

SUPREME COURT OF INDIA

Union of India

Vs

Raja Mohammed Amir Mohammad Khan

Appeal (Civil) 2501 of 2002

(Ashok Bhan and Altamas Kabir)

21/10/2005

JUDGMENT

ASHOK BHAN, J.

Union of India has filed this appeal by leave of the Court against the final judgment/order dated 21.9.2001 passed by the High Court of Judicature at Bombay in Writ Petition No.1524 of 1997 whereby the High Court has allowed the writ petition filed by the respondent. High Court has further directed the return of the property to the respondent.

In order to appreciate the controversy arising in this appeal the facts are required to be set in detail.

Raja Mohammed Amir Mohammad Khan, writ petitioner/respondent herein is the son of Raja of Mahmudabad in Distt. Sitapur Uttar Pradesh. In December, 1957 the erstwhile Raja of Mahmudabad (father of the respondent) migrated to Pakistan and became a citizen of Pakistan. However, the respondent and his mother Rani Kaniz Abdi (since deceased) continued to reside in India as Indian citizen.

The Defence of India Rules, 1962 made under Section 3 of the Defence of India Ordinance, 1962 came into force with effect from 5.11.1962. Rule 133-V, inter alia, provided that the Central Government was authorised to appoint a Custodian of Enemy Property for India to preserve enemy

property. Defence of India Ordinance, 1962 was repealed by Section 48 of Defence of India Act, 1962. The 1962 Rules, however, made under the Defence of India Ordinance, 1962 were deemed to be the rules under the Defence of India Act. Thereafter, the Government of India in exercise of powers under sub-rule (1) of Rule 133-V issued the Enemy Property (Custody & Registration) Order, 1962. In the year 1965 hostilities between India and Pakistan broke out and on 11.9.1965 the Enemy Property (Custody & Registration) Order, 1965 (for short "the Enemy Property Order, 1965") was issued by the Government of India. The effect of the order was that all immovable property in India belonging to or held by or managed on behalf of Pakistani nationals stood vested in the Custodian of Enemy Property in India with immediate effect. Since the father of the respondent was a national of Pakistan his property also vested in the Custodian. Enemy Property Ordinance, 1968 was promulgated which was later on replaced by the Enemy Property Act on 6.7.1968. Enemy Property vested in the Custodian under the Defence of India Rules, 1962, continued to be vested in the custodian under the said Act.

The erstwhile Raja of Mahmudabad died in London on 14.10.1973. The respondent herein is the sole heir of late Raja by virtue of Section 22 of Oudh Estates Act, 1869 as also by virtue of custom and usage of the respondent family. Respondent made numerous representations, including the one dated 18.5.1979 requesting the Union of India as well as the custodian to release the property as the same could not continue to vest with the Custodian after the death of respondent's father and having vested in him, as an Indian citizen. Director Vigilance, Ministry of Commerce wrote to the respondent on 7.3.1981 inter alia, informing him that the question of release had been taken up by the Cabinet and the Cabinet had decided to release 25% of the said property in favour of the legal heirs and successors of the respondent's father. Another communication dated 24.9.1981 was received by the respondent from the Director Vigilance, Ministry of Commerce of Union of India informing him that they would release 25% of the property to the legal heirs of the father of the respondent who had always been Indian citizens. Respondent was requested to contact Custodian of Enemy Property for India and complete the necessary procedural and legal formalities. Thereafter, on 10.10.1981 Custodian of Enemy Property wrote a letter to the respondent asking for legal evidence regarding the heirs and successors of respondent's father to enable him to release the properties to the extent of 25%.

Respondent filed a suit being Suit No.365 of 1981 in the Court of Civil Judge, Lucknow on 18.11.1981 seeking a declaration that he was the sole heir and successor of the deceased Raja of Mahmudabad. This suit was dismissed on 26.3.1984 for non-joinder of the Custodian of Enemy Property (hereinafter referred to as "Appellant No.2") as a party respondent. In July, 1984 respondent filed a second suit being Suit No.219 of 1984 in the Court of Civil Judge, Lucknow, inter alia, contending that by virtue of taking over the property the title of the property did not vest in the custodian. The vesting was limited for the purposes of taking over of the possession, management and control of the enemy property till such time the property remained the enemy property. It was, inter alia, prayed that he be declared the sole heir and successor of his father and thereby entitled to 25% of the properties and to such other percentage or the whole of the said properties. Appellant No.2 filed the written statement contesting the suit inter alia contending that the suit property had vested in the Custodian free from all encumbrances and denied that it had vested in the Custodian for the purpose of management only. It was denied that the respondent was the heir of late Raja of Mahmudabad. Trial Court decreed the suit on 8.7.1986. It was declared that the respondent was the sole heir and successor of his father and thereby entitled to 25% or whatever percentage it may be of the property in the suit. The suit was decreed in the following terms:-

