

M/s. Haji Esmail Noor Mohammad & Co. and Ors

Vs

The Competent Officer, Lucknow & Ors

Writ Petition No. 14 of 1963. and Civil Appeal No. 1566 and 1567 of 1966

(CJI K. Subha Rao, J. C. Shah, J. M. Shelat, V. Bhargava, G. K. Miter JJ)

08.03.1967

JUDGMENT

SUBBARAO, C.J.

The writ petition and the two appeals are connected and they arise out of a dispute under the Evacuee interest (Separation) Act, 1951, (Act No. 64 of 1951) in regard to a partnership firm carrying on business in the name and style of Messrs. Hajee Esmail Noor Mohammad & Co. Its principal place of business is Calcutta and it has branches at Kanpur and Bombay. In 1947 a partnership deed was executed in respect of the said business. Though the business continued to be carried on under the said name, from time to time, having regard to the exigencies, new partnership deeds were executed. In the year 1948, Abdul Latif Hajee Esmail, one of the partners of the firm, went to Pakistan. On May 1, 1949, it appears that the said Abdul Latif Hajee Esmail sent from Pakistan a letter addressed to the partnership firm at Calcutta indicating his intention to retire from the partnership. On June 24, 1949, The United Provinces Administration of Evacuee Property Ordinance, 1949 (U. P. Ordinance No. 1 of 1949) came into force. Under that Ordinance all evacuee property situated in the United Provinces vested in the Custodian. On August 8, 1949, another deed of partnership was executed between the partners excluding therefrom the said Abdul Latif Hajee Esmail and the document was registered. The said Abdul Latif Hajee Esmail and the document was registered on October 24, 1949. On September 7, 1949, the Deputy Custodian of Evacuee Property, Kanpur, informed the firm that possession of the Kanpur property of the firm would be taken within 24 hours. Pursuant to the notice, possession of the firm at Kanpur was taken by the Deputy Custodian. On September 24, 1949, the firm filed a claim under s. 8 of the U. P. Ordinance 1 of 1949 to the effect that the said property was not evacuee property. On October 18, 1949, The Administration of Evacuee Property Ordinance No. 27 of 1949, hereinafter called the 'Central Ordinance' came into force. On May 31, 1950 the Deputy Custodian of Evacuee Property (Judicial), Allahabad Circle, Kanpur, in the objection petition filed by the firm found that Abdul Latif Hajee Esmail was an evacuee, that the notice issued by him to the firm was invalid, as it was not given to the individual partners thereof, that the said Abdul Latif Hajee Esmail would be deemed to be continuing as a partner, that he was an evacuee and that, therefore, his share in the partnership vested in the Custodian. In the result he declared that the share of Abdul Latif Hajee Esmail in the firm, which was annas 5 out of annas 19 and pies 3, was evacuee property. He released the other shares from attachment. No appeal was filed against that order. On December 13, 1952, the Competent Officer, Kanpur, sent separate notices under s. 6 of the Evacuee Interest (Separation) Act, 1951 (Central Act 64 of 1951) to each of the partners of the firm calling upon them to their claim for the purpose of determining the interest of the evacuee in the partnership business. In March 1953, the firm filed a petition under s. 7 of the Central Act 64 of 1951 claiming 14 annas and 3 pies share out of the total share of 19 annas and 3 pies of the Kanpur branch of the partnership

firm. On December 31, 1953, Abdul Latif Hajee Esmail died. On September 12, 1950, the firm raised various objections including one of jurisdiction, the main objection being that Abdul Latif Hajee Esmail was not a partner of the prevent firm. The Competent Officer rejected all the objection and held, by his order dated November 10, 1950, that the firm was accountable to the Custodian in respect of the assets and profits of the firm so far as it related to the Kanpur Branch of the firm preferred an appeal against that order to the Appellate Officer appointed under Central Act 64 of 1951. On April 25, 1960, the Appellate Officer dismissed the appeal. Thereafter, on July 25, 1960, the firm filed a petition in the High Court of Allahabad under Art. 226 of the Constitution against respondents 1 and 2 for quashing their orders and for issuing an appropriate writ or suitable directions against all or any of the respondents. On September 25, 1961, the firm and its partners filed another petition under Art. 226 of the constitution in the said High Court for similar reliefs. The second petition became necessary because certain technical objections were raised in regard to the first petition. On November 29, 1962, Oak, J., of the said High Court dismissed both the petitions. The learned Judge held that the High Court had no jurisdiction to quash the order of the Competent Officer for taking accounts inasmuch as his order and merged in the order of the Appellate Authority whose office was situated in Delhi beyond the territorial jurisdiction of the said High Court. Special Appeals preferred to a Division Bench of the High Court were also dismissed. Hence the two appeals. The firm and its partners also filed a petition in this Court under Art. 32 of the Constitution for the same reliefs.

