

ABDUL HAKIM KHAN AND OTHERS

v.

THE REGIONAL SETTLEMENT
COMMISSIONER(B. P. SINHA, C. J., S. K. DAS, A. K. SARKAR,
N. RAJAGOPALA AYYANGAR and
J. R. MUDHOLKAR, JJ.)

1961

March 22.

Evacuee Property—Declaration of share in joint property—Separation proceedings—Order vesting entire property in Custodian—Legality of—Evacuee Interest (Separation) Act, 1951 (64 of 1951), s. 11.

A Muslim died leaving some property and several heirs. Some of the heirs became evacuees and their 4/7th share in the property was declared under s. 7 of the Administration of Evacuee Property Act, 1950, to be evacuee property. Thereafter, proceedings were taken for the separation of the interest of the evacuees, but as none of the claimants appeared, the Competent Officer passed an order under s. 11 of the Evacuee Interest (Separation) Act, 1951, vesting the entire property in the Custodian.

Held, that the order vesting the entire property in the Custodian was illegal. The share of the evacuees had been determined as 4/7ths and the Competent Officer was only required to separate it. Section 11 could not vest in the Custodian any property which was not evacuee property. This section deals only with cases where the whole property has been declared to be evacuee property and the claim is as mortgagor or mortgagee or to an undivided share in the property. In such cases in the absence of a claim having been filed or having been filed and found unsustainable, s. 11 vests the whole property in the Custodian.

Ebrahim Aboobaker v. Tek Chand Dolwani, [1953] S.C.R. 691, referred to.

ORIGINAL JURISDICTION: Petition No. 91 of 1956.

Petition under Art. 32 of the Constitution of India for enforcement of fundamental rights.

S. P. Sinha, Shaikat Hussain, E. Udayarathnam and *S. S. Shukla*, for the petitioners.

N. S. Bindra, R. H. Dhebar and *T. M. Sen*, for the respondents Nos. 1 to 4.

1961. March 22. The Judgment of the Court was delivered by

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SARKAR, J.—One Abdul Hai died about 1943. He left certain immovable properties. He had three wives and children by each. One of his wives predeceased him. On his death the wives and children, surviving him, succeeded to these properties in certain shares. One of the surviving wives and a daughter died subsequently.

It appears that the remaining wife of Abdul Hai and his six children by her, went to Pakistan but the time when they did so does not appear. It is not however disputed that they had become evacuees and their shares in the properties could be properly declared evacuee property. A notice under s. 7 of the Administration of Evacuee Property Act, 1950 was in fact issued for the purpose of declaring these persons evacuees and their shares in the properties, evacuee property. Proceedings were taken pursuant to the notice and on August 14, 1952, an order was made declaring the migrants evacuees and a 4/7th share in certain properties, evacuee property as belonging to them. Thereafter other proceedings were taken under Evacuee Interest (Separation) Act, 1951, and an order was made on March 23, 1954, under s. 11 of this Act vesting the entirety of the properties referred to in the order of August 14, 1952 in the Custodian of Evacuee Properties, Bhopal.

This petition under Art. 32 of the Constitution challenges the validity of the orders of August 14, 1952, and March 23, 1954, as violating the petitioners' fundamental right to hold property, to wit, their shares in the properties covered by the orders. It is presented by the surviving children of Abdul Hai by his two deceased wives, excepting Abdul Aziz. Abdul Aziz however has been made a respondent to the petition but is not opposing it. It is not in dispute that the petitioners and Abdul Aziz never became evacuees and are entitled to undivided shares in the properties declared to have vested in the Custodian in their entirety. The petition is opposed by the other respondents, namely, the Government of India and various officers concerned with the Acts, and it will be convenient to describe them alone as the respondents.

The first question raised is as to the validity of the order dated August 14, 1952, made under the Act of 1950. It is said that the order is a nullity as the notice under s. 7 of this Act on which it was based, was bad for the reason that it was issued to Abdul Aziz who was, admittedly, not an evacuee. It seems to us that it is unnecessary to decide this question for it is not a matter with which the petitioners are in any way concerned. The proceedings under that Act did not purport to affect their interest in the properties and they cannot, therefore, challenge the order made under it. Further, as we have earlier said, it is not in dispute that the shares of the surviving wife of Abdul Hai and her children in the properties could properly be declared evacuee property under the Act since they had migrated to Pakistan. The order of August 14, 1952, only declared what purported to be their shares, to be evacuee property. By such a declaration no right of the petitioners is affected.

