

Wazira and anr. Vs. Shamulal and ors.

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Court : Rajasthan

Decided On : Jun-18-1960

Reported in : AIR1960Raj283

Judge : I.N. Modi, J.

Acts : [Administration of Evacuee Property Act, 1950](#) - Sections 46

Appeal No. : Second Appeal No. 211 of 1954

Appellant : Wazira and anr.

Respondent : Shamulal and ors.

Advocate for Def. : G.P. Sharma, Adv. for Respondents Nos. 1 and 2,; Rajnarain, Adv. for Respondent No. 3

Advocate for Pet/Ap. : P.C. Bhandari, Adv.

Disposition : Appeal allowed

Judgement :

I.N. Modi, J.

1. This is a second appeal by the plaintiffs Wazira and Mamla against the judgment and decree of the Civil Judge Alwar dated 22-7-1954, by which he reversed the judgment and decree of the Munsiff Kishengarh dated 21-10-1952,

and dismissed the plaintiffs' suit.

2. The facts out of which this appeal arises may be briefly stated as follows. The dispute relates to certain agricultural land measuring in all 12 bighas and 2 Biswas situate in village Kirwari, Tehsil Kishengarh, the particulars whereof are mentioned in the plaint as amended and need not be repeated here. The case of the plaintiffs was that the deceased Khushal was the 'Maurisi Kashtkar' of the aforesaid land and that he died in 1946 issueless and without any widow surviving him.

The plaintiffs also gave the following pedigree table in the plaint which is not disputed:

DALMIR

_____ | _____

|||

Daula Amir Mohar Subdul

_____ | _____ (No issue) (No issue) |

|| Baggad

Khushal Badal _____ | _____

(died in 1946) _____ | _____ ||

|| Rehmat Rehman

Wazira Amar (Deff.1) (Deff.2)

(Pltff.1) |

MaSic (Pltff.2)

The plaintiffs thus claimed that they were the nearest heirs of the deceased Khushal and that mutation had been recorded in their favour in the revenue papers with respect to Khushal's lands on 5-9-1946. (See Ex. PD). The Nazim who

sanctioned the mutation further ordered that any person who was aggrieved by this order should have his rights decided in a competent court of law.

It, however, transpired that on 11-12-1946, the Fatwari of this area recommended that half of the lands in question be recorded in the names of Rehmat and Rehman. (See Ex. PE). The case of Rehmat and Rehman appears to have been that Wazira had executed a writing in their favour to that effect, the reason being that they had served Khushal in his old age and had discharged some debts of his.

It clearly appears from Ex. PE, however, that Wazira was not willing to give effect to this arrangement and stated that Rehmat and Rehman were free to file a civil suit against him if they so chose and it was under these circumstances that mutation was sanctioned with respect to half of Khushal's lands in the names of Rehmat and Rehman by an order of the Nazim dated 16-3-1947. Consequently, the plaintiffs filed the present suit on 8-12-1950. As Rehmat and Rehman had in the meantime gone away to Pakistan, the plaintiffs brought the suit against them through the Custodian, Evacuee Property, Alwar. They also impleaded Dholumal and Shyamumal in this suit as the lands had in the meantime been allotted to those persons by the Custodian and they were in possession thereof. The plaintiffs prayed for possession over the suit lands and they also prayed that the mutation dated 16-3-1947, ordered by the revenue authorities in favour of Rehmat and Rehman be cancelled.

3. The suit was resisted by the defendants. The legal adviser who filed the return statement on behalf of the Custodian expressed his ignorance as to the facts mentioned in the plaint relating to the property in suit but he admitted that the suit lands had been allotted to Dholumal and Shyamumal who were refugees. It was further contended that the lands in suit had vested in the Custodian under Section 8 of the Administration of Evacuee Property Act (No. 31) of 1950 (hereinafter called the Act of 1950), and, therefore, the plaintiffs should have made an application under Section 16 of the said Act for restoration of the lands. It was further contended that Rehmat and Rehman were entitled to receive a share out of the estate of the deceased Khushal. The other defendants merely stated that the suit land had been allotted to them by the Government and, therefore, no cause of

action arose against them.

4. The trial court decreed the suit. It held that the deceased Khusnal being the Maurisi Kashtkar of the suit lands had died issueless and without leaving any widow surviving him. It also held that the plaintiffs were the nearest heirs of the deceased and that Rehmat and Rehman were not entitled to receive any share out of his estate by inheritance according to law. Earlier, by its order dated 22-7-1952, the trial court had also held that the civil court had jurisdiction to take cognizance of the suit. On the above findings it was further held that the mutation recorded by the revenue authorities in favour of Rehmat and Rehman was null and void and of no effect against the plaintiffs, and the plaintiffs' suit was decreed.