*"The suit of the plaintiff for declaration is decreed with costs against the defendants and it is hereby declared that the plaintiff is the sole heir and successor of his father late Raja Mohammad Amir Ahmad Khan and thereby he is entitled to the 25% or whatever percentage it may be, of the properties in suit, described in Schedule I of the plaint, which are going to be released in favour of the heir of late Raja Mohammad Amir Ahmad Khan under the decision of the Government of India, as alleged." **

The aforesaid judgment became final, conclusive and binding as the appellants did not prefer an appeal against the same.

Since despite protracted correspondence over several years, the petitioner No.2 failed to hand over the properties to the respondent, the respondent filed Writ Petition No.1524 of 1997 in the High Court of Judicature at Bombay praying, inter alia, for a declaration that the properties vested with the Custodian ceased to be enemy property and stood divested from appellant No.2 with effect from 14.10.1973 and that the possession of the Custodian was illegal and without authority of law.

By the impugned judgment the High Court has allowed the writ petition and held that on an interpretation of Sections 6, 8 and 18 of the Enemy Property Act, due to vesting of the property in the Custodian, the owner is not divested of his right, title and interest in the property as under the Act title does not come to vest in the Custodian. The vesting is limited to the temporary taking over of the possession, management and control over the property only. It was conceded before the High Court by the counsel appearing for the appellants that respondent who was an Indian citizen was the heir and successor of his late father Raja of Mahmudabad. It was held that the properties were no longer enemy properties as the title of the same now vested in an Indian citizen. The High Court accordingly directed appellant No.2 to handover possession of the properties, actual or juridical, as the case may be, to the respondent within three months from the date of passing of the order. Respondent's prayer for mesne profits and compensation in respect of the properties in question were rejected.

Counsel for the parties have been heard at length.

The Enemy Property Act, 1968 was enacted for purpose of continued vesting of enemy property, vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 and the Defence of India Rules, 1971. Section 2(b) defines enemy, an enemy subject or an enemy firm and the same reads as under:-

*"2(b) "enemy" or "enemy subject" or "enemy firm" means a person or country who or which was an enemy, an enemy subject or an enemy firm, as the case may be, under Defence of India Act, 1962 and the Defence of India Rules, 1962 [or to the Defence of India Act, 1971 and the Defence of India Rules, 1971], but does not include a citizen of India;" **

Section 2(c) defines the expression "enemy property" as follows:-

"2 (c) "enemy property" means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm;

*Provided that where an individual enemy subject dies in the territories to which this Act extends, any property which immediately before his death, belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the purposes of this Act;" **

Section 6 of the Act provides or declaring the transfer of property by enemy subject which is vested in the Custodian to be void by the Central Government after giving reasonable opportunity of being heard. Section 6 reads as under:-

*"6. Transfer of property vested in Custodian by enemy or enemy subject or enemy firm Where any property vested in the Custodian under this Act has been transferred, whether before or after the commencement of this Act, by an enemy, or an enemy subject or an enemy firm and where it appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, then, the Central Government may, after giving a reasonable opportunity to the transferee to be heard in the matter, by order, declare such transfer to be void and on the making of such order, the property shall continue to vest or be deemed to vest in the Custodian." **

This section provides that if any property vested in the Custodian has been transferred, whether before or after the commencement of the Enemy Property Act, by an enemy, or an enemy subject or an enemy firm and if the Central Government is of the opinion that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, the Central Government may declare such transfer to be void after hearing the transferee in the matter. This provision makes it clear that there is no bar on the transfer of the enemy property in general by an enemy subject meaning thereby the title still remains with him.

Section 8 deals with power of Custodian in respect of the enemy property vested in him. The same is reproduced here:-

"8. Powers of Custodian in respect of enemy property vested in him

(1) With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property and where such property belongs to an individual enemy subject, may incur such expenditure out of the property as he considers necessary or expedient for the maintenance of that individual or of his family in India.

