

Shri Har Govind

Vs

Shri Aziz Ahmed and Another

Civil Appeal No. 381 of 1965

(CJI J. C. Shah, S. M. Sikri, G. K. Mitter, K. S. Hegde, V. Ramaswami-I, A. N. Grover JJ)

08.08.1969

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from a judgment of the Allahabad High Court confirming the order of the District Judge dismissing an Execution Application filed by the appellant.
2. On June 16, 1948 the appellant entered into an agreement with Aziz Ahmed Khan - respondent No. 1, for the sale of certain properties comprising houses and plots in the town of Bareilly. The sale consideration of Rs. 1,45,000/- was stated to have been already paid by the appellant to the vendor. Subsequently disputes arose between the vendor and the appellant regarding the completion of the sale. These disputes were referred to the arbitration of Shri R.R. Agarwal who gave an award on August 30, 1949 which was made a rule of the court on November 30, 1949. A decree on the basis of the award was granted in favour of the appellant.

Sometime after November 22, 1949 the vendor Aziz Ahmed Khan left India for Pakistan. On December 7, 1950 the appellant moved the Deputy Custodian (Judicial) Meerut Circle for confirmation of the transfer under Section 38 of the Administration of Evacuee Property Ordinance, 1949 (Ordinance No. 27 of 1949) or under Section 40 of the Administration of Evacuee Property Act 1950 (Act 31 of 1950). On 9th May, 1951 the Deputy Custodian accorded confirmation. The Additional Custodian, however, took suo motu action in exercise of his revisional jurisdiction and set aside the order passed by the Deputy Custodian. On April 4, 1952 the appellant filed an application for execution of the decree passed on the basis of the award. On May 20, 1952 objections were filed on behalf of the Custodian to the execution. The District Judge held that the award made on August 30, 1949 could not have the effect of transferring the properties as the approval of the Collector had not been obtained under the notification dated July 29, 1949 which had been issued under Section 26 of U.P. Administration of Evacuee Property Ordinance No. 1 of 1949 and that on the date of the decree the transfer of properties could not be effected unless confirmed by the Custodian. It was further held by him that no interest by way of charge in favour of the appellant had been created on the properties in dispute. He was further of the view that Section 17(1) of the Central Act of 1950 created a bar to execution of the decree. The execution application was consequently dismissed.

3. The appellant filed an appeal to the High Court which was dismissed. When the appeal came up for hearing before this Court on February 22, 1968 it was considered expedient to have further findings on certain points. The following questions were therefore framed and remitted to the High Court for that purpose :

(1) The date on which Aziz Ahmed Khan migrated to Pakistan.

(2) Whether the properties of Aziz Ahmed Khan vested in the Custodian of Evacuee Property under U.P. Ordinance 1 of 1949 or Central Ordinance 12 of 1949 as made applicable to the State of U.P. by U.P. Ordinance 20 of 1949 or under the Central Ordinance 27 of 1949 or under Central Act of 1950.

The High Court remitted these matters to the District Judge. His findings on the first question was that Aziz Ahmed Khan migrated to Pakistan on some date after November 22, 1949. On the second question he found that Aziz Ahmed Khan's properties did not vest in the Custodian of Evacuee Property under any of the Ordinances or under the Central Act 31 of 1950. Certain additional evidence was produced before the High Court. The High Court expressed agreement with the conclusion of the District Judge on both the points. It may be mentioned that on certain subsidiary points the learned District Judge had also found that it had not been proved that a valid declaration under Section 7(1) of the Central Ordinance 27 of 1949 or of the corresponding provision in the Central Act 31 of 1950 as made for declaring Aziz Ahmed Khan an evacuee. In the opinion of the learned Judge such a declaration was necessary if his properties were to be declared evacuee properties.

4. In view of the findings which have been returned by the High Court on the points referred to it has been contended on behalf of the appellant that there could be no bar to the execution of the decree which was based on the award. It is pointed out that on the conclusions at which the High Court has now arrived the properties of Aziz Ahmed Khan were never declared to be evacuee properties either under the Central Ordinance 27 of 1949 or the Central Act 31 of 1950 and they could not vest in the Custodian unless they had been so declared after appropriate proceedings. It is urged that the decree in favour of the appellant was of the nature of a decree passed in a suit for specific performance. The court could and should have executed a conveyance in favour of the appellant since Aziz Ahmed Khan was no longer available or was refusing to do so and the confirmation of the Custodian could be obtained before the registration was effected. According to the counsel for the appellant the Additional Custodian had declined to confirm the transfer at the previous stage because there was no deed of sale or transfer.