5. The defendant Shyaraumal then went in appeal to the Civil Judge Alwar who upheld the findings of the Court below on all points except that of jurisdiction and he had the following observations to make on the question of jurisdiction:

'Admittedly the property in question went away in possession of the Custodian and he has allotted the same to Dholumal and Shamumal. Once the property goes in the hands of the Custodian, the civil court has no jurisdiction to decide whether a particular property is or is not an evacuee property. Section 46 of the [Administration of Evacuee Property Act, 1950](#), says that save as otherwise expressly provided in this Act, 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, etc. It is, therefore clear that the learned Munsiff was not competent to hold that the land in dispute was not an evacuee property especially when the possession was of the Custodian. If the Custodian takes possession of any land, the remedy is to apply for its restoration under Section 16 of that Act. The present suit is not maintainable.' In this view of the matter, the learned Civil Judge dismissed the plaintiffs' suit. Aggrieved by the aforesaid judgment and decree, the plaintiffs have come up in appeal to this Court.

6. It has been strenuously contended before me on behalf of the appellants that the finding of the learned Civil Judge that the civil court was not competent to take cognizance of this suit was erroneous in law and that it should be set aside. But before I address myself to this question, I wish to make it clear that all other

matters in controversy in this litigation stand concluded by concurrent findings of fact of the two courts below, and these were not assailed before me as indeed they could not be. On the facts, therefore, it must be found that Khushal had died in 1946 without leaving any issue or widow behind him and that the plaintiffs were the nearest heirs to him. The only question which arises for determination in this appeal, therefore, is whether the civil courts were competent to entertain and dispose of this suit.

6a. The answer to the above question depends on the correct interpretation of Section 46 of the Act of 1950 which had come into force on 18-4-1950, before the present suit was instituted on 8-12-1950. Section 46 reads as follows:

'Jurisdiction of civil courts barred in certain matters.

Save as otherwise expressly provided in this Act, 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

(b) Omitted

(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',

The question at once arises whether this section creates an absolute bar against a civil court or a revenue court dealing with a matter which may have been decided by the Custodian or Custodian General under this Act or the bar is limited. It is obvious that the section creates new jurisdiction which is in derogation of a right of suit in competent courts of law and I am, therefore, of opinion that on principles of law relating to interpretation of statutes which are well settled, the section must be strictly construed. Judged in the light of this principle, the section enacts a bar only where the questions arising for decision are questions mentioned in the section

itself and where such questions fall outside the ambit of the section or, in other words, where the action taken by 'the Custodian or Custodian General is without jurisdiction as defined in the Act, the jurisdiction of the civil courts is not taken away.

Section 46 is divided into three clauses. The first clause enacts a bar against the entertaining or adjudication of any question by a civil or revenue court as to whether any property or any right to or interest therein is or is not an evacuee property. The second clause lays down that in case the Custodian General or the Custodian takes any action under this Act, its legality cannot be questioned by a civil court or a revenue court. The last clause ousts th'e jurisdiction of a civil court or a revenue court in matters which the Custodian General or the Custodian is empowered under the Act to decide. It seems to me that other questions not falling within the ambit of the three clauses mentioned above will still fall to be determined in the usual way although they may relate to evacuees or an evacuee property.

It also seems to me that before the bar of section 46 can be held to be properly applicable to a given case, it must be found that the action taken by the Custodian or the Custodian General was or would have been within his jurisdiction embraced in the Act and that where the action taken by him or if taken by him would have been beyond his jurisdiction or in excess of the legitimate jurisdiction entrusted to him under the Act, the jurisdiction of the civil or the revenue courts should not be held to have been excluded or taken away. At this stage, it may be desirable to review a few important cases dealing with Section 46 as decided by the various High Courts in our country.

7. The first case which may be referred to in this connection is Abdul Majid v. P.R. Nayak, AIR 1951 Bom 440. The facts in this case were these. The Deputy Custodian of Evacuee Property, Bombay, in exercise of powers vested in him by the Bombay Evacuees (Administration of Property) Act, 1949 issued on the 7th October, 1949, a notifica-tion under Section 4(2) of the Act vesting the property of petitioner No. 2, a private limited company, in him, and on the 12th October, 1949 issued another notification under Section 6(1) of the same Act assuming

possession of and control over the evacuee property. Similar notifications were issued on the 14th and 25th October, 1949, by the Deputy Custodian of Evacuee Property at Thana so far as the evacuee property was situate within his jurisdiction. The petitioner Company appealed against the four orders to the Custodian of Evacuee Property, Bombay.