(2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as

may be specifically authorised by him in this behalf, may, for the said purpose, ---

(i) carry on the business of the enemy;

(ii) Take action for recovering any money due to the enemy;

(iii) Make any contract and execute any document in the name and on behalf of the enemy;

(iv) Institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities;

(v) Raise on the security of the property such loans as may be necessary;

(vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies.

(vii) Transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties;

(viii) Invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose.

(ix) make payments to the enemy and his dependents;

(x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on the 25th October, 1962 (or on the 3rd December, 1971); and

(xi) Make such other payments out of the funds of the enemy as may be directed by the Central Government.

*Explanation: In this sub-section and in sections 10 and 17, "enemy" includes an enemy subject and an enemy firm." **

Section 9 provides that all enemy property vested in the Custodian shall be exempt from attachment, seizure or sale in execution of decree of a civil court or orders of any other authority.

Section 13 makes provision for validity of action taken in pursuance of orders of Custodian and reads as under:-

"13. Validity of action taken in pursuance of orders of Custodian Where under this Act, --

(a) Any money is paid to the Custodian; or

(b) any property is vested in the Custodian or an order is given to any person by the Custodian in relation to any property which appears to the Custodian to be enemy property vested in him under this Act, neither the payment, vesting nor order of the Custodian nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time, --

(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy firm, had died or had ceased to be an enemy or an enemy firm;

or

*(ii) some person who was so interested and who was believed by the Custodian to be an enemy or an enemy firm, was not an enemy or an enemy firm." **

Section 18 deals with divesting of enemy property vested in the Custodian and reads as under:-

*"18. Divesting of enemy property vested in the Custodian - The Central Government may, by general or special order, direct that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall revert in such owner or other person." **

A reading of Section 18 makes it evident that enemy property is not permanently vested in the Custodian and divesting the custodian of such property is contemplated.

Section 19 protects the action taken under the Act and provides that no suit, prosecution or other legal proceeding shall lie against the Central Government or the Custodian or enemy property for anything which is done in good faith or intended to be done under the Act.

The High Court of Calcutta in *Sudhendu Nath Banerjee and others Vs. Bhupati Charan Chakraborty and others*, 1976 Calcutta 267 (referred), held that on a reading of Section 6, 8, and 18 of the Act, the enemy, due to vesting of his property in the Custodian is not divested of all his right, title and interest in the property, but the vesting in the Custodian is limited to the extent of possession,

management and control over the property temporarily. In *Mumtaz Begum Vs. Union of India and Others*, 1990 Indlaw CAL 293, (referred) the High Court reiterated its earlier view. In this case the High Court was seized of a matter in respect of enemy property which had vested in the Custodian. After adjudication of title in his favour the appellant filed a writ petition in the High Court claiming the property as it no longer belonged to an enemy subject. The Single Judge dismissed the writ petition. The Division Bench reversing the order of the Single Judge took the view that the appellant therein was entitled to get the property back as it no longer belonged to an enemy subject. That the title of the property does not vest in the Custodian and the Custodian takes over the property under the Act temporarily for its management and control. The High Court in the impugned judgment has followed the said Rule.

The enemy, an enemy subject or enemy firm under Section 2(b) means a person or country who or which was an enemy, an enemy subject or enemy firm, as the case may be under the Defence of India Act, 1962 and the Rules made thereunder or to the Defence of India Act, 1971 and the Rules made thereunder but does not include a citizen of India. Enemy property under the Act means any property belonging to or held or managed or on behalf of an enemy, enemy subject or enemy firm for the time being. Proviso to Section 2(c) provides that where an individual enemy subject dies within the territories to which Enemy Property Act extends, any property which immediately before his death belonged to or held by him or managed on his behalf may continue to be regarded as enemy property for the purposes of Enemy Property Act notwithstanding his death.

A conjoint reading of Sections 6, 8 and 18 of the Act, indicates that the enemy subject due to the vesting of his property in custodian is not divested of his right, title and interest in the property. The vesting in the Custodian is limited to the extent of possession, management and control over the property temporarily. This position was not disputed before us by the learned counsel appearing for the appellant. The object of the Enemy Property Act is to prevent a subject of an enemy state from carrying on business and trading in the property situated in India. It is, therefore, contemplated that temporary vesting of the property takes place in the Custodian so that the property till such time as it is enemy property cannot be used for such purpose.

The question that falls for determination is whether the properties in question after its inheritance by the respondent who is a citizen of India can be said to be enemy property.

