Ebrahim Aboobaker And Another — Appellants

Versus

Tek Chand Dolwani — Respondent

(Under Article 32 of the Constitution of India for the enforcement of fundamental rights.)

Ebrahim Aboobaker And Another — Petitioners

Versus

Custodian-General Of Evacuee Property — Respondent.

Petition for Special Leave to Appeal No. 106 of 1952.

Ebrahim Aboobaker And Another — Petitioners

Versus

U.M. Mirchandani — Respondent.

Civil Appeal No. 65 of 1953, decided on 10th day of April, 1953.

The Judgment of the Court was delivered by

GHULAM HASAN, J.— In order to understand and appreciate the point arising for consideration in this case, it will be necessary to set out a few preliminary facts:

One Aboobaker Abdul Rehman, a resident of Bombay, received on December 16, 1949, from the Additional Custodian, Bombay, a notice under Section 7 of Ordinance XXVII of 1949 calling upon him to show cause why his interest in certain specific property should not be declared to be evacuee property. A further notice issued on January 11, 1950, required him to show cause why he should not be, declared an evacuee and all his properties declared to be evacuee properties. On February 8, 1950, the Additional Custodian decided that Aboobaker was not an evacuee, but at the same time issued a fresh notice to him under Section 19, requiring him to show cause why he should not be declared an "intending evacuee" and on the following day, February 9, he declared Aboobaker as "intending evacuee" upon the same evidence. Aboobaker does not appear to have contested this order, but one Tek Chand Dolwani, first informant, carried the matter in appeal to the Custodian-General, praying that Aboobaker be declared an evacuee and that the Imperial Cinema, one of his properties, be allotted to him.

2. The Ordinance expired on October 18, 1949, and was replaced by Act 31 of 1950 (The Administration of Evacuee Property Act) which came into

operation on April 17, 1950. It is not denied that although the Ordinance was repealed by Section 58, the proceedings taken in the exercise of any powers conferred by the Ordinance shall be deemed to have been taken in the exercise of the powers conferred by the Act as if the Act were in force on the day proceedings were taken.

3. The appeal was heard on May 13, 1950, when the preliminary objections in regard to the maintainability of the appeal were argued and the appeal was adjourned to May 15 for orders. On May 14, Aboobaker died leaving him surviving three sons and a daughter as his heirs under the Mohammedan law, the sons taking 2/7th share each and the daughter 1/7th. On May 15, the Custodian-General pronounced the order which was, however, dated May 13. By this order he dismissed the preliminary objections and directed that further enquiries should be made and that Aboobaker be examined further on August 19, 1950. The hearing of the appeal was adjourned from time to time and was fixed for final disposal on March 7, 1951. Notice of this hearing was issued to Ebrahim Aboobaker (son) and Hawabai Aboobaker (daughter) who owned between themselves 3/7th share to appear as the heirs and legal representatives of the deceased. The petitioners, who are residents of India — their two brothers are said to have migrated to Pakistan — filed on February 26, 1951, Miscellaneous Petition No. 15 of 1951 in the Punjab High Court for a writ of prohibition or for directions or order directing the Custodian-General to forbear from proceeding with the hearing of the appeal or making any order in the said appeal or from declaring the properties left by the deceased as evacuee properties. The petitioners contended inter alia, that after the death of Aboobaker the Custodian-General had no jurisdiction to proceed with the appeal. The petition was dismissed on May 24, 1951, the High Court holding that the Custodian-General had jurisdiction. Leave to appeal was granted but the High Court did not stay the hearing of the appeal by the Custodian-General which was fixed for July 3, 1951, and directed that the Custodian-General should not pass final orders until July 23, 1951. On July 3, the Custodian-General heard the appeal and on July 30 which was the date fixed for final orders he declared Aboobaker to be an evacuee and his properties to be evacuee properties.

