RAJASTHAN HIGH COURT

Barkatali

Vs.

Custodian General of Evacuee Property of India

Civil Misc. Writ Case No. 16 of 1952
(Wanchoo, C.J. and Dave, J.)

18.01.1954

JUDGMENT

Wanchoo, C. J.

1. This is an application by Barkatali under Article 226 of the Constitution for issue of a writ in connection with proceedings under the Administration of Evacuee Property Act (No. 31 of 1950) (hereinafter called the Act).

2. The case of the applicant is that he received notice, dated 9-9-1950, from the Assistant Custodian, Pali, under Section 7 of the Act requiring him to appear in person in the office of the Assistant Custodian at 10 A. M., failing which the case would be decided against him. The applicant put in appearance on the date fixed. Thereafter, the case was postponed and was dealt with by one Mr. M.R. Dhariwal who is Naib Tahsildar. This gentleman declared by an order, dated 24-10-1950, certain share in the property to be evacuee property. The applicant went in appeal to the Custodian Rajasthan. This appeal was partly allowed, and the Custodian declared one-eighth share of Niaz Ali, who was held to be an evacuee, to be evacuee property. But this related to only seven properties, and the rest of the order of the Assistant Custodian was set aside. Thereupon, the applicant filed a revision before the Custodian General who dismissed it. The applicant then filed a review application before the Custodian General, and that was also dismissed in February, 1952. Thereafter, the present application was filed in April 1952.

3. The applicant's case is two-fold. In the first place, it is urged that as Mr. Dhariwal was a Naib Tahsildar, and was never invested with the powers of an Assistant Custodian, his order was without jurisdiction, and the subsequent proceedings would

also be without jurisdiction. The second point, that is urged, is that the notice issued under Section 7 of the Act was not in the form prescribed by the Rules, and therefore the Assistant Custodian did lay the foundation of his jurisdiction in this and all proceedings taken on a notice like one issued on 9-9-1950, were without jurisdiction.

4. The application has been opposed on behalf of the State. The facts alleged by the applicant are not disputed. But it is contended that of the State. The facts alleged the application should be dismissed on the following grounds:

(1) that the office of the Custodian General of evacuee property is permanently located in New Delhi outside the territorial jurisdiction of this Court, and therefore this Court cannot issue any writ to him.
(2) As the applicant did not challenge the order of the Assistant Custodian before the Custodian or the Custodian General on the two grounds that he is urging in this Court, he is not, entitled to get any relief from this Court.
(3) That there has been delay in the presentation of the present application.
(4) That the property of the applicant has not been declared evacuee property, but only the property of Niazali, and therefore the applicant, not being aggrieved is not entitled to maintain the writ application.
(5) We shall first consider the points raised on behalf of the applicant. It is first contended that Sri Dhariwal, who passed order dated 24-10-1950, was only a Naib Tahsildar, and was never authorized to Act as Assistant Custodian of evacuee property; As such his order is without jurisdiction. It does appear from the copy of the order which has been filed that though Sri Dhariwal has noted under his signature that he is Assistant Custodian of evacuee property, the order begins with the following words
"Copy of order of Naib Tahsildar, Pali"

5. It is admitted on behalf of the State that Tahsildars were appointed ex-officio Assistant Custodians by notification No. D-1219-1/RR/49, dated 17th of December, 1949. It is also not disputed that no notification authorizing Naib Tahsildars to Act as Assistant Custodian was ever issued. It is also not suggested that Shri Dhariwal was even appointed Assistant Custodian by name. It seems that the Naib Tahsildar, who usually acts as Tahsildar in the absence of the Tahsildar, took upon himself to act as Assistant Custodian of Evacuee Property as well. But there is nothing to show that Sri Dhariwal was ever appointed Tahsildar of Pali, and the heading of the order, dated 24-

10-1950, makes it quite clear that it is the order of the Naib Tahsildar of Pali. In these circumstances, the order must be held to be without jurisdiction.