5. Counsel for the respondent has drawn attention to a decision of this court in *Azimunissa and Others v. The Deputy Custodian Evacuee Properties, District Deoria and Others* ((1961) 2 SCR 91) in which the effect of the declaration of U.P. Ordinance 1 of 1949 to be invalid by the courts came up for consideration, as also of the subsequent evacuee legislation namely, Central Ordinance 27 of 1949, Central Act 31 of 1950 and the Administration of Evacuee Property (Amendment) Act 1960. It appears to have been held in that case that the property which had vested under the U.P. Ordinance 1 of 1949 continued to vest in the Custodian notwithstanding the fact that the High Court of Allahabad in *Azimunissa and Others v. Assistant Custodian* (AIR 1957 All 65) held the vesting to be invalid. This was the result of the introduction of Section 3(2-A) in the Central Act of 1931 by the Central Amendment Act 1 of 1960. In the present case, however, Aziz Ahmed Khan migrated to Pakistan after November 22, 1949. At that point of time it was Central Ordinance 27 of 1949 which was in force. It appears highly doubtful that the respondent could take advantage of the provisions of automatic vesting contained in U.P. Ordinance 1 of 1949.

6. There is, however, a serious hurdle in the way of the appellant even when the provisions of Central Ordinance 27 of 1949 or the Central Act 31 of 1950 are taken into consideration. Section 38(1) of that Ordinance provided that no transfer of any right or interest in any property after the

14th day of August 1947 by or on behalf of an evacuee or by or on behalf of a person who had become an evacuee after the date of the transfer shall be effective so as to confer any rights or remedies on the parties to such transfer unless it was confirmed by the Custodian. The provisions of Section 40 of the Central Act 31 of 1950 were similar though there was a certain change in the language. Sub-section (1) of that section was in the following terms :

"No transfer made after the 14th day of August, 1947, but before the 7th day of May 1954, by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto or any person claiming under them or either of them, if, at any time after the transfer, the transferor becomes an evacuee within the meaning of Section 2 or the property of the transferor is declared or notified to be evacuee property within the meaning of this Act, unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act."

7. Under both these enactments transfer of property was ineffective until confirmed by the Custodian even if it was made by a person who became an evacuee after the date of the transfer. It was not necessary that the property should have been declared or notified to be evacuee property before the aforesaid provisions were attracted. Under Section 40(1) of the Act, the transfer was to be ineffective in both eventualities; (1) if the transferor became an evacuee within the meaning of Section 2 after the transfer or (2) if the transferor's property had been declared or notified to be evacuee property. It is abundantly clear that if Aziz Ahmed Khan became an evacuee even after the transfer, Section 38(1) of the Ordinance and Section 40(1) of the Act became applicable. One of the meanings of the word "evacuee" as given in the definition in Section 2(b) of the Ordinance and of the Act was :

Section 2(d) "(i)" 'evacuee' means any person, -

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, left any place in a Province for any place outside the territories now forming part of India."

8. Aziz Ahmed Khan became an evacuee the meaning of the above definition. It was necessary, therefore, for the appellant to have obtained the confirmation of the Custodian in respect of the transfer which has been made by Aziz Ahmed Khan in his favour of the properties in question. The Additional Custodian declined to confirm the transfer and thus the condition precedent for the transfer to become effective remained unsatisfied. It is significant that even in the award which formed the basis of the decree it had been provided "the second party (Aziz Ahmed Khan) is hereby directed to execute the necessary, documents in respect of the transfer by him of the properties referred to above within one month from the date of the receipt of the confirmation or approval according to law failing which the first party will, at his option, get the same executed and registered through court on the basis of this award which would be made a rule of the court. Therefore according to the award the confirmation or approval of the Custodian had to be obtained before the transfer documents were to be executed and completed in accordance with law. It was, incumbent on the appellant to obtain the confirmation order before he could ask for any further steps to be taken by the courts in the matter of execution and registration of the transfer deed. Under Section 39 of the Central Ordinance 27 of 1949 no document could be registered of nature mentioned in Section 38 unless the Custodian had confirmed the transfer. Similar provisions were

contained in Section 40 of the Central Act 31 of 1950. The prayer in the Execution Application that the court might grant assistance "by execution of sale deed under the enabling para 5 of the Decree" could not, be entertained or acceded to by the Executing Court.

9. There is one matter, however, on which we would like to express no view and leave it open to the appellant to take such steps as he may be advised. Para 6 of the award which became part of the decree was as follows :-

"The claim of the first party for this transfer and exchange consideration is Rs. 1,50,000/- (one lakh fifty thousand) on account of all principal money and interest and other expenses calculated to date against the second party Sri Aziz Ahmed Khan, which the second party will pay with interest at 12 per cent. per annum in case the transaction and transfer of the properties referred to above in favour of the first party Sri Sardana is not confirmed or approved in any way and for any other reasons whatsoever.

Sri Sardana will force the payments against the properties referred to above and these properties are hereby charged with this claim and Sri Sardana will have his remedies to enforce the payment of the above claim against all other properties of the second party and also against his person."

10. The High Court in the judgment under appeal dealt with this question as if the charge was on the evacuee property. On the reasoning of which has been pressed before us about the necessity of a declaration under the provisions of Central Ordinance 27 of 1949 or Central Act 31 of 1950 this part of the judgment does not appear to be correct. We would, however, refrain from expressing any final opinion as in fairness to both sides this question should be left for being decided, if taken, in appropriate proceedings including proceedings before the Executing Court.

11. With the above observations the appeal is dismissed but in view of the entire circumstances we make no order as to costs.

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