the Custodian-General by his order dated April 9, 1956. The petitioner then made an application to the Ministry of Rehabilitation for an order of restoration of the property in her favour under the provisions of s. 16(1) of the Act. This application was also rejected. The petitioner then moved the High Court of Kerala by means of a writ petition under Art. 226 of the Constitution. This petition was, however, withdrawn by the petitioner on the ground that the Kerala High Court had held in an

earlier decision reported in Arthur Import & Export Company, Bombay v. Collector of Customs, Cochin [(1958) 18 K.L.J. 198.] that when an order of an inferior tribunal is carried up in appeal or revision to a superior tribunal outside the court's jurisdiction and the superior tribunal passes an order confirming, modifying or reversing the order, the High Court cannot issue a writ to an authority outside its territorial jurisdiction. Then, on March 5, 1959, the petitioner filed the present writ petition and the basis of her contentions is that the fundamental rights guaranteed to her under Arts. 19(1)(f) and 31 of the Constitution have been infringed and she is entitled to an appropriate writ or order from this Court for the restoration of the property transferred to her by her husband.

In her petition, the petitioner has contested the validity of the notice issued on December 8, 1954, on the ground of non-compliance with certain rules. She has also contested on merits the correctness of the findings arrived at by the relevant authorities that Kunhi Moosa Haji was an evacuee and the property in question was evacuee property. Learned Counsel for the petitioner tried to argue that the invalidity of the notice issued under s. 7 of the Act went to the root of jurisdiction of the subsequent orders. We do not, however, think that any question of lack of jurisdiction is involved in this case. The petitioner appeared in response to the notice and raised no point of jurisdiction. In subsequent proceedings before the Deputy Custodian and the Custodian General she contested the correctness of the orders passed on merits : no question of jurisdiction was canvassed at any stage and we do not think that the notice suffered from any such defect as would attract the question of jurisdiction. We need only add that no question of the constitutionality of any law is raised by the petitioner.

In the view which we have taken, this petition is concluded by the decision of this Court in Sahibzada Saiyed Muhammed Amirabbas Abbasi v. The State of Madhya Bharat [[1960] 3 S.C.R. 138.] and it is not necessary to consider on merits the contentions urged on behalf of the petitioner. The position as we see it is this. This Court can exercise jurisdiction under Art. 32 of the Constitution only in enforcement of the fundamental rights guaranteed by Part III of the Constitution. In the present case, the appropriate authorities of competent jurisdiction under the Act have determined the two questions which fell for their decision, namely, (1) that Kunhi Moosa Haji was an evacuee within the meaning of s. 2(d) of the Act and (2) that his property was evacuee property. It was open to the petitioner to challenge the decision of the Custodian General, New Delhi, by moving the appropriate High Court in respect thereof; it was also open to the petitioner to move this Court by way of special leave against the decision of the Custodian General or of the other appropriate authorities under the Act. The petitioner did not, however, choose to do so. The result, therefore, is that the order of the Custodian General has become final. Under s. 28 of the Act the order cannot be called in question in any court by way of an appeal or revision or in any original suit, application or execution proceeding. It is, indeed, true that s. 28 of the Act cannot affect the power of the High Court under Arts. 226 and 227 of the Constitution or of this Court under Arts. 136 and 32 of the Constitution. Where, however, on account of the decision of an authority of competent jurisdiction the right alleged by the petitioner has been found not to exist, it is difficult to see how any question of the infringement of that right can arise as a ground for a petition under Art. 32 of the Constitution, unless the decision of the authority of competent jurisdiction on the right alleged by the petitioner is held to be a nullity or can be otherwise got rid of. As long as that decision stands, the petitioner cannot complain of any infringement of a fundamental right. The alleged fundamental right of the petitioner is really dependent on whether Kunhi Moosa Haji was an evacuee and whether his property is evacuee property. If the decision of the appropriate authorities of competent jurisdiction on these questions has become final and cannot be treated as a nullity or cannot be otherwise got rid of, the petitioner cannot complain of any infringement of her fundamental right under Arts. 19(1)(f) and 31 of the Constitution.

It is worthy of note that the relevant provisions of the Act have not been challenged before us as unconstitutional, nor can it be seriously contended before us that the orders of the appropriate authorities under the Act can be treated as null and void for want of jurisdiction. What is contended before us is that the orders were incorrect on merits. That is a point which the petitioner should have agitated in an appropriate proceeding either by way of an appeal from the order of the Custodian General with special leave of this Court or by an appropriate proceeding in the High Court having jurisdiction over the Custodian General. The petitioner did not take either of these steps, and we do not think that she can be permitted now to challenge the correctness on merits of the orders of the appropriate authorities under the Act on a writ petition under Art. 32 of the Constitution on the basis that her fundamental right has been infringed.

In Sahibzada Saiyed Muhammed v. The State of Madhya Bharat [[1960] 3 S.C.R. 138.] the facts were these. The petitioner who had migrated to West Pakistan applied to the High Court of Madhya Bharat for a writ of habeas corpus for directions to produce petitioners 2 and 3, his minor children, before the court on the allegation that they were wrongfully confined and, upon the dismissal of the said application, he applied to the District Judge of Ratlam under the Guardian and Wards Act for his appointment as guardian of the person and property of the said minors; the District Judge rejected the application and appointed another person as guardian; the petitioner then appealed to the High Court against the order of the District Judge and that appeal was dismissed. He applied for special leave to appeal to this Court and that application was also rejected. Thereafter he moved an application under Art. 32 of the Constitution and it was held that where on account of the decision of the decision of a court of competent jurisdiction, the right alleged by the petitioner does not exist and, therefore, its infringement cannot arise, this Court cannot entertain a petition under Art. 32 for protection of the alleged right. We are of the opinion that the principle of this decision also applies to the present case. The circumstance that in Sahibzada Saiyed Muhammed v. The State of Madhya Bharat [[1960] 3 S.C.R. 138.] an application for special leave was made and rejected makes no difference to the application of the principle. So far as the principle is concerned, the position is the same when an application is made and rejected and when no application is made. The result in both cases is that the decision becomes final and binding on the parties thereto. We must make it clear that we are not basing our decision on the circumstance that the High Court of Kerala rejected the application of the petitioner on the ground that it had no territorial jurisdiction. We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the infringement of a fundamental right, for she has no such right.

We would, accordingly, dismiss the petition with costs.

Petition dismissed.

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