6. The second contention on behalf of the applicant is that the notice issued under Section 7 was not in the form provided by the Rules. That is undoubtedly so. Rule 6 of the Evacuee Property Rules provides what should be the contents of the notice under Section 7, and the form in which it should be issued. The notice, dated 9-9-1950, does not comply with R. 6, and is not in the form prescribed by that rule. It was held by this Court in - *'Hafiz Abdul Rahim v. Deputy Custodian',* [1] that where the notice is not in conformity with the form prescribed in the rule, and does not supply the necessary information to the person concerned, there is no foundation for the jurisdiction of the Custodian, Deputy Custodian, or Assistant Custodian, and the proceedings taken under a defective notice are liable to be set aside. There is no doubt that the notice, which was issued on the 9th September, in this case, was defective, and on that ground also the proceedings are liable to be set aside.

7. We now turn to the grounds urged on behalf of the State, to see whether the application can be dismissed on any of those grounds, in spite of what we have said as to the grounds raised on behalf of the applicant.

8. The first point, which is urged on behalf of the State, is that the office of the Custodian General of India is in Delhi beyond the jurisdiction of this Court, and as the matter was taken in revision to the Custodian General, it is not open to us to pass any order under Article 226. Reliance in this connection is placed on - *'Election Commission, India v. Saka Venkata Rao',*[2] In that case, it was held that the jurisdiction of the High Court to issue a writ depends on two conditions, namely :

> (1) The power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction.
>
> (2) The person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

The opposite parties in this case, besides the Custodian General of India, are the Custodian of Evacuee Property Rajasthan, and the Assistant Custodian of Evacuee Property, Pali. So far as the latter two are concerned, this Court clearly has jurisdiction

to issue a writ to them. So far as the Custodian General of Evacuee Property is concerned, this Court cannot issue a writ to the Custodian General because his office is not located within the territories over which this Court has jurisdiction.

9. This, however, does not dispose of the matter. The question is whether the order, which is in dispute in this case, can be said to be the order of the Custodian General of Evacuee Property. The original order was passed by the Naita Tahsildar, Pali, purporting to act as Assistant Custodian of Evacuee Property for that area. That order was taken in appeal to the Custodian of Evacuee Property, Rajasthan, and was modified. This order of the Custodian was taken in revision to the Custodian General. The revision was dismissed, and the order of the Custodian Rajasthan stood as it was. Under these circumstances, it seems to us that the order really in dispute before us is not the order of the Custodian General, but the order of the Custodian Rajasthan. The matter would have been different if the Custodian General had modified the order of the Custodian Rajasthan in any way. In that case, the order of the Custodian General would have been the order in dispute. All that the Custodian General, however, did in this case was to dismiss the revision, and the order of the Custodian Rajasthan stood as it was. As that order was passed by a person within the territories over which this Court has jurisdiction, and relates to Pali which is also within the jurisdiction of this Court, we are of opinion that we can issue a writ against the Custodian of Evacuee Property, Rajasthan, and the Assistant Custodian of Evacuee Property, Pali.

10. 'Saka Venkata Rao's case' can, in our opinion, be distinguished. In that case, the Governor of Madras forwarded a matter relating to the disqualification of a member of the Madras Legislative Assembly to the Election Commission for its opinion. Thereupon, Saka Venkata Rao challenged the competency of the reference, and applied to the High Court under Article 226 at a time when the proceedings were pending before the Election Commission. He prayed that the High Court should direct the Election Commission not to proceed with the reference made to it by the Government of Madras. It was in those circumstances that it was held that, as the Election Commission was not situated within the territories over which the High Court exercised jurisdiction, the High Court could not issue a writ to the Election Commission. The case here is, in our opinion, very different. Here a revision was taken to the Custodian General, and unless the applicant did so, we would not have heard him as he had another remedy open to him. That revision was dismissed in toto by the Custodian General, so that the order of the Custodian, Rajasthan, stood as it was. Under these circumstances, we are of opinion that it is not the order of the

Custodian General in revision which is being challenged before us, but the order of the Custodian Rajasthan. As we have pointed out, the matter would have been different if the Custodian General had in any manner modified the order of the Custodian Rajasthan, for in that case the order in dispute would have been the orders the Custodian General, and we would not have been in a position to issue a writ to the Custodian General. We are, therefore, of opinion that it is unnecessary to issue a writ to the Custodian General in this case, and that we have the power to issue a writ to the Custodian of Evacuee Property Rajasthan, and to the Assistant Custodian Evacuee Property, Pali, who are also parties before us.