We shall first take the petition filed in this Court under Art. 32 of the Constitution.

Mr. S. T. Desai, learned counsel for the petitions, raised before us the following points : (1) Abdul Latif Harjee Esmail was not an evacuee and, therefore, his property was not evacuee property within the meaning of cls. (c) and (d) of s. 2 of the U. P. Ordinance No. 1 of 1949 and, therefore, the orders of the Competent Officer or of the Appellate Officer were without jurisdiction. (2) The decision given by the two officers were also without jurisdiction as no notice was issued and as no declaration was made under s. 7 of the Central Ordinance No. 27 of 1949 or of the Central Act 31 of 1950. (3) The said officers also had no jurisdiction to pass any order relating to the share of Abdul Latif Hajee Esmail confined only to the Kanpur branch of the firm. (4) In any case, the said Officers committed an error in holding that Abdul Latif Harjee Esmail had a subsisting share in the partnership even after February 10, 1949 and August 8, 1949, i.e., after the dates of reconstitution of the partnership.

Mr. N. S. Bindra, learned counsel for the respondents, apart from contesting the correctness of the points raised by the petitioners' counsel, argued that the petitioners had no fundamental right to maintain the petition. His contention was that the interest of Abdul Latif Hajee Esmail in the partnership had automatically vested in the Custodian under the provisions of the U. P. Ordinance No. 1 of 1949, that the petitioners had no interest in the said share and, that, therefore, no fundamental right of theirs was affected by the order of the Competent Officer or of the Appellate Officer made in the appeal against the said order.

To appreciate the contentions it is necessary to consider the provisions of the relevant Ordinance and the Acts.

U. P. Ordinance No. 1 of 1949

Section 2, (c) " evacuee " means any person,

(i) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has on or after the 1st day of March, 1947 any place in the United Provinces for any place outside the territories now forming part of India, or

(ii) who is resident in any place now forming part of Pakistan and is for that reason unable to occupy, supervise or manage in person his property in the United Provinces or whose property in the Province has ceased to be occupied supervised or managed by any person, or is being occupied supervised or managed by an unauthorised person, or.....

* * * *

(d) " evacuee property " means any property in which an evacuee has any right or interest.....

(e) " property " includes any property, right or interest, but does not include a mere right to sue or a cash deposit in a bank.

Section 5. Vesting of evacuee property in the Custodian.

(1) The Custodian may from time to time, notify by publication in the official Gazette or in such other manner as may be prescribed, evacuee properties which have vested in him under this Ordinance.

(2) Where after the vesting of any evacuee property in the Custodian any person is in possession of any such property, he shall be deemed to be holding it on behalf of the Custodian and shall on being so required, surrender possession thereof to the Custodian or any person appointed by him in this behalf.

Under this Ordinance ' property of an evacuee ' as defined in s. 2 (c) automatically vests in the Custodian under s. 5. Thereafter any person in possession of the said property holds it only on behalf of the Custodian, who can take necessary steps to take possession from his.

The Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance, No. 12 of 1949.

This Ordinance was extended to the United Provinces by the Administration of Evacuee Property (Chief Commissioners' Provinces) Amendment Ordinance, No. 20 of 1949. It came into force on August 23, 1949.

Section 5. Vesting of evacuee property in the Custodian.-

(1) Subject to the provisions of this Ordinance, all evacuee properties situate in a Province shall vest in the Custodian of that 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, that evacuee property shall, on the commencement of his Ordinance,

be deemed to have vested in the Custodian appointed for the Province under this Ordinance.

