

## **Hafiz Mohammad Yusuf vs The Custodian General, Evacuee ... on 22 December, 1953**

**Equivalent citations: AIR1954ALL433, AIR 1954 ALLAHABAD 433**

### **JUDGMENT**

M.L. Chaturvedi, J.

1. This is a petition under Article 226 of the Constitution.

2. The case of the petitioner as set out in the petition is that one Abdul Hakim was the tenant, along with his brother, of a shop in the Vegetable Market, Bisheshar Ganj, Banaras. Abdul Hakim's brother died about 10 years ago, and in 1948 the petitioner became a partner of Abdul Hakim in the fruit business carried on in the shop. The petitioner says that he contributed a sum of Rs. 5,000/- and that a deed of partnership was executed on the 25th October, 1943. Subsequently Abdul Hakim went to Pakistan, and a notice was issued to him in April 1950 under Section 7 of the Administration of Evacuee Property Act of that year to show cause why he should not be declared an evacuee and his property as evacuee property. No objection was filed by Abdul Hakim, and the movable property in the shop was in due course declared to be evacuee property. Subsequently however, Abdul Hakim returned to India, and, on an objection being then filed by him, the order declaring him an evacuee and his property to be evacuee property was set aside.

Abdul Hakim's stay in India appears to have been temporary and he again went to Pakistan. A second notice was thereupon issued under Section 7 of the Act to which an objection was filed by the petitioner on the ground that Abdul Hakim had surrendered his rights as lessee in the shop in question and that the Municipal Board had allotted the shop to the petitioner on a monthly rent of Rs. 8/-, A second objection was that the tenancy rights of Abdul Hakim in the shop were not mentioned in the second notice as property to be declared as evacuee property.

3. The petitioner's objections were dismissed by the Assistant Custodian, Banaras, on the 25th September, 1951, and an appeal from the order of the Assistant Custodian was dismissed by the Additional Custodian, Lucknow, on the 5th April, 1952. The petitioner then filed an application in revision to the Custodian General under Section 27 of the Act which was also dismissed on the 26th August, 1953. It is in these circumstances that the petitioner has filed the present petition in which he prays for a writ of 'certiorari' to quash each of the orders made by the Assistant Custodian, the Additional Custodian and the Custodian General. He has impleaded one Daya Ram, who appears to be the person who is now a tenant of the shop in question, as respondent No. 4.

4. A preliminary objection to the maintainability of this petition has been taken by the learned Counsel who appears for the first three respondents. It is that the orders made respectively by the

Assistant Custodian and the Additional Custodian have merged in the order of the Custodian General dated the 26th of August, 1953, and that as the Custodian General neither resides nor is his office located within the territory in relation to which this Court exercises jurisdiction, it can issue no writ of 'certiorari' to quash the order made by him. In our opinion this objection must be upheld.

5. It is, in our opinion, now well settled so far as this Court is concerned that the decree of an appellate Court supersedes the decree of the first Court even in cases where the appellate Court merely affirms the original decree: -- 'Mohammad Sulaiman Khan v. Mohammad Yar Khan', 11 All 267 (A); -- 'Mohammad Sulaiman Khan v. Fatima', 11 All 314 (B). The same principle has been extended by a learned single Judge of this Court in the case of -- 'Gauri Shankar v. Jagat Narain', AIR 1934 All 134 (C), in which it was held that the 'ex parte' decree of the lower Court merged in the decree passed by this Court in revision.

6. Our attention has been drawn by the learned counsel for the petitioner to the case of -- 'Chandu Abdul Majid v. Jawahar Lal', AIR 1914 PC 66 (D). In that case the Privy Council held that where an appeal before the Board had been dismissed for want of prosecution it could not be said that the Privy Council had dealt with the matter judicially in any manner and therefore their Lordships added, the decree of the High Court had not merged in the decree of the Privy Council. The observations in this case support the submission of the respondents rather than that of the petitioner. Reference was also made on behalf of the respondents to a decision of the Judicial Commissioner of Peshawar in the case of -- 'Ghaiar Shah v. Sikandar Shah', AIR 1935 Pesh 91 (E), in which a distinction was drawn between the case where an application in revision was dismissed and the case in which the application was allowed, and it being held that it was only in the latter case that the decree of the lower Court merged in that of the High Court. The distinction appears to have been based on the fact that when a revision is dismissed the High Court does not confirm the decree of the lower Court but merely declines to interfere.

We are not impressed by this argument because it appears to us that a Court of appeal which dismisses without modification an appeal from the decree of the lower Court declines to interfere no less than a Court of revision which dismisses an application in revision. But whatever may be the position in the case of the orders passed under Section 115, Civil P. C., we think no such distinction can be drawn in the case of orders passed under Section 27 of the Administration of Evacuee Property Act.

7. Looking upon the matter somewhat more broadly the word "appeal" includes an application in revision. "Appeal" has been defined in Wharton's Law Lexicon as "the removal of a cause from an inferior to P superior Court for the purpose of testing the soundness of the decision of the inferior court'.

and the expression 'appellate jurisdiction' has been defined by the same authority as, "the power of superior Court to review the decision of an inferior Court".

Now under Section 27 of the Administration oi Evacuee Property Act, 1950, the Custodian General may at any time, either on his own motion or on an application made to him, call for the record of

any proceeding in which any District Judge or Custodian has passed an order for the purposes of satisfying himself as to the legality or propriety of such order, and he may himself pass any order in relation thereto as he thinks fit. No restriction is placed by the Act upon the exercise by the Custodian General of this power other than this that he shall not pass an order prejudicial to any person without giving him a reasonable opportunity of being heard. It is further to be observed that under Rule 31 of the Rules made under this Act a common procedure is prescribed for appeals, reviews and revisions, and that Sub-rule 9 of Rule 31 provides that the Custodian-General as well as any authority hearing an appeal may admit additional evidence or remit the case for admission of additional evidence. It is manifest, therefore, that the powers of the Custodian-General are very wide and for all practical purposes are, in our opinion, indistinguishable from those of an appellate authority under the Act. Upon the general principle that the order of a Court merges in that of an appellate authority, we are of the view that the order of the Assistant Custodian made on the 25th September, 1951, merged in the order of the Additional Custodian made on the 5th April, 1952, and that that order in its turn merged in the order passed by the Custodian General on the 26th August, 1953.

8. As regards the second part of the preliminary objection, we are of the opinion that the matter is concluded by authority. In the case of -- 'Election Commission v. Venkata Rao', AIR 1953 SC 210 (F), Patanjali Sastri, C. J., delivering the judgment of the Supreme Court pointed out that wide as were the powers conferred under Article 226 of the Constitution, a two-fold limitation was placed upon their case.

"In the first place, 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. Secondly, 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."

9. There is no doubt that the office of the Custodian General is located in New Delhi where he himself ordinarily resides. In our opinion, we have no power to summon the records of any case in the custody of the office of the Custodian General or to quash any order made by him. For these reasons we are of opinion that the petition fails on the preliminary objection and must be dismissed with costs which we assess at Rs. 100/- in the case of the first three respondents, and at Rs. 50/- in the case of the fourth respondent.