PATNA HIGH COURT

S.M. Zaki

Vs

State of Bihar

Misc. Judicial Case No. 302 of 1950

(Ramaswami and Sarjoo Prosad, JJ.)

05.01.1953

JUDGMENT

Sarjoo Prosad, J.

1. The petitioner S.M. Zaki, has been declared an evacuee under Section 2(d)(i) of the Administration of Evacuee Property Ordinance, 1949, (Ordinance 27 of 1949) by the Assistant Custodian. The ground for declaring him an evacuee is that he left India due to the setting up of the Dominions of India and Pakistan. As a result of the declaration, the properties of the petitioner have been declared to be 'evacuee' properties and have vested in the Custodian. The said order of the Assistant Custodian has been upheld on appeal by the Deputy Custodian by an order dated 9-6-1950. The petitioner has consequently moved for a writ of certiorari for quashing the orders aforesaid, and also for a mandamus restraining the opposite party the State of Bihar, and the Assistant Custodian and the Deputy Custodian of Evacuee properties from interfering with his possession and enjoyment of the properties belonging to the petitioner.

2. The petitioner claims that he is a citizen of India having his domicile and residence in the territory of this dominion. At the time of the partition of the country he was in service as a railway employee of the then East Indian Railway. Prior to the partition, he was given an option as to whether he intended to serve in India or Pakistan, and he opted for service in the latter dominion. He, however, states that he never abandoned his domicile or residence in India, and that his wife and children continued to stay here in village Alianagar Pali Police station Jehanabad in the District of Gaya. He further says that off and on he visited his family and looked after his properties but was compelled to stay in Pakistan merely because of the exigencies of service. He, therefore, submits that he never left the territory of India either before or after the 1st day of March 1947, for any place outside it, and the order declaring him an evacuee was entirely illegal and without jurisdiction. In a supplementary affidavit filed after his application for the aforesaid writ, he stated that when he learnt that proceedings were pending against him, he addressed a petition dated 10-4-1950, to the Assistant Custodian Jehanabad, and forwarded copies of the petition to the District Magistrate of Gaya, the District Mechanical Engineer, East Indian Railway, Lalmanirhat, where he was serving, the General Manager, East Bengal Railway, Chittagong, the District Magistrate of Rangpur and the Assistant Secretary to

Government East Bengal.
He says he did send a copy of the petition to the railway authorities and the Government of East Bengal in order to apprise them of the fact that he never had or has any intention of giving up his domicile in India, and that his stay in Pakistan was only temporary and for the period of his service. A copy of the petition formed an annexure to the supplementary affidavit. In the petition he recited that he had reliably learnt of his being treated as an evacuee; and that accordingly notices had been served to show cause as to why all his properties moveable and immovable should not be seized under the Bihar Evacuee Ordinance or Act. He then proceeds to explain in the petition that he was a railway employee and had gone to serve in Pakistan on option in ordinary course, and then to retire to his native place, and that he had not purchased any property in Pakistan with a view to settle down there or sold any of his belongings in India. On these facts, it is urged on behalf of the petitioner that he was not an evacuee at all but a national and citizen of India, and the Evacuee Property Ordinance or the Evacuee Property Act had no application to him. It may be observed that the Evacuee Property Ordinance was later substituted by an Act being the Administration of Evacuee Property Act (Act 31 of 1950) - hereinafter called the Evacuee Property Act.

3. The orders of the Assistant Custodian and that of the Deputy Custodian affirming it show that he was declared an evacuee under Section 2(d)(i) of the Ordinance because he had left India after the setting up of the two dominions having opted for service in Pakistan as a railway employee. The question, therefore, which arises for consideration is whether on this ground alone the said authorities were competent to declare him an evacuee within the meaning of the Evacuee Property Ordinance or Act. Dr. Sultan Ahmad on behalf of the petitioner contended firstly that the petitioner was not an evacuee but an Indian National and could not be declared an evacuee merely because in ordinary course he had opted for service in Pakistan, and secondly, that if the ordinance or the Act intended to declare an Indian citizen an evacuee it was ultra vires the Constitution. He also suggested that in any case it would be unfair on the part of the Government of India to impose the restrictions contemplated by the Ordinance or the Act after having given the petitioner the choice to serve in Pakistan. To deal with these contentions it would be necessary to examine the relevant provisions of the Evacuee Property Ordinance or Act and the Constitution.

