Gorkha Ram and Others

Vs

The Custodian General of India, Delhi

Civil Appeal No. 340 of 1958

(J. R. Mudholkar, J. L. Kapur K. Subha Rao, Raghuvar Dayal JJ)

21.04.1961

JUDGMENT

RAGHUBAR DAYAL, J. -

This appeal, by special leave, is against the order of the Punjab High Court dismissing the petition of the appellants under Art. 226 of the Constitution praying for quashing the orders of the Custodian General, dated June 17, 1952.

The appellants and respondents Nos. 4 and 5 are residents of village Baland, Tehsil and District Rohtak, and are members of the body of proprietors of that village. The village Baland is divided between three estates. The plot in suit is in the estate known as 'Barsan'. One Fakira, a mendicant and a non-proprietor, had his house on the plot in suit. In January, 1950, the Custodian of Evacuee Property issued a notice under s. 7 of the Administration of Evacuee Property Ordinance No. XXVII of 1949, stating that the appellants were in unauthorised possession of the house of Fakira, a Muslim evacuee, and that they should either vacate the house or show cause to the contrary. The appellants filed their objections to the notice. The Deputy Custodian of Evacuee Property, by his order dated September 3, 1950, rejected the objections raised by the appellants and declared the house to be 'evacuee property'. The Deputy Custodian passed this order after he got an enquiry made through the Revenue Assistant (Rehabilitation). The appellants went in appeal to the Additional Custodian, Evacuee Property, who got further enquiry made to ascertain whether Mumtaz, son of Fakira, evacuee, had been in occupation of the house up to the date of the migration of the Muslims as a result of the partition. This enquiry revealed that Mumtaz had continued to reside in the village Baland and that a son was born to him in July, 1947. The Additional Custodian therefore agreed with the report and the order of the Deputy Custodian that the property in suit was evacuee property. The appellants then filed a revision before the Custodian General. It was dismissed on June 17, 1952. The Custodian General observed that there was more than sufficient evidence to establish that Mumtaz continued to be in possession of the house in dispute up to July, 1947.

Thereafter, the appellants filed a writ petition in the High Court challenging the legality of the order of the Deputy Custodian on the grounds that the Deputy Custodian gave no notice or opportunity to them to meet the case and that the Custodian had no jurisdiction in the matter in view of the provisions of the wajib-ul-arz according to which the house of a non-proprietor, on his leaving the village, vested in the proprietory body. The learned Single Judge who heard the petition held that the provisions of the Administration of the Evacuee Property Act, 1950 (Act XXXI of 1950), had been complied with throughout and referred the question whether the site occupied by a non-proprietor vested or not in the Custodian after the occupier had abandoned it, to a large Bench in view of his opinion that the decision of another Single Judge in Joti Parshad v. Bhawani Lal

required re-consideration. The Division Bench then decided this question and held the right of a non-proprietor to occupy a village site was a right in property, though it might not be an interest in property and that this right vested in the Custodian if the non-proprietor left the country and became an evacuee. The writ petition was accordingly dismissed and it is against this order that this appeal has been filed.

The sole question for determination in this case is whether Fakira had any such right in the property in suit which could vest in the Custodian on Fakira or his son Mumtaz becoming an evacuee. The case for the appellants is that Fakira had no such right which could vest in the Custodian both on account of the terms of the wajib-ul-arz and on account of his being a licensee. The respondents rely on s. 18 of the Administration of Evacuee Property Act to rebut this contention. It is necessary therefore to determine the scope of s. 18 of the Act.

Section 18, as originally enacted, was substituted by s. 8 of Act XI of 1953, which provided that the substituted section shall be deemed always to have been substituted for the original section. Thus the present section must be deemed to be the section existing from the commencement of this Act. Sub-section (1) of s. 18 is :

> "(1) Where the rights of an evacuee in any land or in any house or other building consist or consisted of occupancy rights, nothing contained in any law for the time being in force or in any instrument having the force of law or in any decree or order of any court, shall extinguish or be deemed to have extinguished any such rights either on the tenant becoming an evacuee within the meaning of this Act or at any time thereafter so as to prevent such rights from vesting in the Custodian under the provision of this Act or to prevent the Custodian from exercising all or any of the powers conferred on him by this Act in respect of any such rights, and, notwithstanding anything contained in any such law, contract, instrument, decree, or order, neither the evacuee nor the Custodian, whether as an occupancy tenant or as a tenant for a certain time, monthly or otherwise, of any land or house or other building shall be liable to be ejected or be deemed to have become so liable on any ground whatsoever for any default of
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> (a) the evacuee committed after he became an evacuee or within a period of one year immediately preceding the date of his becoming an evacuee; or
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> (b) the Custodian."

The expression 'occupancy rights' has not been defined in the Act. It is these occupancy rights which are not extinguished in spite of the provisions to the contrary in any other law or in any instrument having the force of law or in any decree or order of the Court. The occasion when they will not be extinguished would be when a tenant becomes an 'evacuee' within the meaning of the Act, or thereafter. It follows that sub-s. (1) of s. 18 provided for the non-extinguishment of those occupancy rights which would have been extinguished otherwise on the tenant's becoming an evacuee and that therefore the person having such rights must be a tenant. If he is not a tenant, then the occasion contemplated by sub-s. (1) of s. 18, for the application of its provisions, does not arise. This is further clear from the latter part of this sub-section which provides that notwithstanding anything contained in any law etc., neither the evacuee nor the Custodian, whether as an occupancy tenant or as a tenant for a certain time, shall be liable to be ejected or be deemed to have become so liable on any ground whatsoever for any default. This latter part also makes it clear that the persons

contemplated by the section are the tenants, whether occupancy tenants or tenants for a certain time. We therefore hold that the provisions of s. 18 apply to the occupancy rights of a tenant.

