

# **Begum Noorbanu And Ors. vs Deputy Custodian General Of Evacuee ... on 7 May, 1965**

**Equivalent citations: AIR1965SC1937, AIR 1965 SUPREME COURT 1937**

**Author: J.R. Mudholkar**

**Bench: K.N. Wanchoo, J.C. Shah, J.R. Mudholkar**

## **JUDGMENT**

J.R. Mudholkar, J.

1. This is an appeal by special leave against an order of the Deputy Custodian General, Evacuee Property dated September 12, 1960 holding that one Zarina who migrated to Pakistan in the year 1949 had 7/48th interest in certain specified items of property left by her father Khan Bahadur Ahmed Alladin who died on December 21, 1954. The appellants before us are the widow and the two sons of this gentleman whom we shall hereafter refer to as Khan Bahadur.

2. After his death proceedings were initiated by the Custodian of Evacuee Property, Hyderabad to declare the share of Zarina in the properties left by her father as evacuee property. Pursuant thereto a notice dated February 17, 1955 under Section 7 of the Administration of Evacuee Property Act, 1950 was issued by the Senior Assistant Custodian and served on the firm of M/s. Khan Bahadur Ahmed Alladin & Sons stating that Zarina was an evacuee, and as all properties belonging to her were evacuee properties including her share in the properties mentioned in the said notice the Custodian would hold an enquiry on March 2, 1955 in the matter. A similar notice bearing the same date was served on Noorbanu, the widow of the Khan Bahadur.

3. On March 2, 1955 a preliminary objection was lodged by the appellants before the Senior Assistant Custodian in which they challenged the validity of notice and made a request that this question be tried as a preliminary issue. The Senior Assistant Custodian by his order dated March 3, 1955 overruled the preliminary objection and set down the matter for March 10, 1955 for recording evidence.

4. Against this order the appellants preferred a writ petition in the former High Court of Hyderabad on or about March 10, 1955. This was dismissed on the ground that the appellants had a remedy under the Administration of Evacuee Property Act by way of an appeal against the order of the Custodian. Accordingly the appellants filed an appeal before the additional Custodian of Evacuee Property. The appeal was dismissed on April 4, 1955 whereupon the appellants preferred a second writ petition before the High Court issue of a writ of prohibition against the Assistant Custodian from continuing the proceedings and holding any further enquiry in the matter and for quashing

those proceedings by issuing a writ of certiorari. This writ petition was dismissed by the High Court on September 15, 1955.

5. In the meantime the Senior Assistant Custodian issued a notice under Section 8(4) of the Act calling upon the first appellant to surrender possession of the 7/48th share of Zarina in I properties mentioned in that notice on or before March 29, 1955. This notice was sent on March 14, 1955. On March 21, 1955 he issued a notification stating that all the properties belonging to Zarina, including her 7/48th share left by her father and certain other properties were evacuee properties and that they were vested in the Custodian. On that very day a notice under Section 7 of the Act was issued and served on the firm of M/s. Khan Bahadur Ahmad Alladin and Sons stating that as Zarina was an evacuee and properties belonging to her were evacuee properties, including her share in the properties specified in the said notice, the Custodian would hold an enquiry on April 2, 1955 in the said Mutter. A notice to this effect was also issued to the first appellant. A third notice was issued on April 6, 1955 also under Section 7 stating the same things and stating also that an enquiry will be held by the Custodian on April 15, 1955. On April 6, 1955 a similar notice was served on the first appellant. Thereupon an enquiry was held by the Senior Assistant Custodian.