4. The Ordinance came into force on 18-10-1949 and was promulgated by the Governor-General under powers conferred on him by Section 42 of the Government of India Act. It was later replaced by the Evacuee Property Act which repealed the Ordinance but made a saying in respect of anything done or any action taken in the exercise of any power conferred by or under the Ordinance by virtue of Section 58(2) of the Act. For our purposes it may be assumed that the relevant provisions of the Ordinance and the Act are substantially identical. Section 7 of the Ordinance provided that where any property was in the option of the Custodian Evacuee Property within the meaning of the Ordinance, he might after causing notice thereof to be given in prescribed manner to the person interested, and after making such inquiry into the matter as the circumstances of the case permitted, make an order declaring such property to be evacuee property. it also provided that where any such notice had been issued in respect of any property, the said property was to be deemed to have been attached by the Custodian from the date of the notice pending the determination of the question, and any transfer or delivery of such property or any right or interest therein contrary to the attachment should be void against all claims enforceable under the attachment. The Custodian was then to notify either by publication in the

official Gazette or in any prescribed manner all properties declared by him to be evacuee properties; and by virtue of Section 8 of the Act, any property so declared to be evacuee property was to vest in the Custodian who could, under the provisions of the law take possession of the property even on ejecting a person forcibly who offered resistance to his possession. The term "evacuee property" has been defined under the law to mean any property in which an evacuee has any right or interest. The definition of the term "evacuee" as provided under Section 2(d) of the Ordinance and the Act, is, therefore, important, and, in particular, clause (i) of the section with which we are at present concerned. Section 2(d) runs as follows:

(D) "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, left any place in a Province for any place outside the territories now forming part of India, or
> * * * *

Much stress has been laid upon the word "leaves" or "has left" occurring in the clause. The contention of the learned Counsel is that the word "left" must be deemed to have been used in the sense of permanently leaving the Dominion of India with a view to settle down in Pakistan and with the intention of changing one's domicile completely. Reference has been made to Part II of the Constitution of India and the various articles occurring in this part. Article 5 of the Constitution enacts that every person who has his domicile in the territory of India and who was born in the territory of India; or either of whose parents was born in the territory of India; or who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of india. In the light of this article the petitioner contends that he is a citizen of India by all accounts. Article 7, however, provides that notwithstanding anything in Articles 5 and 6, a person who has after the first day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. It has been urged that Article 7 of the Constitution has no application to the petitioner because in view of the finding that he had merely opted for service in Pakistan and was on that account staying in that territory, it could not be held that he had migrated to Pakistan. The word "migration" definitely suggests an element of permanent change of residence and not merely movement from one place to another. Reliance has been placed upon a decision of Chagla, C.J., in - *'Abdul Majid v. P.R. Nayak[1]',* where his Lordship casually examined the scope of the definition of "evacuee" in Section 2(d) of the Act and the contentions urged with regard to the wide scope of the definition, and incidentally observed that the term "resident" used in sub-clause (ii) must connote a certain amount of permanency. A mere temporary abode in Pakistan on legitimate
business or occupation would not make a person a resident for the purpose of this sub-clause. Reliance has also been placed upon a recent decision of the Allahabad High Court in - *'Shabbir Hussain v. State of UP[2]',* where a Bench of the Court considered the meaning of the expression "migrated from the territory of India to the territory now included in Pakistan" as used in Article 7 of the Constitution, and opined that 'migration' has been used in the sense of departure from one country to another for the purpose of residence or settlement in another country. A temporary visit to another country on business or otherwise would not amount to migration. I have no doubt

that in the context in which it occurs the word "migration" must indicate a change of movement from one place of abode to another with a view to settle down in that country so as to affect the person's right of citizenship in the country from which he had migrated, because it is in this sense that it appears to have been used in Article 7 of the Constitution. The article definitely says that in such a case he shall not be deemed to be a citizen of India; and that can only happen where there has been a complete change of domicile and he has no intention of returning to the territory of India and owing allegiance to it. I, therefore, respectfully agree with the view expressed by the Allahabad High Court in the decision in question as to meaning of the expression "migrated". But even if this meaning is attached to the expression "migrated" as used in Article 7 of the Constitution, the question is whether the word "left" in Section 2(d)(i) of the Evacuee Property Ordinance or the Act carries the same sense as the learned Counsel contends. It is suggested on behalf of the petitioner that if any other meaning is given to the expression, it would be in conflict with the Constitution of India and must, therefore, be understood to have been used in the same sense. The argument, however, proceeds on the assumption that the term "evacuee" as used in the evacuee law cannot apply to a citizen of India. This assumption is obviously falacious in view of Clause (iii) of Section 2(d) itself, which refers to any person who has after a certain date obtained otherwise than by way of purchase or exchange any right or interest in any property which is treated as evacuee property. It could not, therefore, be argued that the Act never contemplated to affect or operate upon the rights of an Indian citizen. I do not for a moment suggest that the words

> "leaves or has, on or after the 1st day of March 1947, left, any place in a State for any place outside the territories now forming part of India"

mean leaving temporarily or casually. Such a construction of Section 2(d)(i) would be ludicrous. It is common and in fact natural that a citizen of India would often and occasionally go out of the territories of India. But it would be unreasonable to assume that any such citizen who leaves India even for a short period would become an evacuee. Such an interpretation cannot commend itself to any one. The provision of the law has to be reasonably construed in the setting in which the words occur, and there can be no doubt that in the context the words do limply some amount of permanent stay or residence outside India but not to the extent of completely abandoning the Indian domicile. The word "resident" as used in Clause (ii) of Section 2(d) must also contemplate some sort of permanent residence in the Dominion of Pakistan though not necessarily with the conclusive intent of abandoning the Indian domicile.