Section 7 and 8 of this Ordinance correspond to ss. 7 and 8 of the U. P. Ordinance No. 1 of 1949; the former confers power on the Custodian to take possession of any evacuee property vested in him and the later provides for filing of claims by interested persons. Under this Ordinance the evacuee property automatically vested in the Custodian was deemed to have vested in the Custodian for the Province concerned.

Central Ordinance No. 27 of 1949.

This Ordinance came into force on October 18, 1949.

Section 55.

(1) The Administration of Evacuee Property Ordinance, 1949 (XII of 1949), as in force in the Chief Commissioners' Provinces and the Province of Madras and the United Provinces is hereby repealed.

(2).....

(3) Notwithstanding the repeal by this Ordinance of the Administration of Evacuee Property Ordinance, 1949, or of any corresponding law, anything done or any action taken in the exercise of any power conferred by that in the exercise of any power conferred by that Ordinance or law shall be deemed to have been done or taken in the exercise of the powers conferred by this Ordinance, and any penalty incurred or proceeding commenced under that Ordinance or law shall be deemed to be a penalty incurred or proceeding commenced under this Ordinance as if this Ordinance were in force on the day on which such thing was done, action taken, penalty incurred or proceeding commenced.

Section 8.

(1).....

(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 this 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. It is clear from the said provisions that the Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance No. 12 of 1949, was repealed and under s. 8 (2) the evacuee property automatically vested under U. P. Ordinance No. 1 of 1949 and thereafter deemed to have been vested in the Custodian under the Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance No. 12 of 1949, as amended by the Administration of Evacuee property (Chief Commissioners' provinces) Amendment Ordinance, 1949, Ordinance No. 20 of 1949, was deemed to have been vested in the Custodian appointed under this Ordinance. Under the saving clause things done or action taken under the previous Ordinance was deemed to have been taken or done under this Ordinance.

Central Act 31 of 1950

Section 58.

(1) The Administration of Evacuee Property Ordinance, 1949 are hereby repealed.

(2).....

(3) The repeal by this Act of the Administration of Evacuee Property Ordinance, 1949. shall not affect the previous operation of that Ordinance, Regulation or corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under that Ordinance, Regulation or corresponding law, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act were in force on the day on which such thing was done or action was taken.

Section 8 (2) of this Act corresponds to s. 8 (2) of the Central Ordinance No. 27 of 1949. This Act repeals the Ordinance and practically enacts its provisions. Under this Act also the automatic vesting of the evacuee property in the Custodian under the U. P. Ordinance No. 1 of 1949 deemed to have continued to vest under the Custodian appointed under the Central Ordinance No. 27 of 1949 is continued, by fiction, under this Act. The High Court of Allahabad in Azimunnissa's (1) case held that there was no valid vesting under Ordinance XII of 1949 or even under Ordinance XX of 1949 or even under Ordinance XX of 1949 for lack of legislative competence and, that, therefore, the deeming clause in Ordinance XXVII of 1949 or Act XXXI of 1950 would not continue the vesting. This defect was cured by Act 1 of 1960 retrospectively validating the vesting under the earlier laws. This aspect of the case was considered by this Court in Azimunnissa v. The Deputy Custodian, Evacuee properties, District Deoria (1). Therein Kapur, J., speaking for the Court, observed : " The effect of s. 8 (2-A) is that what purported to have vested under s. 8 (2) of Ordinance XXVII of 1949 and which is to be deemed to be vested under s. 8 of 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 s. 8 (2) of Ordinance XXVII of 1949 or s. 8 (2) of Ordinance XXVII of 1949 or s. 8 (2) of Ordinance XXVII of 1949 or s. (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 in effective; (4) makes the property evacuee property by its deeming effect; and (5) validates all orders passed by the Custodian in regard to the property".