The next question to determine is whether Fakira was a tenant of this house. It is clear that Fakira who resided in the house in suit, was not a tenant of it. He occupied the site and probably built the house himself on getting the necessary permission from the proprietors.

With respect to non-proprietors, the wajib-ul-arz of the village states :

> "No non-proprietor can settle in the village or build a house without the consent of the owner of the estate. Whenever anybody settles, he obtains land or house from the proprietor of the same and he can live there so long as he pleases. Whenever he abandons the village, if the house belongs to the Shamlat of..... it falls into the possession of that proprietor..... About the houses of non-proprietors..... there is no customary right to sell or mortgage residential houses, remove the material or build burnt brick house without the consent of the proprietor..... If any person dies heirless his house reverts to the possession of the proprietor of the estate in which it is situate."

The mendicants are mentioned as one of the types of non-proprietors settled in the Shamlat of the estate. It is clear from these provisions that Fakira, a non-proprietor, had no such right in the site as would make him a tenant of it. He just had a right to occupy it and build a house which was, however, heritable and transferable only with the consent of the proprietor.

It follows, therefore, that the provisions of sub-s. (1) of s. 18, do not apply to Fakira's rights in the plot in suit and cannot therefore over-ride the provisions of the wajib-ul-arz according to which his right to reside in the house in suit came to an end when he abandoned the village on his migrating to Pakistan.

Learned counsel for the respondent has further contended that apart from s. 18 of the Act, Fakira's right to residence in the house in suit will vest in the Custodian as his migrating from the village to Pakistan on partition does not amount to abandonment contemplated by the provisions of the wajib-ul-arz. It is submitted that the wajib-ul-arz contemplates voluntary abandonment and not abandonment under force. We find it difficult to accept this contention. The abandonment is voluntary, though the volition to abandon arises on account of circumstances over which Fakira had no control. He left the village and migrated to Pakistan because he thought that to be the better thing to do. This point was also not taken before the High Court.

Reliance is placed on the case reported as Associated Hotels of India v. R.N. Kapoor [[1060] 1 S.C.R. 368, 385] for supporting the contention that Fakira was a lessee of the land in suit and not a licensee. We do not think this case supports the contention. The following propositions were laid down in that case for determining whether a document creates a licence or a lease :

> (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form.
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> (2) The real test is the intention of the parties whether they intended to create a lease or a licence.
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> (3) If the document creates an interest in the property, it is a lease, but, if it only

> permits another to make use of the property, of which the legal possession continues with the owner, it is a licence, and
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> (4) If under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant, but circumstances may be established which negative that intention to create a lease.

The terms of the wajib-ul-arz, already mentioned, make it clear that no interest in the site on which Fakira was settled was given to Fakira by the proprietors of the village. He was just granted a heritable right to occupy it for residence. The house reverted to the possession of the proprietors if he died heirless.

Learned counsel for the respondent has drawn our attention to the observation in the above to the effect :

> "The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence."

This observation does not help the respondent's case because no interest was created in Fakira and therefore no question of his transferring that interest arises. The wajib-ul-arz only expresses this much, that there was no customary right to sell or mortgage residential houses, remove the material or build burnt brick houses without the consent of the proprietors. It does not say that the non-proprietor can transfer his residential right to any one with or without the consent of the proprietor. We therefore do not agree with this contention.

It has also been contended for the respondent that the licensee's rights which Fakira had, could vest in the Custodian, as they come within the meaning of the expression 'property'. Even if they do, those rights get extinguished in view of the provisions of the wajib-ul-arz and therefore there could be no vesting of those rights in the Custodian if the vesting of those rights is not prevented on account of the applicability of s. 18 of the Act. We have already held that s. 18 does not apply as Fakira was not a tenant. The expression 'evacuee property' as it stood in the Act till its amendment in 1953, meant any property in which an evacuee had any right or interest, whether personal or as a trustee or as a beneficiary or in any other capacity and included any property etc. Fakira had no right in any capacity in the property in suit when the Administration of Evacuee Property Act came into force in 1950, and therefore the property in suit could not have been 'evacuee property'.

Lastly, we do not find any support in the provisions of the wajib-ul-arz or in any law for the observation in the judgment of the Court below :

> "Were the evacuee to come back he could demand to take possession of the site, and so it cannot be said that the right has ceased to exist. The right ceases only if the occupier leaves the village permanently with no intention of returning,..."

It was nobody's case that Fakira and his son had left the village temporarily and were to return. It was said in paragraph 5 of the written statement of respondents 1 to 3 that Fakira abandoned the house only in 1947 at the time of partition. The entire case was that Fakira had migrated to Pakistan and had abandoned the village.

We are therefore of opinion that Fakira did not possess any such right in the land in suit which could vest in the Custodian and that therefore the property in suit is not 'evacuee property'. We therefore

allow the appeal with costs throughout and, setting aside the order of the Court below, allow the petition and quash the order of the Custodian General dated June 17, 1952, declaring the property in suit to be evacuee property.

Appeal allowed.

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