It is next submitted that the Act imposes unreasonable restrictions upon the right to acquire, hold and dispose of property as vouchsafed under Article 19(f) of the Constitution and is not saved by Clause (5) of that article. This submission is not quite tenable. The Evacuee Ordinance and the Act came into being to meet an unparalleled situation arising in the country on account of the creation of the two Dominions of India and Pakistan. It is common knowledge that during the period and even thereafter there was migration of large populations from the Dominion of Pakistan to the Dominion of India and vice versa, and the people who fled from the Dominions left property behind; therefore, some legislation was necessary for the protection of those properties and for the management thereof. The provisions of the law quite clearly indicate that they were conceived in that spirit in order to meet such a situation. Section 10 provides that the Custodian may take such measures as he considers necessary or expedient for the purpose of securing, administering, preserving and managing any evacuee property. He can carry on the

business of an evacuee, appoint a manager for the property and take all such measures as may be necessary to keep the property in good repair, take action for the recovery of any debt due to the evacuee, and institute, defend or continue any legal proceeding in any civil Or revenue Court on behalf of the evacuee. The section also enjoins on him to pay to the evacuee or to any member of his family or to any person as in the opinion of the Custodian is entitled thereto, any sums of money out of the funds in his possession, and invest money held by him in any of the securities approved by the Central Government. Section 15 further enjoins that he should maintain accounts of the property of each evacuee in his possession; and section 16 enacts that the Custodian may on an application made to him in this behalf in writing by an evacuee or any person claiming to be the heir of an evacuee, restore the evacuee property to which the evacuee or other person would have been entitled subject to such terms and conditions as he may think fit to impose. Such a legislation, although in certain cases may work some hardship, cannot be said to be an unreasonable legislation placing undue fetters upon the right to manage and hold property. One has to approach this legislation knowing that it is an emergency legislation, "an offspring of emergency, and intended to deal with abnormal and unusual times and conditions." The above submission, therefore, is without any merit. In this particular case the learned Government Pleader points out that the custody of the property will remain in the hands of the Custodian only so long as the petitioner continues to serve in the Dominion of Pakistan, and when he returns to his native village on retirement and makes a proper application to the authorities, the Custodian under the provisions of Section 16 of the Act may restore the property to the petitioner or his heirs. The Act has also provided for a complete machinery for appeals, review and revision, and a person aggrieved can always take advantage of these provisions for the redress of his wrongs. In the present case, an appeal was preferred on behalf of the petitioner though without any success, and we are informed that he has also applied for review or revision of the orders complained against. In those circumstances, where the Act itself has provided adequate remedies, an interference by way of a writ of certiorari would not be desirable, except under very extraordinary circumstances for which there is no warrant in the present case.

5. The Government Pleader on behalf of the State has contended that the question whether the petitioner was or was not an "evacuee" was a matter to be determined by the Custodian himself as the law authorized the Custodian to declare any property to be evacuee property if in his opinion and after making such enquiry as he thought fit he found that the property was evacuee property. He argued that it was open to the Custodian to issue notice as soon as he formed an opinion that a particular property was an evacuee property, and that jurisdiction which he once acquired could not be defeated merely because on such assumption of jurisdiction, he later wrongly decides that the person who owned the property was an evacuee though legally he was not so. In support of his arguments he relied upon two decisions of the Supreme Court in -*'Brij Raj Krishna v. S.K. Shaw and Brothers[3]',* and - *'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi[4]',* It has been undoubtedly pointed out in those cases that once it is held that the Court has jurisdiction but while exercising it, it made some mistake, then the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly. The last case was a case which arose under the Evacuee Property Ordinance itself and is, therefore, clearly apposite.

6. It was also suggested, though at a late stage in arguments, that the petitioner had not been served with any notice as prescribed under Section 7 of the Act and an endeavour was made to impress upon the Court that the procedure adopted by the Custodian was in violation of

fundamental principles of justice. The petitioner himself never appeared before the Assistant Custodian, or the Deputy Custodian at all. His wife appeared in the proceeding to show cause and she never asserted that no notice under Section 7 of the Act had been issued. She raised a plea amongst others that her ausband had no property at all, because whatever the husband had passed to the wife by oral gift. Even in the petition before this Court there is no specific allegation about non-service of notice under Section 7. On the contrary, I find from a copy of the petition which the petitioner sent to the railway authorities and which forms an annexure to his supplementary affidavit that notices to show cause had been served. Whether the said notices were or not in the prescribed form is not a matter to be considered by this Court to justify the issue of a writ. If there was any genuine grievance on that account the complaint should have been made before the appropriate tribunals authorized to deal with the matter under the law. There is, therefore, no foundation for the above suggestion at all.