4. On August 6, 1951, the petitioners filed a petition (Miscellaneous Petition No. 191 of 1951) under Article 226 of the Constitution in the Bombay High Court against the Custodian-General and the Custodian Bombay for a writ of certiorari for quashing and setting aside the said order and for an order directing the Custodian-General and the local Custodian from acting upon the order or from taking possession of the property which was situate in Bombay. The petition was dismissed by Shah, J. on October 4, 1951, on the ground that the Bombay High Court had no jurisdiction against the Custodian-General and that the petition against the local Custodian was premature. Appeal No. 88 of 1951, was filed on October 5, 1951, against the said order to the Bombay High Court. An interim order was passed whereby the petitioners undertook to keep accounts and not to dispose of the properties while the Custodian-General gave an undertaking not to take possession pending the hearing

of the appeal. The appeal came up for hearing on November 20, 1951, before the Chief Justice and Gajendragadkar, J. but it was allowed to stand over with a view to await the decision of this Court in appeal against the order of the Punjab High Court as they did not wish to pass any order which might conflict with the decision of this Court. That appeal was dismissed by this Court on May 26, 1952. See *Ebrahim Aboobaker* v. *Custodian Genera of Evacuee Property*1. This Court decided only the preliminary point that Tek Chand Dolwani was entitled to prefer an appeal but left the question about the jurisdiction of the Custodian-General to declare the properties of Aboobaker as evacuee properties after his death open as that question was not raised before it, the order of the 30th July, 1951, having been passed after the filing of the appeal in the Supreme Court and also because that question was pending determination in the appeal before the Bombay High Court.

5. Appeal No. 88 of 1951 was dismissed on lst/2nd July 1952, by the Chief Justice and Gajendragadkar, J. on the preliminary ground that they had no jurisdiction to quash the order of the Custodian-General passed on 30th July, 195l. They declined to pass any order against the local Custodian observing that they could not do indirectly what could not be done directly. A petition for leave to appeal was also rejected by the High Court on 14th July, 1952.

6. Petition No. 105 of 1952 is for special leave to appeal against the order of the Custodian-General dated July 30, 1951. Petition No. 106 of 1952 is against the order of the Appellate Bench of the Bombay High Court dated lst/2nd July, 1952, Petition No. 247 of 1952 is an independent petition under Article 32 of the Constitution, challenging the order of the Custodian-General dated July 30, 1951, as being in violation of the fundamental rights of the petitioners and being without jurisdiction.

7. Tek Chand Dolwani has filed a caveat against the Petition No. 105 of 1952, while the petition under Article 32 has been heard upon notice to the Custodian-General. In this petition it is submitted that on a true construction of the relevant provisions of the Ordinance and the Administration of Evacuee Property Act, the Custodian-General had no jurisdiction to hear the appeal after the death of Aboobaker, or to make any order declaring the properties left by him to be evacuee properties as the appeal abated on his death and the properties vested in specific shares in his heirs under the Mohammedan law. It was urged that as the said properties did not fall within the definition of evacuee property on the 30th July, 1951, or at any time after the death of Aboobaker, the Custodian-General had no jurisdiction to declare the properties to be evacuee properties. As a matter of fact, the deceased had no right, title or interest in the said properties after his death; nor were the said properties acquired by his heirs by any mode of transfer from the deceased. The order of 30th July, 1951, is challenged as being void and inoperative as it violates the fundamental rights of the petitioners under Articles 19(1)(*f*) and 31(1) of the Constitution. The petitioners pray for the issue a writ of

certiorari against the Custodian-General calling for the records of the case relating to the above order and after looking into the same and going into the question of the legality thereof quash and set aside the same. They also ask for a writ of prohibition or mandamus or directions or an order or a writ directing the custodian General, his servants and agents to forbear from acting upon or enforcing the order dated the 30th July, 1951, or from taking any steps or proceedings in enforcement of the same. We heard the petitioners and the Solicitor-General on petition under Article 32 and reserved orders till we had heard Dolwani who is the caveator in the application for special leave to appeal. Dolwani was served with a notice personally and through his agent but neither put in appearance. We granted the application for leave to appeal against the order of the Custodian-General and directed the appeal to be posted for hearing along with the application under Article 32. Dolwani again did not appear and we proceed, therefore, to dispose of the appeal and the petition by a common judgment.