6. The contention raised by the appellants at the enquiry were briefly these. The family belongs to the Khoja sect of Muslims and in the matter of succession the Khojas being governed by the Hindu law a Khoja is competent to make a will disposing of his property. According to them the Khan Bahadur executed a will on September 6, 1948 where-under he created a wakf of certain property, made certain cash bequests including one of Rs. 50,000 in favour of Zarina and bequeathed his remaining property, movable and immovable to the appellants. Therefore, according to them, Zarina could not be regarded as one of the heirs of the Khan Bahadur and consequently no share in the property of the Khan Bahadur could vest in the Custodian of Evacuee Property. The Senior Assistant Custodian of Evacuee Property set out in his order dated March 31, 1956 that the following properties were left by the Khan Bahadur:

1. Houses bearing Nos. 72, 92, 92/A, 92/B, 93 and 93/A situate at Sarojani Devi Road, Secunderabad-Deccan.
2. House bearing No. 3914 situate at Market Street, Secunderabad.
3. Houses bearing Nos. 1-8-540 to 570 situate at Begumpet, Hyderabad-Deccan.
4. Mulgi No. IVC-I-1097 (old) 21-1-1097 (New) situate at Pathargatti, Hyderabad-Dn.
5. S. Nos. 59, 60/1, 57/1 and 75/1-2, measuring about 200 acres situate at village Fatehnagar Tq. Hyderabad-West, Dist Hyderabad and Survey No. 67/1 at Pahool Khan Guda, Taluq Hyderabad, Distt. Hyderabad.
6. Land measuring about 300 acres, known as Alladdin East situate at Sanatnagar and Erragadda, Hyderabad-Dn.

7. Houses bearing Nos. F-1-648 to 699 situate at Sanatnagar, Hyderabad-Dn.
8. 136 Labour quarters situate at Sanatnagar, Hyderabad-Dn.
9. 8 buses situate behind Laminated Factory, Hyderabad-Dn.
10. 3 barracks in the North of Erragadda in Alladin Estate, Hyderabad-Dn.
11. Firm known as Khan Bahadur Ahmed Alladdin & Sons situate at Secunderabad-Dn.
12. Properties mentioned in the will executed by the deceased and any other property left by him.

7. ejecting the contentions of the appellants he held that Zarina had 7/48th share in each of these items. His order was upheld in appeal by the Additional Custodian of Evacuee Property. It is from that decision that the appellants went to the Deputy Custodian General by way of revision. He excluded some properties but held that in the remaining ones Zarina had 7/48th share which vested in the Custodian. The question about the validity of the notices issued by the Custodian was also raised before him but he held that the notices were good in law.

8. Before us three broad contentions were raised by Mr. Agarwala. One was that the notices were bad and, therefore, the notifications issued by the Custodian were invalid. The second was that the will was a valid one while the third was that certain properties, despite what was held by the Custodian General belonged exclusively to the first appellant.

9. In so far as notices are concerned the contention of Mr. Agarwala is that it was obligatory upon the Custodian to issue notices under Section 7(1) to all persons who were interested in the property which was claimed to be evacuee property and that unless a valid notice was issued to every one of them the Custodian will have no jurisdiction to proceed under Chapter II of the Act. This chapter deals with "Evacuee property vesting there of in the Custodian." According to learned counsel the issue of a valid notice to every person interested is a condition precedent to the exercise of the powers conferred by this chapter and that omission to issue notice even to one of the various persons interested in the property would invalidate those proceedings.

10. In point of fact notices were issued by the Custodian. One was to the first appellant, Noorbanu and the other was to the firm of "M/s. Khan Bahadur Ahmed Alladin & Sons." This was on March 21, 1955. It is true that on an earlier occasion, that is, on February 17, 1955 notice was given only to the firm and not to the first appellant. However, if the notices issued on March 21, 1955 are valid and adequate in law, they would be sufficient to confer jurisdiction upon the Custodian to proceed further under Chapter II. It is not contended that the notice issued to the first appellant is invalid or insufficient. But what is contended is that notice to Khan Bahadur Ahmed Alladin & Sons could not be regarded as sufficient notice to the partners of the firm, the appellants 2 and 3. There is no substance in this contention because apart from them, there are no other partners in the firm and in