7. For the reasons set forth above, I see no substance in this application which is accordingly dismissed and the rule is discharged with costs : hearing fee five gold mohurs.

Ramaswami, J.

8. I agree. During the hearing of the case an important question was raised - whether the Custodian has exclusive jurisdiction to decide that the petitioner is an evacuee and that the petitioner's property is evacuee property within the meaning of the Administration of the Evacuee Property Act. It was strongly contended by Dr. Sultan Ahmad on behalf of the petitioner that the Custodian cannot give himself jurisdiction by wrongly deciding that a certain person was evacuee and that the proceedings of the

Custodian in such a case could be challenged in the High Court under Article 226 of
the Constitution. The matter resolves itself into the question whether upon a proper construction of the Administration of Evacuee Property Act the Custodian has authority not merely to take possession of the evacuee property but also to conclusively decide whether a certain person is evacuee within the meaning of the Act and whether such person's properties are evacuee properties. The distinction between the two classes of tribunals has been clearly pointed out by Lord Esher in - *'The Queen v. Commrs. for Special Purposes of the Income-tax'*[5]*,*

> "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to

> consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facte to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide without any appeal being given, there is no appeal from such exercise of their jurisdiction."

There can be no doubt that the present case falls within the second category mentioned by Lord Esher. For, in my opinion, the impugned Act has conferred upon the Controller (Custodian?) jurisdiction not merely to take charge of and administer evacuee properties but also jurisdiction to finally determine whether a certain person is evacuee and whether a certain property is evacuee property within the meaning of the Act. In the first place, it is important to mark the wording of Section 7 which states

> "Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry.....pass an order declaring any such property to be evacuee property."

It should be noticed that the Custodian has jurisdiction to commence inquiry as soon as he forms an opinion that any property is evacuee property. The matter is left to the subjective opinion of the Controller (Custodian?) which cannot be obviously vested in a Court of law. This circumstance shows that the legislature has deliberately conferred upon the Controller (Custodian?) the exclusive jurisdiction to decide whether a proceeding can be started for declaring a certain property as evacuee property within the meaning of the Act. It is manifest that if after commencing proceeding the Custodian wrongly decides upon a misconception of law or fact that a certain property is an evacuee property that is a matter which goes not to the root of the jurisdiction but it is only an error of law or fact in the course of exercise of jurisdiction. In the second place, it should be noticed that Section 46 of the Act expressly states that no civil or revenue Court shall have jurisdiction

> "(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property, or..... (c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or (d) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine." In this connection, Chapter V of this Act is significant. Section 24 provides for an appeal from the order of the Assistant Deputy Custodian to the Custodian or to the Custodian-General as the case may be. Section 25 similarly provides that any person aggrieved may appeal in certain class of cases to the District Judge nominated in this behalf by the State Government. Section 26 also permits the person aggrieved to apply for review or revision to the Custodian or Additional Custodian who is

authorised to call for the record of any proceeding from an officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any order passed. Section 27 grants wide power of revision to the Custodian General. It is apparent that the Act provides a complete machinery of appeal and revision for the party aggrieved from the order of Assistant or Deputy Custodian. In the context of these provisions, Section 46 of the Act must be construed to mean that the jurisdiction of a civil or revenue Court is ousted even if the Custodian has wrongly decided that any property is an evacuee property under the Act.

Lastly, it is necessary to remember that the legislation was enacted against a background of political disturbance when there was large influx and movement of refugees from India to Pakistan and vice versa. In this context, learned Government Pleader said that the Administration of Evacuee Property Act was to some extent political in character. Learned counsel referred to Article 31(5)(b)(iii) of the Constitution which states that nothing in Clause (2) shall affect the provisions of any law which the State may make in pursuance of any agreement entered into between the Government of the Dominion of India and the Government of any other country, with respect to property declared by law to be evacuee property. All these considerations support the view that the jurisdiction of the Custodian falls under second category mentioned by Lord Esher in the passage to which I have already referred. Reference may be made in this connection to 'AIR 1951 S C 115 (C)' and 'AIR 1952 S C 319 (D)'. I agree that this application has no merit and should be dismissed with costs

Application dismissed.
Cases Referred.

[1] AIR 1951 Bom 440
[2] AIR 1952 All 257
[3] AIR 1951 SC 115
[4] AIR 1952 SC 319
[5](1888) 21 QBD 313 at p.319