

Abu Khan and Others

Vs

Union of India Anothers

Civil Appeal No. 1816 (N) of 1970

(D. A. Desai, A. Varadarajan, O. Chinnappa Reddy JJ)

30.09.1983

JUDGMENT

DESAI, J. -

1. One Sumer Khan had five sons and two daughters. They were Imam Khan, Sodey Khan, Rahmat, Khan, Hanif Khan, Gafoor Khan and Hazran and Mima respectively. Out of these five sons, Hanif Khan and Gafoor Khan were declared as evacuees. Sumerkhan had died leaving two houses bearing Nos. 11/5/68 and 11/5/80 situated in Jodhpur in the State of Rajasthan. On Hanif Khan and Gafoor Khan being declared evacuees, their undivided two-fifth share in the aforementioned two house was declared evacuee property. Abu Khan, appellant No. 1 is the son of Sodey Khan. He was also suspected to have migrated to Pakistan and therefore, he was declared an evacuee. Series of proceedings successively Custodian-General of Evacuee Property remanding the matter for a fresh enquiry. In the fresh enquiry Abu Khan was held not to be an evacuee, After the decision was recorded in favour of Abu Khan that he was not an evacuee, he approached the competent authority for separation of the non-evacuee interest in the aforementioned two house stating therein that only the share of Gafoor Khan an Hanif Khan has been declared to be evacuee property. The State Competent Officer who dealt with this proceeding held as per his order dated January 27, 1959 that Abu Khan had two-fifteenth share in the said property and the share of the female claimants was seven-fifteenth. The share of two evacuees Gafoor Khan and Hanif Khan was declared to be six-fifteenth. The State Competent Officer after determining the shares of the various claimants as also of the two evacuees gave a choice to the non-evacuees to purchase the evacuee interest for a price that was to be determined by the Competent Authority. It is at that stage that respondent No. 6 Maljimal entered the picture. The Managing Officer-cum-Assistant Custodian of Evacuee Property moved an application on February 10, 1959 before the State Competent officer by his order dated March 3, 1959 directed that house No. 11/5/168 has been put in possession of respondent No. 6, Maljimal, who was a displaced person and the same may be allotted to Maljimal on the assessed price. The State Company Officer by his order dated March 3, 1959 directed that house No. 11/5/168 should be given to Maljimal and house No. 11/5/180 should be given purchased by Abu Khan and other non-evacuees. It appears that in the mean time respondent No. 6, Maljimal preferred an appeal before the Custodian-General questioning the correctness of the decision in the fresh enquiry by Assistant Custodian holding that Abu Khan was an evacuee. This appeal was dismissed confirming that Abu Khan was not an evacuee. By that time, Respondent No. 6, Maljimal had occupied the property and therefore, the State Competent Officer directed that house No. 11/5/68 should be given to refugee allottee who is residing therein and the other house may be given to Abu Khan and other non-evacuee claimants provided they were prepared to purchase the evacuee interest therein. Abu Khan preferred an appeal against this order to the Appellate officer. This appeal was allowed by the Appellate Authority holding that even though some hardship is likely to

be caused to the displaced allottee who was in occupation of the house, he is not without a remedy because the Central Government may take action under Section 20-B of the Displaced Persons (Compensation and Rehabilitations) Act, 1954. Taking cue from the observation of the Appellate Officer, respondent No. 6, Maljimal moved an application before the Government of India under Section 20-B. To this application neither Abu Khan nor other non-evacuees having an interest in the property involved in the dispute were impleaded as impleaded as parties. When Abu Khan came to know about the application made by respondent No. 6, he filed an application before the Secretary, Government of India, Ministry of Rehabilitation pointed out therein that respondent 6, Maljimal cannot complain of any hardship because as far back in 1955 when Abu Khan was declared to be a non-evacuee, Maljimal was asked to vacate the house but he has been successfully avoiding the same. Appellant Abu Khan also pointed out that he had already deposited the assessed price of the evacuee interest in both the houses and thereby has become the full owner of the house in possession of Maljimal. He accordingly requested the Government of India not to accept the application of respondent No. 6, Maljimal under Section 20-B. It appears that the Government of India accepted the application of respondent No. 6, Maljimal holding that he should be allowed to retain the house in question. The State Competent Officer informed Abu Khan and his co-claimants on April 28, 1964 about the order made by the Government of India under Section 20-B. Abu Khan and his co-claimants thereupon filed a writ petition in the Rajasthan High Court under Article 226 of the Constitution. The High Court rendered its decision on January 31, 1969 holding that the Government of Indian was not bound to hear Abu Khan and his co-claimants before making an order under Section 20-B, and found no other adequate reason to interfere with the order made by the Central Government. Hence this appeal by special leave.

2. Mr. B. D. Sharma, learned counsel who appeared for the appellant urged that Section 20-B of the Displaced Persons (Compensation and Rehabilitations) Act, 1954 has been declared ultra vires by this Court in *Lachhman Dass v. Municipal Committee, Jalalabad* ((1969) 3 SCR 645 : AIR 1969 SC 1126 : (1969) 1 SCC 653) and therefore, the order made in exercise of the power conferred by Section 20-B would be illegal, invalid and of no effect and accordingly must be quashed and set aside by this Court. This Court in the aforementioned decision rendered on February 12, 1968 held that Section 20-B is ultra vires Article 31(2) of the Constitutions. The Section was accordingly struck down. Undoubtedly, it was struck down as being violative of Article 31(2) which itself has been repealed by Construction (Forty-fourth Amendment) Act, 1978. However, once Section 20-B was struck down way back in 1968 as being violative of Article 31(2) but it was not re-enacted after the repeal and deletion of Article 31(2) and therefore, no order could have been made by the Central Government in 1964 under an unconstitutional provision when it purported to make the impugned order. Though this decision holding Section 20-B ultra vires the construction was rendered aback a year before the High Court pronounced the Judgment under appeal, it was not brought to the notice of the High Court. Since then Section 20-B has not been re-enacted; obviously, therefore an order made under an unconstitutional provision would be illegal and invalid and no effect can be given to it. This was the only point raised in this appeal which must be accepted and therefore, the appeal must succeed.

3. Unfortunately, neither the Union of India nor the sixth respondent appeared before us to canvass any other contention on which the impugned order could be sustained.

4. Accordingly this appeal is allowed and the judgment of the High Court dated January 31, 1969 is quashed and set aside as also the order of the Central Government made under Section 20-B of the Displaced persons (Compensation and Rehabilitation) Act, 1954 is quashed and set aside. The appeal is allowed to that extent with no order as to costs.

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