8. The crucial question which arises for consideration before us is whether a person can be declared an evacuee after his death and whether the properties which upon his death vest in his heirs under the Mohammedan law can be declared evacuee properties. Before we proceed to determine that question we must notice the objection raised by the Solicitor-General about the maintainability of the petition under Article 32 of the Constitution. He contends that there is no question of any infraction of fundamental right in the present case as the petitioners have not been deprived of any property without the authority law. The Custodian-General, it is said, undoubtedly purported to act under an express statutory enactment. He might have misapplied or misappreciated the law or committed an error in the assumption or exercise of jurisdiction, but that would not bring the case within the purview of Article 31(1) read with Article 19(1)(*f*) of the Constitution. The point is debatable and we do not desire to express any opinion upon this point as we propose to examine the validity of the order of the Custodian-General dated July 30, 1951, in the appeal (Civil Appeal No. 65 of 1953) which arose out of Petition No. 105 of 1952 for special leave and not on the petition under Article 32.

9. Section 2(*d*) and (*f*) define "evacuee" and "evacuee property" respectively as follows:

> (*d*) "Evacuee" means any person,—
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> (*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 State for any place outside the territories now forming part India, or
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> (*ii*) who is resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any part of the territories to which this Act extends, or whose property in any part of the said territories has

ceased to be occupied supervised or managed by any person or is being occupied, supervised managed by an unauthorised person, or

(*iii*) who has, after the 14th day of August, 1947, obtained, otherwise than by way of purchase or exchange, any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan;

(*f*) "Evacuee property" mean any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity), and includes any property—

(1) which has been obtained by any person from an evacuee at the 14th day of August, 1947, by any mode of transfer, unless such transfer has been confirmed by the Coustodian.

10. The use of the present tense "leaves" or "has left" in the definition of evacuee and "has" in the definition of evacuee property is relied upon in support of the contention that the object of the legislature in enacting these provisions was to confine their operation to a living person only. This line of argument may not per se be of any compelling force but it receives support from the rest of the provisions of the Act to which reference will be made hereafter. It may, however, be pointed out here that clause (*f*)(1) will not apply to the case of the petitioners for they do not claim the property from the evacuee after the 14th day of August, 1947, by *any mode of transfer* but by right of succession under the Mohammedan law. Succession to property implies devolution by operation of law and cannot appropriately be described as a mode of transfer, as contended for by the Solicitor-General, which obviously contemplates a transfer inter vivos.

11. Section 7 refers to the notification of the evacuee property. It lays down that (1) "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 into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property".

12. Rule 6, which is framed in exercise of the powers conferred by Section 56 of the Act, lays down the manner of enquiry under Section 7 and is follows:

"(1) Where the Custodian is satisfied from information in his possession or otherwise that any property or an interest therein is prima facie evacuee property, he shall cause a notice to be served, in Form No. 1, on the person claiming title to such property or interest and on any other person or persons whom he considers to be interested in the property.

(2) The notice shall, as far as practicable, mention the grounds on which the property is sought to be declared evacuee property and shall specify the provision of the Act under which the person claiming any title to, or interest in, such property is alleged to be an evacuee.

(3) The notice shall be served *personally,* but if that is not practicable the service may be effected in any manner provided in Rule 28. (This rule refers to a mode of substituted service).

(4) Where a notice has been duly served, and the party called upon to show cause why the property should not be declared an evacuee property, *fails to appear* on the date fixed for hearing, the Custodian may proceed to hear the matter ex parte and pass such order on the material before him as he deems fit.

(5) Where such party *appears* and contests the notice he shall forth with file a written statement verified in the same manner as a pleading under the Code of Civil Procedure 1908, stating the reasons why he should not be deemed to be an evacuee and why the property or his interest therein should not be declared as evacuee property. Any person or persons claiming to be interested in the enquiry or in the property being declared as evacuee property, .may file a reply to such written statement. The Custodian shall then, either on the same day or on any subsequent day to which the hearing may be adjourned, proceed to hear the evidence, if any, which the party appearing to show cause may produce and also evidence which the party claiming to be interested as mentioned above, may adduce.