In the instant case, from the narration of the facts it is clear that Abdul Latif Harjee Esmail, in view of the disturbed conditions, went away to Pakistan in the year 1948 and, therefore, he was an evacuee within the meaning of the U. P. Ordinance 1 of 1949. His property, i.e., his interest in the partnership business, automatically vests under the Ordinance in the Custodian. The Deputy Custodian of Evacuee Property, Kanpur issued notice to the firm on September 7, 1949, informing the firm that the Kanpur property of the firm would be taken possession. The said vesting was deemed to have taken place under the Central Ordinance 27 of 1949 and the Central Act 31 of 1950. Subsequent proceedings were taken under the provisions of the said Central Ordinance and Act. As stated above, the automatic vesting of Abdul Latif Harjee Esmail's share in the firm was

continued by Central Ordinance 27 of 1949 and Central Act 31 of 1950 by the deeming provisions contained therein. Therefore, no question of issuing further notice or making a declaration that the said interest was evacuee property under s. 7 (1) of the Ordinance arises. Section 7 only applies to properties other than those which have been vested automatically in the Custodian. Such a vesting cannot be reopened under the Central Ordinance or the Central Act, for it has already vested thereunder by a fiction. It follows that the petitioners have no interest in the share of Abdul Latif Hajee Esmail in the firm which had vested in the Custodian.

That apart, after the Central Act 31 of 1950 came into force on April 17, 1950, the Deputy Custodian of Evacuee Property (Judicial), Allahabad, made an order on the objections filed by the firm. Therein he held that the share of Abdul Latif Hajee Esmail in the firm, i.e., 5 annas out of 19 annas and 3 pies, vested in the Custodian and on that finding declared it to be evacuee property. That order had become final. The firm did not take any further proceedings under the Act to set aside that order which had become final. It is no longer open to it to question this finding. It follows that the petitioners have no fundamental right in regard to the interest of Abdul Latif Hajee Esmail in the partnership.

But this will not dispose of the petition. The petition is not solely based upon the fundamental right in respect of the interest of Abdul Latif Hajee Esmail, for the allegations made in the petition and the reliefs asked for discloses that the petitioners' case is that the fundamental right of the firm and its partners as in-fringed by the impugned orders in the manner mentioned in the petition. But the reliefs asked for are similar to those asked for in the appeals. As we are remanding the appeals to the High Court for decision on merits, the other questions raised in the writ petition can more conveniently be disposed of only after the High Court gives its findings on the other points raised in the appeals. If the appeals succeed in the High Court, this writ petition will become unnecessary; if they fail, the findings therein will be binding in the writ petition. In that event, if appeals are filed in this Court, the questions will be finally decided therein. In these circumstances we dismiss the writ petition without prejudice to the petitioners' personal rights which we will presently consider in the appeals. There will be no order as to costs.

Now coming to the appeals, the High Court, as indicated earlier, dismissed the writ petitions on the ground that it had no jurisdiction to issue a writ against the Appellate Officer in whose order the order of the Competent Officer had merged, as he held his office outside the territorial jurisdiction of the High Court of Uttar Pradesh.

To appreciate this argument it is necessary to state some relevant facts. The Competent Officer of Kanpur who made the order dated November 10, 1959 has his office at Kanpur in Uttar Pradesh. The Appellate Officer, who by his order dated April 25, 1960, dismissed the appeal against the order of the Competent officer, has his office located at New Delhi. In the memorandum of appeal filed by the appellants before the Appellate Officer the location of his office was described thus :

" In the Court of the Appellate Officer, Under the Evacuee Interest (Separation) Act, 1951. Ministry of Rehabilitation. Government of India, Dilaram place, Mussoorie".

In the order of the Appellate Officer, the said Officer is described thus :

" Shri. Parshottam Swarup, Appellate Officer, India".

It also shows that the appeal was heard and the judgment was delivered at Allahabad. In the counter

- affidavit filed in the writ petition on behalf of the Appellate Officer it is stated in parts 4 (a) and 4 (b) that the office of the Appellate Officer is situated at New Delhi and the record of the Appellate Court is kept at Delhi. In the rejoinder affidavit filed by the appellants it is averred that the Appellate Officer to whom the appeal was presented had his head - office at Mussoorie, that he was appointed by the State Government and that he gave his decision at Allahabad on emerge : The Competent Officer's office is at Lucknow and he made his order at Lucknow. The Appellate Officer, who was appointed by the State Government, had his main office at Mussoorie in Uttar Pradesh, heard the appeal at Allahabad and dismissed it there. Laer on, his man office was shifted to Delhi. Section 2 (a) of the Evacuee Interest (Separation) Act, 1961 (Act No. 64 of 1951) defines " appellate officer " thus :

" "appellate " officer means an officer appointed as such by the State Government under section 13".