The second question raised concerns the order of March 23, 1954, made under the Act of 1951. This order vests the entirety of certain properties left by Abdul Hai including the petitioners' shares in them, as evacuee property and, therefore, clearly affects the petitioners. We think that the petitioners' grievance against this order is of substance and the order as it stands cannot be sustained.

This order was made under s. 11 of the Act of 1951. This Act was passed "to make special provisions for the separation of the interests of evacuees from those of other persons in property in which such other persons are also interested": see the preamble to the Act. It creates an officer called the "Competent Officer" for effecting such separation. The disputed order was made by such an officer. Section 2(d) defines "composite property", which, so far as is material, is in these terms:

S. 2(d). "composite property" means any property which, or any property in which, an interest has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950) and—

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(i) in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not being an evacuee; or

(ii) in which the interest of the evacuee is subject to mortgage in any form, in favour of a person, not being an evacuee; or

(iii) in which the interest of a person, not being an evacuee, is subject to mortgage in any form in favour of an evacuee; or.....

Section 2(b) defines a "claim" as follows:

S. 2(b): "Claim" means the assertion by any person, not being an evacuee, of any right, title or interest in any property—

(i) as a co-sharer or partner of an evacuee in the property; or

(ii) as a mortgagee of the interest of an evacuee in the property; or

(iii) as a mortgagor having mortgaged the property or any interest therein in favour of an evacuee;.....

Section 6 authorises a Competent Officer to issue, "for the purpose of determining or separating the evacuee interest in a composite property", notices requiring persons claiming interest in any composite property, to submit their claims to him. Section 7 deals with the procedure, the form and the time of making the claims. Section 8 lays down that on receipt of a claim, the Competent Officer shall make an enquiry in the manner provided and pass an order determining the interest of the evacuee and the claimant in the property. It also provides that the order shall contain, among others, the following particulars:

(1) in any case where the evacuee and the claimant are co-sharers or partners, their respective shares in the property and the money value of such shares;

(2) in any case where the claim is made by a mortgagor, the amount due to the evacuee; and

(3) in any case where the claim is made by a mortgagee, the amount due under the claim in accordance with the provisions of section 9.

Sub-section (2) of s. 8 is in these terms:

S. 8(2): Where the Custodian under the Administration of Evacuee Property Act 1950 (XXXI of 1950), has determined that the property in question or any interest therein is evacuee property, the decision of the Custodian shall be binding on the competent officer:

Provided that nothing contained in this sub-section shall debar the competent officer from determining the mortgage debt in respect of such property or any interest therein or from separating the interest of the evacuee from that of the claimant under section 10.

Claims by mortgagees over evacuee properties are dealt with by s. 9. Section 10 gives the Competent Officer power to separate the interests of the evacuee from those of the claimant. It provides that the Competent Officer "in particular may:—(a) in the case of any claim of a co-sharer.....

(i) direct the custodian to pay to the claimant the amount of money assessed in respect of his share in the composite property or deposit the same in a civil Court having jurisdiction over such property and deliver possession of the property to the Custodian and the claimant may withdraw the amount in deposit in the civil Court; or

(ii) transfer the property to the claimant on payment by him of the amount of money assessed in respect of the share of the evacuee in the property; or

(iii) sell the property and distribute the sale proceeds, thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property; or

(iv) partition the property according to shares of the evacuee and the claimant and deliver possession of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively;.....".

Then comes s. 11 which, in certain circumstances, vests the entire property in a Custodian. It was under this section that the order now being considered

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was passed and it will be convenient to set it out later.

It is said on behalf of the respondents that notices under s. 6 of the Act of 1951, both general and special, the latter addressed to the petitioners, asking for submission of claims in respect of the properties had been issued but no claim was submitted by any one. The learned counsel for the respondents produced a copy of one of such notices which was in the form set out below:

“Subject:—105.10 acres agricultural land and one house in village Junapari Tahsil Berosia (4/7 share of Abdul Aleem etc. evacuees)

To

Shri Abdul Aziz and his two brothers village Junapani (Tahasil Berosia).

FORM ‘C’

WHEREAS information has been received that you have an interest in the composite property described in the Schedule hereto annexed.

AND WHEREAS the evacuee interest in the said property is to be separated from other interests.

I, NOW, hereby call upon you to submit your claim to me in the prescribed form within sixty days from the date of this notice.”

Abdul Aleem mentioned in this notice is one of the children of Abdul Hai who had evacuated to Pakistan.

The order that was passed by the Competent Officer under s. 11 of the Act of 1951, on March 23, 1954, recited that notices inviting claims were issued but no claims had been submitted, and then concluded, “So it is proved that no claim is filed deliberately though the individual notice has been served by post under a postal certificate. The whole Composite property listed by Custodian shall vest free of encumbrances and liabilities in the Custodian Bhopal U/s 11 of the Evacuee Interest (Separation) Act 1951.”