On the 3rd March, 1950, the Custodian issued a notice to the petitioner Company under Sec, 26(1) of the Administration of Evacuee Property Ordinance 1949 to show cause why it should not be declared an evacuee under Section 2(d)(i)(ii)(iii) of the said Ordinance and all its properties to be evacuee property. On the 28th March, 1950, the Custodian set aside the order passed by the Deputy Custodian but on the same day issued a notification under Section 7(3) of the Ordinance enumerating the properties of the petitioner Company which had vested in him, and on the 4th April, 1950, the Custodian issued a notice to the directors of the Company asking them to make certain additions and alterations in the Articles of Association of the Company. Petitioner No. 1 a shareholder and director of the Company and petitioner No. 2 the company applied to the High Court to vacate the two orders passed by the Custodian.

It was held that there is an ambit within which a Legislature can make orders of officers conclusive and final and that ambit must be restricted to orders passed with jurisdiction, and that the same cannot be extended to cover orders which are found to be without jurisdiction or in excess of jurisdiction. It was further held relying on *Secretary of State v. Mask and Co.*, 42 Bom LR 767: (AIR 1940 PC 105) that it was settled law that the exclusion of the jurisdiction of the civil courts was not readily inferred, and that such exclusion must either be explicitly expressed or clearly implied and that it was also well settled that even if jurisdiction was so excluded, the civil courts possessed jurisdiction to examine into cases where the provisions of the Act had not been complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure.

It was, therefore, held that notwithstanding Sections 28 and 43 of the Administration of Evacuee Property Ordinance, 1949, it was open to an aggrieved

party to challenge the validity of the orders of the Custodian of the Evacuee Property if they were in excess of the jurisdiction conferred upon him under the Ordinance or if they contravened any of the fundamental rights guaranteed to the subject under the Constitution.

8. The next case which may be referred to in this connection is *M. B. Namazi v. Deputy Custodian of Evacuee Property, Madras*, AIR 1951 Mad 930. The following observations of Rajamannar C. J. in this case are pertinent to our present purpose. Said the learned Chief Justice :

'There is, however, one thing about which I am not quite clear. The Ordinance no doubt declares the order of the Custodian declaring any property to be evacuee property as final. That might be so in one sense, i.e., if any property belongs to a person who has been declared to be an evacuee within the meaning of the definition, in the Ordinance, then the Custodian's order would be final. But does the finality amount to an adjudication on title in case there is any dispute? Take for instance the case where a property is declared to be evacuee property on the assumption that it belongs to A who is an evacuee. Does it mean that some one else cannot say that the property really does not belong to the evacuee but belongs to himself who is not an evacuee? I am inclined to hold that the order of the Custodian or the notification under Section 7 of the Ordinance is not final, in case of disputed title.'

9. The next case is *S. M. Zaki v. State of Bihar*, AIR 1953 Pat 112. In that case it was contended by the petitioner that he had been wrongly declared an evacuee because he was a citizen of India having his domicile and residence in the territory of this dominion and that at the time of the partition of the country he was in service as a railway employee of the then East Indian Railway and had merely gone to Pakistan having been given an option for service there on account of the exigencies of service, but thereby he had never abandoned his residence or domicile in India and that his wife and children had all the time stayed in a village in India.

It was contended by the Government pleader on behalf of the State, among other matters, 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 authorised 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.

It was further contended that as soon as the Custodian formed an opinion that a particular property was an evacuee property it was open to him to issue notice to show cause and that the jurisdiction which he thus acquired could not be defeated merely because on such assumption of jurisdiction he later wrongly decided that the person who owned the property was an evacuee though legally he was not so.

Reference was made in support of this submission to two cases of the Supreme Court in *Brij Raj Krishna v. S.K. Shaw and Bros.* AIR 1951 SC 115 and *Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi*, AIR 1952 SC 319. It was held that once it was apparent that the Custodian had acquired jurisdiction to take action under the Act of 1950, the mere circumstance that the Custodian had wrongly decided that any property was evacuee property under the Act would not be sufficient warrant for the High Court to interfere with the order of the Custodian or the Custodian General, inasmuch as Section 46 of the Act ousts the jurisdiction of a civil court in such matters even though the point may have been wrongly decided.

With all respect, this decision may be all right in one sense; but it does not afford any answer to the question whether the civil courts or for that matter the High Court would be powerless to interfere in a matter where the order of the Custodian or Custodian General is without jurisdiction or in excess of their legitimate jurisdiction. Such a case would clearly seem to me to arise where, for example, the Custodian may not have given any notice under Section 7 of the Act of 1950 and nevertheless he proceeds to declare a certain property to be evacuee property.