It is not in dispute that respondent was born in India and is an Indian citizen. His late father migrated to Pakistan in the year 1957 and become a citizen of Pakistan. After the breaking of the hostilities between India and Pakistan in the year 1965 the property of his father located in India got vested in the Custodian. After the coming into force of the Enemy Property Act in the year 1968 the properties of late Raja continued to be vested with the Custodian till he died on 14.10.1973 in London. After the death of his father respondent who is a citizen of India inherited the property being the sole heir and successor of his father. Can he be termed as enemy or enemy subject within the meaning of Section 2(b) or can the property of an Indian citizen be termed as enemy property within the meaning of Section 2 (c)? Answer is emphatic No. The definition of enemy provided under Section 2(b) excludes citizens of India as an enemy, or enemy subject or enemy firm. Under the circumstances, the respondent who was born in India and his Indian citizenship not being in question cannot by any stretch of imagination be held to be enemy or enemy subject under Section 2(b). Similarly, under Section 2(c) the property belonging to an Indian could not be termed as an enemy property.

After the death of his father the respondent had filed a Suit No.219 of 1984 seeking a declaration that he was the sole heir and successor of his father. The appellants were defendants in the said suit. The suit was decreed on 8.7.1986. The said judgment and decree having attained finality there remains no dispute that the respondent is the sole legal heir and successor of his father, the late Raja of Mahmudabad and properties belonging to late Raja came to be owned exclusively by him. After the death of late Raja of Mahmudabad the respondent became the sole owner of the properties which had been taken over by the Custodian of Enemy Property. Having acquired the title by way of succession the properties in question could not be said to be enemy property within the meaning of Section 2(c) because enemy property means the property belonging to or held or managed on behalf of the enemy or enemy subject or enemy firm. Since the respondent was not an enemy within the meaning of Section 2(b), the properties owned, held and belonging to him cannot be held to be the enemy properties under the Enemy Property Act.

As indicated above, the vesting of the properties in the Custodian under the Enemy Property Act is limited to the extent of possession, management and control over the properties only. The right, title or interest of the owner is not taken away. After the ceasing of the property to be enemy property it ceased to be belonging to an enemy. The Custodian cannot be permitted to continue with the possession of such properties. The property which initially vested in the Custodian under the Defence of India Rules and thereafter under the Enemy Property Act ceased to be enemy property upon the death of respondent's father on 14.10.1973. In the circumstances, property which was vested in the Custodian ceased to be enemy property upon the death of the father of the respondent and the Custodian could not continue with the possession of the property. #

Reliance placed by the counsel for the appellant on Section 13 is totally misplaced. Section 13 does not alter the aforesaid legal position. Section 13 only provides that the vesting of the property of the enemy or enemy subject in the Custodian or order of Custodian or the proceedings in consequence thereof are not invalidated or affected by reason that at the material time such an enemy subject had died or ceased to be enemy. It only means that action of vesting or the order passed by the Custodian of the proceedings taken in consequence thereof is not invalidated or affected on the ground that such enemy subject had died or ceased to be enemy when the vesting took place or the order came to be passed by the Custodian or proceedings in consequence thereof were taken. It does not mean that the property can be continued to be enemy property under the Act when the property is succeeded to by a citizen of India. Once the property is succeeded to by a citizen of India the property ceases to be covered by proviso to Section 2(c). In law, the vesting in the Custodian of the property belonging to an Indian citizen cannot be permitted to be continued under the Enemy Property Act as Indian citizen is excluded from being an enemy in terms of the provisions of Section 2(b).

Counsel for the appellant laying stress on the provisions of Section 18 contended that only the Central Government can divest the Custodian of the enemy property by passing a general or special order directing that any enemy property vested in the Custodian under the Act shall be divested from him and be returned in such manner as may be prescribed to the owner thereof or to such other person as may be specified in the direction and only thereupon such property shall cease to vest in the Custodian and revest in such owner or such other person. Since in the present case no such order

has been passed by the Central Government this Court cannot divest the Custodian of the property. We do not agree with this submission. In the present case the respondent filed several representations but the Central Government did not take a decision on them for years together. In such a situation the power of the Court is not taken away to pass appropriate orders in a case where the property which vested in the Custodian ceases to be enemy property, the same having vested in a citizen of India by way of succession after the death of the enemy subject.