(6) After the whole evidence has been duly recorded in a summary manner, the Custodian shall proceed to pronounce his order. The order shall state the points for determination, and the findings thereon with brief reasons."

Form No. 1 in Appendix A to the rules is as follows:

"WHEREAS there is credible information in possession of the Custodian that *you* are an evacuee under clause (*iii*) of Section 2(*d*) of the Administration of Evacuee Property Act on account of the grounds mentioned below:—

AND WHEREAS it is desirable to hear *you in person;*

Now, therefore, *you* are hereby called upon to show cause (with all material evidence on which you wish to rely) why orders should not be passed declaring you an evacuee and all your property as evacuee property under the provisions of the said Act.

Deputy

----------Assistant Custodian."

13. The next important section is Section 8 the relevant portion of which is as follows:

"(*i*) Any property declared to be evacuee property under Section 7 shall be deemed to have vested in the Custodian for the State,—

(*a*) in the case of the property of an evacuee as defined in sub-clause (*i*) of clause (*d*) of Section 2, from the date on which he leaves or left any place in a State for any place outside the territories now forming part of India;"

14. If we substitute in Section 8 the definition of evacuee property given in Section 2, the meaning of Section 8 will become clearer. Any property declared to be:

(*i*) property in which an evacuee has any right or interest,

(*ii*) property which has been obtained by any person from an evacuee after the 14th of August, 1947, by any mode of transfer unless that transfer has been confirmed by the Custodian under Section 7, shall be deemed to have vested in the Custodian for the State:

(*a*) in the case of the property of an evacuee as defined in sub-clause (*i*) of clause (*d*) of Section 2, from the date on which he leaves or left any place in a State for any place outside the territories now forming part of India.

15. The language of the rule read with the form given above, the notice issued to the person claiming interest in the property which, according to the information in the possession of the Custodian is prima facie evacuee property, the manner of its service and the mode of enquiry, lead to the unmistakable conclusion that the object of Section 7 was to take proceedings against a living person and to, that extent the use of the present tense in the definition of "evacuee" and "evacuee property" lends corroboration to the contention raised that the proceedings are intended to be applicable to living persons only. The property which is declared to vest under (*i*) must be one in which an evacuee has any right or interest but the deceased has no right or interest after his death as his property vests in his heirs. Nor does (*ii*) apply as petitioners have not obtained the property from an evacuee by any mode of transfer.

16. It is obvious that property must be declared to be evacuee property under Section 7 before it can vest under Section 8. There is no doubt that when the property does so vest the vesting takes effect retrospectively, but where the man dies before any such declaration is made, the doctrine of relation-back cannot be invoked so as to affect the vesting of such property in the legal heirs by operation of law. To take a simple illustration, if a person leaves India after 1st of March, 1947, the date given in Section 2(*d*), and dies in Pakistan before any notice is issued to him under Section 7 and before any enquiry is held in pursuance thereof, it is obvious that the heirs, who have succeeded to his property, can not

be deprived of it by conducting an inquiry into the status of the deceased and investigating his right or interest in property which has already devolved on legal heirs. Section 8 in such a case will not come into play and there can be no vesting of the property retrospectively before such property is declared as evacuee property within the meaning of Section 2(*f*) of the Act.

17. Reading Sections 7 and 8 together it appears that the Custodian gets dominion over the property only after the declaration is made. The declaration follows upon the enquiry made under Section 7, but until the proceeding is taken under Section 7, there can be no vesting of the property and consequently no right in the Custodian to take possession of it. Now if the alleged evacuee dies before the declaration, has the Custodian any right to take possession of the property? If he cannot take possession of the property of a living person before the declaration, by the same token he cannot take possession after the death of alleged evacuee when the property had passed into the hands of the heirs. The enquiry under Section 7 is a condition precedent to the making of a declaration under Section 8 and the right of the Custodian to exercise dominion over the property does not arise until the declaration is made. There is no reason therefore why the heirs should be deprived of their property before the Custodian obtains dominion.