In such a case, I have no doubt that the proceedings taken by the Custodian would be entirely without jurisdiction and Section 46 of the Act cannot be allowed as a bar in the way of the civil courts going to hold that the order passed by the Custodian was without jurisdiction in a matter of this kind. Reference may be made in this connection to *Ebrahim Aboobakar v. Tek Chand*, AIR 1953 SC 298.

10. The next important case is Khalil Ahamad v. M.M. Nigar Begum, AIR 1954 All 362 (FB). This case is slightly different on facts, because when the Act of 1950 came into force, the appeals were already pending in the High Court, and it was, therefore, obvious that where such appeals were pending and the Custodian had merely taken action on the basis of the judgment of the lower court without deciding the matter for himself, that judgment being subject to correction by the court on appeal, it could hardly be said that the Custodian had taken any independent action by himself.

Nevertheless, Agarwala J. considered the question of the applicability of Section 46 on other grounds also and his observations are of importance in this connection. Addressing himself to the argument that under the U. P. Ordinance No. 1 of 1949 which was replaced by the Government of India Ordinance No. 27 of 1949 which was in turn replaced by the Act of 1950, no notice was necessary to be given and all property which was evacuee property vested in the Custodian automatically, and once such property had vested, it remained vested even under the present Act of 1950 by virtue of Clause (2) of Section 8, the learned Judge observed as follows :

'But this position also does not help the respondent. It is true that under paragraph 5 of the Ordinance No. 1 of 1949, a property which, was evacuee property vested in the Custodian automatically and by virtue of Clause (2) of Section 8 of the present Act it will be deemed to be evacuee property, declared as such, within the meaning of the Act and shall be deemed to be vested in the Custodian automatically and shall continue to so vest. But in a case of dispute who is to determine whether the property has vested in the Custodian? The Custodian cannot, because the Act does not give him the power to determine such a question. Obviously it is the civil court which must determine that question. Therefore, in such a case also clauses (a) and (d) cannot bar the jurisdiction of the civil court.'

11. Learned Assistant Government Advocate drew my attention also to Sat Narain v. Custodian Evacuee Property, Jullundur, AIR 1949 Punj 417. This case hardly helps him. It has been laid down in this case that Clause (c) of Section 46 will be

attracted into application only where it has been shown that the Custodian or the Custodian-General have taken an action under the Act and the suit in question aims at impugning the legality of that action, and the words 'under the Act' are of great significance and can be properly interpreted to mean 'as sanctioned or authorised by the Act'. If the Custodian-General or Custodian take an action which is-not sanctioned or authorised by the Act, but which they merely purport to take as one under the Act, the civil Court is perfectly entitled to question the legality of the same. It was further laid down that: 'A civil court can certainly examine whether the action of the Custodian-General or the Custodian, the legality of which is impugned before the Court, is one which was sanctioned or authorised by the Act, and if the Court comes to the conclusion that it was authorised, it will have no more jurisdiction in the matter. If, however, the Court comes to the conclusion that the action impugned was not sanctioned or authorised by the Act, it will have every jurisdiction to question the legality of the said action, and the mere fact that the Custodian General or the Custodian have purported to act under the Act would not, in any way, bar the jurisdiction of the Court to question the legality of the same'.

It was similarly laid down that Clause (d) of Section 46 bars the jurisdiction of the civil court also to a limited extent and that the precise bar that was created was that, a civil court would not entertain a suit respecting any matter which the Custodian General or the Custodian was empowered by or under the Act to determine, or, in other words, in a manner sanctioned or authorised by the Act.

12. The principle which emerges from a review of the case law, even without going as far as some of the aforesaid cases have gone, is certainly this that the bar as to the jurisdiction of the civil courts should be upheld only to the extent to which it is strictly necessary to do so and that this bar is not absolute and it cannot apply where the Custodian or the Custodian-General have acted without jurisdiction or in excess of their jurisdiction.

It may be added in this connection that a usurpation of jurisdiction does not stand on the same footing as a mere error in the exercise of jurisdiction and that where the only flaw in the exercise of the jurisdiction by the Custodian or the Custodian-

General amounts to a mere error in the exercise of jurisdiction, the civil courts or the revenue courts, as the case may be, would have no authority to entertain and dispose of such matters, because if that were allowed, the purpose of Section 46' or for that matter of Section 28 of the Act of 1950 would be completely frustrated. I hold accordingly.