pursuance of that notice both these appellants entered appearance and submitted to the jurisdiction of the Custodian. But then it is said no notice was issued to Zarina who was obviously a person interested because according to the Custodian she has 7/48th share in the property. It is true that no separate notice was issued to Zarina on this occasion but on April 29, 1950 a notice was issued to her under Section 5(3) of the Hyderabad Administration of Evacuee Property Regulation No. XII of 1359F. It may be mentioned that at the time Zarina migrated to Pakistan it was this regulation which was in force in the former State of Hyderabad and it was after action had been taken under this Regulation against Zarina that the Administration of Evacuee Property Act, 1950 was applied to the State of Hyderabad. Under Section 5(1) of that Regulation, where the Custodian is of opinion that any property is evacuee property within the meaning of the Regulation he may, after causing notice thereof to issue to the persons interested and after holding an enquiry, pass an order declaring any such property to be evacuee property. Sub-section (3) of Section 5 provides that the Custodian shall from time to time notify all properties declared by him to be evacuee property under Sub-section (1). Under Sub-section (1) of Section 6 any property declared to be evacuee property under Section 5 shall vest in the Custodian. In the notification dated April 29, 1950, the following amongst others, were declared evacuee properties. They are items 7 and 8 in that notification and are described thus:

"7. All properties belonging to Mrs. Zareen Calcuttawalla w/o Ghulam Mohd. A Calcuttawalla, Hyderabad-Deccan.

8. All properties belonging to Mr. Amir Ali Calcuttawalla son of Mr. Ghulam Mohd. A. Calcuttawalla, Hyderabad-Dn."

It is not contended before us that no notices were issued to Zarina before she was declared an evacuee and her properties were declared as evacuee properties. It is stated in the order of the Deputy Custodian General dated September 12, 1960 thus:

"It may be mentioned at the outset that soon after her migration to Pakistan a notice under Section 5 of the Hyderabad Administration of Evacuee Property Regulation was issued to Smt. Zareena Calcuttawalla wife of G. M. A. Calcuttawalla in respect of all of her properties (movable as well as immovable) including her shares and securities etc., in the Meezan Press Ltd. She was declared an evacuee and all her properties as evacuee property vide notification No. 34 dated 29th April 1950. Her shares in the Hyderabad Chemicals and Fertilizers Ltd. were also taken over as evacuee property. No one has challenged this declaration and it has been argued by Shri K. H. Bhabha for the Department that the same has become final." It seems to us that the notice contemplated by Section 7 of the Act is in the first place intended to provide an opportunity to the person whose property is in the opinion of the Custodian an evacuee property to satisfy the custodian that he is not an 'evacuee' as defined in Section 2(d) of the Act. For, if he is not an 'evacuee' his pro-pert) cannot be declared evacuee property. In the second place it is to afford an opportunity to persons who have not migrated to Pakistan to satisfy the Custodian that the property which, in the opinion of the Custodian, is evacuee property does not belong to an evacuee or that an evacuee has no interest therein. Therefore, once a person has been

declared an evacuee after due notice it would be unnecessary to give notice to him thereafter under Section 7 of the Act. No purpose will be served by issuing such notice because the earlier notification would be conclusive against the evacuee on the question of his migration to Pakistan. Having migrated to Pakistan the evacuee loses all interest in the property left by him in India in the sense that upon its being declared as 'evacuee property' it would vest in the Custodian alone under Section 8(1) of the Act. That is to say, where any property of a person has been declared 'evacuee property' he must be deemed to be an evacuee. The only persons who could claim to be interested in the property would, therefore, be those who have not migrated to Pakistan and who may possibly claim that the property is theirs and did not belong to the evacuee. It is immaterial for the purposes of Section 7 whether a particular property had actually devolved on the evacuee before migration to Pakistan or devolved later. Whatever be the point of time at which the property devolved on the evacuee it would become evacuee property in the sense that it is liable to be declared as evacuee property and to vest in the Custodian, provided that the devolution occurred before the power of the Custodian to declare any property as evacuee property came to an end under Section 7-A of the Act. It is not disputed that the devolution of the Khan Bahadur's estate occurred and the declaration of Zarina's share of evacuee property was made at a time when it was competent to the Custodian to make it. Apart from that there is a good deal of force in the argument that the objection of non-service of notice could properly be taken only by the person on whom the notice is not served and not by third parties.