Under s. 13 of the said Act, the State Government with the approval of the Central Government may, by notification in the approval of the Central Government may, by notification in the Official Gazette, appoint as many appellate officers as may be necessary for the purpose of hearing appeals against the orders of the competent officers and an appellate officer shall have jurisdiction over such local area or areas as may be specified in the notification. Sections 14 to 18 provide for filing of appeals and also define the powers of the competent appellant officers in the matter of disposing of those appeals. The Appellate Officer therefore derives his jurisdiction under a State statute, he is appointed by the State Government, though in consultation with the Central Government, though in consultation with the Central Government, and exercises his jurisdiction within the territorial limits of the High Court. It appears that the same officer is also appointed by other States and that for convenience his office is now situated at Delhi, though he disposes of appeals pertaining to each State only in that State.

On these facts the question arises whether the High Court of Allahabad has jurisdiction to issue a writ under Art, 226 of the Constitution against the Appellate Officer. It has now been will settled that under Art, 226 of the Constitution, before it was amended, the High Court had no jurisdiction to issue a with thereunder against a person or authority unless the person or authority resided or was located within the territorial jurisdiction of the appropriate High Court : See Election Commission, India v. Saka Venkata Subba Rao (i) and Lt. Col. Khajoor Singh v. The Union of India (ii). In the jurisdiction of the High Court to issue a writ of certiorari against orders made by a hierarchy of tribunals or authorities, two situations arise, namely, (1) where the order of an appellate authority or tribunal, having its office outside the territorial jurisdiction of the High Court, is a nullity, and (ii) where the order of the original authority within the territorial jurisdiction of the High Court merges with that of the appellate authority outside its territorial jurisdiction, in the former case the appropriate High Court can issue a writ against the order of the original authority and in the latter it cannot : see A. Thangal Kunju Musaliar v. V. Venkitachalam Pott (3); Collector of Customs v. East India Commercial Company (4); and Shriram Jhunjhunwala v. The State of Bombay (5). This Court has also held that in all cases after the appellate authority has disposed of the appeal the operative order was of the final authority whether it has reversed, modified or confirmed the original orders : see Collector of Customs v. East India Commercial Company (4). Though Das, C.J., in The State of Uttar Pradesh v. Mohammad Nooh (6), was not able to equate the orders made in departmental enquiries with decrees in civil courts in the context of the doctrine of merger, this Court in Collector of Customs, Calcutta v. East India Commercial Co., Ltd(4) distinguished that case with the following observations at p. 573 :

"That case was not concerned with the territorial jurisdiction of the High Court where the original authority is within such territorial jurisdiction while the appellate authority is not and must therefore be confined to the special facts with which it was dealing."

In that case the Court held that, as the Central Board of Revenue which had confirmed the order of the Collector of Customs had its office in New Delhi, the Calcutta High Court could not issue a writ against it. But in none of the cases the Court considered a situation similar to that now presented to us. They dealt with the case of an appellate authority or tribunal which had been appointed by the Central Government and was disposing of only statutory appeals or other proceedings in a place outside the territorial jurisdiction of the concerned High Court, though in one of the cases, i.e., Election Commission, India v. Saka Venkata Subba Rao (1), the Central Authority for convenience heard the parties and made the order within the territorial jurisdiction of parties and made the order within the territorial jurisdiction of the High Court. In all these cases the appellate authority, both factually and legally; had its residence or location outside the territorial jurisdiction of the High Court. But in the present case, the appellate authority, though for convenience is having its head office in New Delhi, is factually and legally functioning under the State Act within the territorial jurisdiction of the High Court. To hold that such an authority which is appointed by the State Government and holds office, entertains and disposes of appeals within the State is outside the jurisdiction of the High Court is to carry technicality beyond reasonable limits. One can hold reasonably that such an appellate authority is located within the territorial limits of the High Court for the purpose of disposing of the appeals under the Act. This is a converse case where legally and factually the appellate authority is located in the State though for convenience it also holds office in New Delhi, as presumably the same officer has been appointed appellate officer by other States under different Acts. We, therefore, hold that the High Court has jurisdiction to issue a writ in appropriate cases against such an authority under Art, 226.

In the result, the order of the High Court is set aside and the appeals are remanded to it for disposal in accordance with law. Costs will abide the result.

G. C. Appeal remanded.

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