18. The matter may be looked at from another point of view. Section 141 of the Civil Procedure Code which makes the procedure of the Court in regard suits applicable in all proceedings in any Court of civil jurisdiction does not apply, as the Custodian is not a court, though the proceedings held by him are of a quasi-judicial nature. Section 45 of the Act applies the provisions of the Code only in respect of enforcing the attendance of any person and examining him on oath compelling and the discovery and production of documents.

19. The provisions of the Code relating to substitution are, therefore, inapplicable and there is no other provision in the Act for the heirs to be substituted in place of the deceased so as to continue proceedings against them. If the proceedings cannot be continued against the heirs upon the death of the alleged evacuee it is logical to hold that they cannot be initiated against them. We hold, therefore, that the proceedings must lapse upon the death of such person.

20. There is no provision in the Act that after a man is dead, his property can be declared evacuee property. If such a provision had been made, then the vesting contemplated in Section 8 of the Act would have by its statutory force displaced the vesting of the property under the Mohammedan law in the heirs after death. It is a well recognised proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death and the devolution is neither suspended by reason of debts due from the

deceased, nor is the distribution of the shares inherited postponed till the payment of debts. It is also well understood that property vests in the heirs under Mohammedan law, unlike the Indian Succession Act, without the intervention of an administrator.

21. Section 40 of the Act imposes a restriction upon the right of an evacuee to transfer property after 14th August, 1947. This section prohibits transfer inter vivos but cannot affect devolution by operation of law such as, on death. According to this section where the property of a person is notified or declared to be an evacuee property, he cannot transfer that property after 14th of August, 1947, so as to confer any right on the transferee unless it is confirmed by the Custodian. This shows that a transfer between the 1st of March and the 14th of August, 1947, is immune from the disability of being treated as evacuee property notwithstanding the fact that the transferor migrated after the 1st of March. If he made a bona fide transfer of his entire property before 14th of August, 1947 then the property does not acquire the character of evacuee property and such a transfer does not require confirmation by the Custodian, although all transfers after that date are held suspect. If the transfer between the two crucial dates is held valid, then on a parity of reasoning the death of the transferor before the declaration after the 14th of August should lead to the same result.

22. It was contended before us that the Act aims at fixing the nature of the property from a particular date and that the proceedings taken are against the property and not against the person. This argument is fallacious. There can be no property evacuee or otherwise unless there is a person who owns that property. It is the property of the owner which is declared to be evacuee property by reason of the fact that he is subject to disability on certain grounds. The definition of evacuee property in the Act begins by saying "property in which an evacuee has any right or interest in any capacity". The Act also shows that the property cannot be notified as evacuee property unless and until the person claiming interest in it has been given notice.

23. Reference may also be made to Section 43 as indicating that the declaration under Section 8 was intended to be made during the life time of the alleged evacuee. This section lays down "where in pursuance of the provisions of this Act any property has vested in the Custodian neither the death of the evacuee at any time thereafter, nor the fact that the evacuee who had a right or interest in that property had ceased to be an evacuee at any material time shall affect the vesting or render invalid anything done in consequence thereof". The section shows that where the property has vested in the Custodian, then the death of the evacuee or his ceasing to be an evacuee afterwards shall not affect the vesting or render invalid anything done in consequence thereof. The section seems to suggest that the vesting must take place in the life time of the alleged evacuee, otherwise there was no point in providing that the vesting will not be affected by the death the evacuee or the evacuee ceasing to be so.

24. The Solicitor-General contended that Section 43 embodies the principle once an evacuee always an evacuee. This conclusion is hardly justified on the terms of Section 43 as explained above and it finds no support from the other provisions of the Act. The object and the scheme of the Act leave little doubt that the Act was intended, as its title shows, to, provide for the administration of evacuee property and it is common ground that this property has ultimately to be used be for compensating the refugees who had lost their property in Pakistan. The Act contains elaborate provisions as to how the administration is to be carried out.