It is the validity of this order that is questioned by the petitioners. They admit that they filed no claims but they deny that any notice was served on them

and also otherwise challenge its validity. We do not think it necessary to go into the question of the validity of the notice for it seems to us that even if there was valid notice, the order challenged cannot be upheld.

The question is, was the order justified by s. 11 of the Act of 1951? That section so far as relevant reads thus:

S. 11(1).—Where in respect of any property, notice under section 6 is issued but no claim is filed or found to exist or where any claim in respect of such property is found to exist and the competent officer separates the evacuee interest therein under section 10, the whole property, or, as the case may be, the evacuee interest in the property thus separated shall vest in the Custodian free from all encumbrances and liabilities and any payment, transfer or partition made or effected under section 10, in satisfaction of any claim in respect of the property shall be a full and valid discharge of all claims in respect of the property.

The respondents contend that the notice mentioned in the section having been issued and no claim pursuant thereto having been filed, the whole property had to vest in the Custodian and therefore the order of the Competent Officer was valid. This contention seems to us to proceed on a misreading of the section. Notices under s. 6 are issued "for the purpose of determining or separating the evacuee interest in a composite property". The object of the notice can therefore be one or other of two things, namely, for determining the evacuee interest or for separating the evacuee interest, in a composite property. These are two entirely different things and are so treated in the Act as will appear from the definition of composite property and ss. 8, 9 and 10. The question of determining the evacuee interest arises when the interest is either a mortgagor's or mortgagee's interest in property or an undivided share in property the extent of which is not known. The determination is then made as provided in cls. (b), (c) and (d) of s. 8(1), ascertaining the quantum of the interest as mortgagor,

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mortgagee or co-sharer, as the case may be. A question as to separation of interest can arise, of course, only when that interest is known. This is done under s. 10 of the Act. A case of separation may arise, for example, when the evacuee is found to have a definite undivided share in property.

Now, an evacuee may be found to have a definite undivided share as a result of enquiry under s. 8 of the Act of 1951 or under the order made by the Custodian under s. 7 of the Act of 1950. In the present case the Custodian had held under s. 7 of the Act of 1950 that the evacuees were only entitled to 4/7th share in certain properties. This will appear from the notice under s. 6 of the Act of 1951 which we have earlier set out. Section 8(2) says that the declaration by the Custodian under the Act of 1950 that any interest in property is evacuee property shall be binding on the Competent Officer, but this shall not prevent him from separating under s. 10, the interest of the evacuee from that of the claimant. In the present case the notice was expressly for the purpose of separation.

We have to read s. 11 of the Act of 1951 in the light of the preceding sections. We have also, in doing so, to remember that the object of the Act of 1951 is not to vest in the Custodian property which was not evacuee property but to vest in him only the evacuee interest in property after determining or separating, as the case may be, that interest from the interests of other persons in the manner laid down. It has further to be remembered that it has been held by this Court that no property vests in the Custodian unless proceedings under s. 7 of the Act of 1950 had been taken: *Ebrahim Aboobaker v. Tek Chand Dolwani* (1). Section 11 therefore cannot vest in the Custodian any property which was not evacuee property; it cannot have the effect of making the entire property vest in the Custodian as evacuee property where the order under s. 7 of the Act of 1950 held that a certain share in it only was evacuee property. It would follow that when s. 11 makes the whole property vest in the Custodian in the absence of a claim

(1) [1953] S.C.R. 691.

having been filed or such claim having been filed but found to be unsustainable, it deals with a case where the claim is as mortgagor or mortgagee or to an undivided share in a property where the order under s. 7 of the Act of 1950 has declared the whole property to be evacuee property. If it were not to be so read, then it would enable property admittedly not belonging to an evacuee, to vest in the Custodian. Such could not have been the intention of the Act and would be against the decision of this Court earlier referred to. The section therefore does not warrant the order of March 23, 1954, which purported to vest the entire properties in the Custodian though the Order under s. 7 of the Act of 1950 found only a four seventh share therein to be evacuee property.

We think it right to point out that it has not been contended on behalf of the respondent that the petition was not maintainable. We have therefore not gone into that aspect of the case and are not to be understood as having decided any question as to the maintainability of the petition.

In the result we set aside the order of March 23, 1954. There will be no order as to costs. This order will not however prevent proper steps being taken for the separation of the evacuees' interest in the properties from the rest in accordance with the Act of 1951 or other provisions of law.

Petition allowed.

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