Another interesting feature which can be taken notice of is that on a representation filed by the respondent the appellants agreed to release 25% of the property in favour of the respondent on production of proof of his having succeeded to the property of his father. It shows that the appellants accepted that the property could be released in favour of the respondent provided he had succeeded to it after the death of enemy subject. It further shows that the property could be released in favour of an Indian citizen provided he had succeeded to the estate. It further shows that the title of the enemy property does not vest in the custodian and it had vested in the custodian for the purposes of management, control and possession of the properties only.

In the High Court the Union of India had taken certain points such as delay in filing the writ petition; that properties had been retained by the Government of India as a matter of policy and that the writ petition was barred by the principle of res judicata and the principles analogous thereto were not pressed before us. Apart from the submission noted and dealt with by us no other point was raised.

On 4.9.2001 the High Court directed the appellants to place on record copy of note put up for release of property of the respondent's father and the decision taken thereon by the Cabinet. The respondents refused to place a copy of the note of the Cabinet claiming privilege in regard to the said document as in their opinion the public interest required that the same should not be disclosed. This shows the mala fide intentions of appellants to retain the possession of huge properties without any authority of law.

To be just and act in a just manner is writ large in our Constitution and the laws. The Legislature is to act in a just manner by enacting just laws within the frame work of the Constitution. The executive is enjoined with a duty to act or apply the laws in a just manner and if an individual or institution is dissatisfied with the State action in enacting the laws or their implementation he can approach the court seeking redressal of his grievances.

Unfortunately a dangerous attitude resulting in doing institution damage is developing, that the justice is required to be done only by the Courts. This attitude is betrayal of Constitution as well as laws. Every and any authority working under the statute has to discharge its duties in a just manner otherwise people will lose faith in the governance.

The case in hand is a typical example of such an attitude. It is admitted by the counsel for the appellants that under the Enemy Property Act the title of the property of an enemy does not vest in the Custodian. The custodian takes over the enemy property only for the purpose of possession,

control and management. An Indian citizen is excluded from the definition of an 'enemy' or 'enemy subject' under Section 2(b). Respondent was declared to be the heir and successor of late Raja of Mahmudabad. On being so declared the property which came to vest in the respondent who is a citizen of India ceased to be an enemy property. On a representation filed by the respondent, the appellants recognized this fact and agreed to release 25% of the property although he was entitled to the whole of the property. No reasons were given for doing so. Still worse the appellants did not even release 25% of the property. Again no reasons are forthcoming for doing so. When asked by the Court to produce the cabinet note put up before the cabinet in this regard, the appellants refused to do so and claimed it to be a privileged document. When admittedly the title of the property did not come to vest in the custodian then as soon as the title in the property came to vest in an Indian citizen the property ceased to be an 'enemy property'. The authorities were duty bound to release the property in favour of the true owner (respondent). Instead of doing it the Union of India forced the respondent to knock at the doors of the Court. The authorities have deprived the respondent of the possession and enjoyment of the properties for the last 32 years without any justification. The reasons for doing so as we understand is that buildings are being occupied by the Deputy Commissioner, Superintendent of Police and other district officers for their residences as well as for their offices, which they did not want to give up. This is highly objectionable and unjust. It needs to be deprecated. In the light of what we have stated, we do not find any merit in this appeal and the same is dismissed.

The High Court had refused to grant the mesne profits to the respondents, against the aforesaid finding no appeal has been filed by the respondent. Since no appeal has been filed, the appellants are not entitled to the mesne profits till the passing of the interim orders of status quo by this Court on 5.4.2002. The respondent would be entitled to the actual mesne profits by filing a suit, if so advised, for this period. However whatever moneys have been collected by the appellants by way of rent or lease etc. after 5.4.2002 till the handing over of the possession of these properties to the respondents be deposited/dispensed to the respondent within 8 weeks.

The appellants are directed to get the buildings (residence or offices) vacated from such officers and handover the possession to the respondent within eight weeks. Similarly, appellants are directed to handover the possession of other properties as well. The officers who are in occupation of the buildings for their residences or for their offices are also directed to immediately vacate and handover the buildings or the properties to the Custodian to enable him to handover the possession to the respondent in terms of the directions given. Failure to comply with the directions to handover the possession within 8 weeks will constitute disobedience of this order and the appellants would be in contempt of this order. Respondent would be at liberty to move an application in this Court if the above directions are not complied with for taking appropriate action against the appellants or their agents. Since the appellants have retained the possession of the properties illegally and in a high handed manner for 32 years, the appeal is dismissed with costs which are assessed at Rs. 5 Lacs.