11. Then it is urged that as the applicant did not challenge the order of the Assistant Custodian before the Custodian or the Custodian General on the two grounds which he has urged before us, he should not be heard in this case. It may be accepted that it was open to the applicant to urged before the Custodian that a Naib Tahsildar was not authorized at all to act as Assistant Custodian, and that he failed to do so. But this is a case where the lack of jurisdiction is patent, and the mere fact that no objection was taken before the Custodian or the Custodian General would not disable the applicant from raising the point before us. The matter would have been different if the question of jurisdiction depended upon the allegation and proof of certain facts. In that case, if no objection had been taken, we would not have heard the applicant.
In the present case, however, the order itself shows that it was passed by a Naib Tahsildar and at it is not in dispute that Naib Tahsildars were never authorised to act as Assistant Custodians. A there was total absence of jurisdiction on the fact of the proceedings, we are of opinion that we an if entitled to grant a writ even though the applicant acquiesced in the exercise of jurisdiction by the inferior Court. Reference in this connection may be made to - *'Dholpur Co-operative Transport and Multi-purposes Union Ltd. v. Appellate Authority (Transport) Rajasthan1,* [3]

12. Then it is urged that the applicant should nave raised the question about the defectiveness of the notice before the Custodian or the Custodian General, and as he failed to do so, he should not be heard by us on that point. It may, however be pointed out that the law as to the effect of defective notice was laid down by us for the first time in - 'Hafiz Abdul Rahim's case'- decided on 16-11-1951. The Custodian General had already decided the revision on 8-9-1951. The point, therefore, could not be raised in revision. It is urged that the applicant filed a review application before the Custodian General, and the point should have been raised in that. That application was

dismissed on 18-2-1952, probably even before the decision of - 'Hafiz Abdul Rahim's case' was published in the law reports. Further, is doubtful whether such a point could be take in review. We are therefore of opinion that the applicant cannot be barred from raising this point before us under the circumstances.

13. Then it is urged that there was delay in filing the application. We, however, do not think so, because the order of the Custodian General on the review application was made on the 18th February 1952 and the present application was filed within six weeks on 2-4-1952.

14. Lastly, it is urged that as the share of the applicant was never declared evacuee property, he cannot maintain this application as he is not interested in the property of Niazali, which has been declared evacuee property. We are of opinion that there is no force in this contention. The applicant claims that the property, which has been declared evacuee property on the ground that it belonged to Niazali, is really his property. He, therefore has interest in making the present application before us.

15. We are, therefore, of opinion that as Shri Dhariwal who passed the order dated 24-10-1950, was a Naib Tahsildar, and as Naib Tahsildars were never invested with powers of Assistant Custodians of Evacuee Property, the order dated 24th October, 1950, is without jurisdiction. We are further of opinion that as the notice, dated 9th of September, 1950, is not in accordance with R. 6 in the form prescribed therein, and does not give the requisite information to the person to whom it was issued, Sri U.T. Thakur, who was Assistant Custodian and issued that notice, did not lay the foundation of his jurisdiction under the Act.

16. For these reasons, the order dated 24-10-1950, and the subsequent order in appeal, dated 11-5-1951, which is only the consequence of that order should be set aside. It will be open to the Assistant Custodian of Evacuee Property, Pali, to proceed afresh after giving proper notice as required by Section 7 of the Act, and Rule 6 of the Rules framed there under. In view however of the fact that the applicant did not raise the question that a Naib Tahsildar was not authorised to act as Assistant Custodian earlier before Custodian as he could have done, we think parties should bear their own costs.

17. We, therefore, allow the application, and quash the order of the Assistant Custodian, dated 24-10-1950, and the Custodian, dated 11-5-1951, and leave it to the

Assistant Custodian to proceed afresh according to law if he so desires. Parties will bear their own costs.

Application allowed.

Cases Referred.

1. AIR 1952 Raj 162
2. AIR 1953 SC 210
3. AIR 1953 Raj 193