13. Now let us see how these principles apply to the present case. What is the question which the Civil Courts are called upon to determine here? That question is as to the right of inheritance of the plaintiffs to the estate of Khushal in suit. It is true that this question may affect the rights of the evacuees Rehmat and Rehman indirectly. But that is not the same thing as to say that the real question for decision arising in this litigation is any other than that I have pointed out above. Khushal had already died in 1946 before the Matsya Evacuees (Administration of Property) Ordinance, 1948 (No. II of 1948) had come into force on the 28th August, 1948, or before the partition of India, as it then was, came to be effected.

As soon as Khushal died, his estate vested in his heirs according to the law of inheritance applicable to the Muslims. There is evidence to show that after his death, the present plaintiffs obtained mutation in the revenue papers in September, 1946.

This was, however, later changed, and mutation to the extent of half of the estate of Khushal which had earlier been recorded in the names of the plaintiffs was changed over to Rehmat and Rehman without the consent of the plaintiffs. The principal question which arose for determination was whether Khushal's estate at all vested in the Custodian. The learned Assistant Government Advocate himself conceded that it did not so far as half of it which was still recorded in the revenue papers in the names of the plaintiffs was concerned. From this it inevitably follows that the Custodian had no jurisdiction whatsoever to intermeddle with this half and whatever action was taken by him with respect thereto was entirely without jurisdiction.

Even so far as the remaining half which is said to have been later mutated in the names of Rehman and Rehmat who subsequently went over to Pakistan is concerned, the question for determination is not merely whether this is an evacuee

property and rightly or wrongly taken to be so but the real question is whether that portion of the property devolved in law on Rehmat and Rehman. There is nothing on the record to show that the last-mentioned persons had any right to that property except the bare mutation entry which was recorded by the revenue officers in the teeth of opposition from the present plaintiffs.

It is not disputed before me, and indeed there is no room for dispute, that Wazira plaintiff was the nearest heir to the deceased Khushal. On his death, therefore, Khushal's entire estate devolved on him. Rehmat and Rehman, therefore, had no right in law with respect to it and, therefore, this other half portion of the suit property could not have possibly vested in the Custodian even under the principle of automatic vesting enforced by Section 4 of the Matsya Evacuees (Administration of Property) Ordinance, 1948.

It was faintly sought to be argued before me that even Wazira and Manila had gone over to Pakistan and they themselves were evacuees, and, therefore, their estate also vested in the Custodian. This position, however, cannot possibly be accepted on the record as it stands. There is not a scintilla of evidence to show that these persons had ever left India. Not a single question was put to Wazira in this connection when he came into the witness-box. In fact the Custodian and his legal adviser do not seem to have taken any interest whatsoever in this litigation after filing the written statement in the trial court, so that, so far as the defendants are concerned there is no evidence whatever to show that Rehmat and Rehman were ever declared evacuees or that the suit property was declared evacuee property.

14. Again, the question as to what is the proper legal effect of the mutation entry made in favour of Rehmat and Rehman in the circumstances mentioned above and whether on that account alone the property, with respect to which, it was made, made them the owners thereof in law, (and it is on a proper and lawful decision of these questions alone that the property could be said to have vested or not in the custodian even under the principle of automatic vesting under the Matsya Ordinance of 1948) are matters which, in my considered opinion, properly fall outside the scope of Sec, 46 of the Act of 1950, for it can hardly be postulated

of questions like these that they have been relegated to the exclusive or special jurisdiction of the Custodian under any of the three clauses of Section 46.

I am altogether unable to hold that a controversy of the character we have before us in this case is merely a simple matter as to whether a particular property is an evacuee property or an interest therein is evacuee property or that it is one which the Custodian or the Custodian-General is empowered to entertain and decide by anything contained in the Act.

15. When this question of jurisdiction is thus disposed of against the defendants, I have no manner of doubt whatever on the findings of the two courts below that the property in suit even to the extent that it was somehow mutated in the names of Rehmat and Rehman never devolved in law upon them and that the same had, on the other hand, vested in the plaintiff Wazira (it is unnecessary to decide for present purposes whether it was vested in the other plaintiff also), he being the nearest heir of the deceased Khushal and it could not, therefore, have possibly vested in the Custodian, and, therefore, the latter had no jurisdiction whatever to deal with it or allot it to anybody else.

16. In this state of affairs and having regard to the principle of law formulated by me above, the only correct conclusion to which it is possible to come is that the civil court had jurisdiction to take cognizance of and decide this dispute, as it does not strictly fall within the bar created by Section 46 of the Act of 1950.

17. The result is that this appeal must be allowed, the judgment and decree of the learned Civil Judge set aside and that of the Munsiff restored. The plaintiffs will be entitled to one set of costs throughout. Leave to appeal is refused.