25. Section 9 enables the Custodian to take possession of the evacuee property vested in him under Section 8 and Section 10 which defines the powers of the Custodian generally enables him to take such measures as he considers necessary or expedient for the purposes of administering, preserving and managing any evacuee property. These are mentioned in detail in sub-section 2 of Section 10, clause (*j*), which authorizes the Custodian to institute, defend or continue any legal proceedings in any civil or Revenue court on behalf of the evacuee.

26. Section 15 imposes an obligation on him to maintain a separate account of the property of each evacuee.

27. Section 16 empowers the Custodian to restore the evacuee property upon application to the evacuee or any person claiming to be his heir provided he produce a certificate from the Central Government that the evacuee property may be restored to him. Upon restoration the Custodian shall stand absolved of all responsibilities in respect of the property so restored, but such restoration shall not prejudice the rights, if any, in respect of the property which any other person may be entitled to enforce against the person to whom the property has been so restored.

28. By Section 52 of the Act it is open to the Central Government by notification in the Official Gazette, to exempt any person or class of persons or any property or class of property from the operation of all or any of the provisions of this Act. In pursuance of this section the Central Government issued Notification SRO 260, dated 3rd July, 1950, which was published in the Gazette of India Part II Section 3, dated the 15th July, 1950, p. 254, in which broadly three categories of persons were exempted:

> (*a*) Any person who on or after the 1st day of March 1947, migrated from India to Pakistan but had returned to India before the 18th day of July 1948, and had settled therein;
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> (*b*) Any person who has left or leaves for Pakistan on a temporary visit taking with himself a "No objection to return" certificate, and has returned or returns, to India under a valid permit issued under

the Influx from Pakistan (Control) Act, 1949, for permanent return to India; and

(*c*) Any person who has come from Pakistan to India before the 18th day of October, 1949, under a valid permit issued under the Influx from Pakistan (Control) Act, 1949, for permanent resettlement in India.

29. These provisions far from suggesting that the person declared an evacuee suffers a civil death and remains an evacuee for all time show on the other hand that the person may cease to be an evacuee under certain circumstances that he is reinstated to his original position and his property restored to him subject to certain conditions and without prejudice to the rights if any in respect of the property which any other person may be entitled to enforce against him. These provisions also establish that the fact of a property being evacuee property is not a permanent attribute of such property and that it may cease to be so under given conditions. The property does not suffer from any inherent infirmity but becomes evacuee because of the disability attaching to the owner. Once that disability ceases, the property is rid of that disability and becomes liable to be restored to the owner

30. Mr Desai counsel for the petitioner referred in the course of the arguments to Section 93 of the Presidency-towns Insolvency Act and Section 17 of the Provincial Insolvency Act. According to the former "if a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall unless by the court otherwise orders, be continued as if he were alive". By the latter section "if a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor". Though there is slight difference in the language of these two sections, the principle underlying the Insolvency Law seems to be that the death of the insolvent during the pendency of the application for insolvency does not cause the proceedings to abate but that they must be continued so that his property could be administered for the benefit of the creditors. There is no so provision in the Act before us. It follows therefore that if the intention of the legislature had been to treat the person proceeded against under Section 7 as alive for purposes of the proceedings even after his death, such a provision would have been incorporated into the Act.

31. After giving our best consideration to the case we are of opinion that the order of 30th July, 1951, passed by the Custodian-General declaring Aboobaker Abdul Rehman deceased as an evacuee and the property left by him as evacuee property cannot stand and must be set aside. We accordingly allow Appeal No. 65 of 1953, arising out of Petition No. 105 of 1952 and hold that the Custodian-General had no jurisdiction to pass the order of 30th July, 1951, and set it aside. We make no order as to costs.

32. Petition No. 106 of 1952 is not pressed and no order need be passed in respect thereto. In view of our order in Appeal No. 65 of 1953, no orders are called for in Petition No. 247 of 1952.

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