11. It was then said that no notices were issued to Putli, another daughter of Khan Bahadur and to Abdulla, brother of the Khan Bahadur. Neither of them appeared before the Custodian to assert their rights or to challenge the jurisdiction of the Custodian to proceed in the matter. Apart from that Abdulla clearly had no interest in the property under the Mohammadan law. In so far as Putli is concerned, being a daughter she would get the same share in her father's property as Zarina and that absence of notice to her would not affect her interest in the property adversely. After all the main ground upon which the claim of the appellants is based is that the Khan Bahadur had validly disposed of the property by his will. If the will is upheld it is the appellants alone who stand to gain and not Putli because all that she was to get under the will was a sum of Rs. 50,000 whereas the value of 7/48th share in her father's property would be very much more. For these reasons we do not think that the absence of notice to these two persons affects the validity of the declaration made by the Custodian or the proceedings taken by him under the Act.

12. It was then contended that the notices issued to the firm and to the first appellant were defective as neither the grounds on which they were issued were set out nor were the properties sufficiently specified. The scheme of the Act does not require that grounds should be specified in the notification. But of course a sufficient description of the properties is required to be given so that the properties could be readily identified. In so far as items 1 to 10 are concerned it was not seriously contended before us by Mr. Agarwala that the description was inadequate. His argument concerned items 11 and 12 only. Item 11 already quoted by us pertains to the assets of the firm of which the father and the sons were partners. This, in our opinion, is sufficient to identify the assets of that

firm. It is item 12 which needs careful scrutiny. What is specified therein is "Properties mentioned in the Will executed by the deceased Khan Bahadur Ahmed Alladdin and any other property left by him." In so far as the last portion is concerned, that is any other property left by him we are clear that it is far too vague and unless it is shown that a particular item falls under items 1 to 11 or is a property mentioned in the will as belonging exclusively to the Khan Bahadur it will have to be left out. Para 4 of the will which is material for this purpose reads thus:

"After payment of the above set out Legacies my executors are directed to divide the remaining property consisting of:

(a) All my shares and stocks in various Companies in our State and elsewhere and all cash balances in Banking Accounts.

(b) My immovable properties set out as under:

(1) The Ex-Bren Gun Estate and now known as Alladdin Industrial Estate.

(2) Noor Bagh.

(3) Rockland and its adjoining land.

(4) Market Street House.

(5) Gundipet land.

into three equal parts and handover one part thereof to my devoted and loving wife Noor Banu Begum Saheba, their mother and the remaining two parts one thereof to be taken by each of my beloved sons, Dost Mohammed and Noor Mohammed."

It is contended on behalf of the appellants that the following properties did not belong to the Khan Bahadur at all:

(1) Noor Bagh, Begumpet.

(2) Property Nos. 3914 to 3916, Market Street, Hissagung, Secunderabad.

(3) Molgi No. IV/CI/1097 (old) 21-1-1097 (new), Paterghatti, Hyderabad.

(4) Rockland.

(5) Firm known as Khan Bahadur Ahmed Alladdin & Sons, and (6) Firm known as M/s. Khan Bahadur Ahmed Alladdin & Co. Noor Bagh, it is said, belongs exclusively to appellant No. 1, Noor Banu. The Deputy Custodian General, however, after considering the entire evidence has come to the conclusion that though the property

stood in her name it was held by her benami for her husband and that, therefore, it must be treated as his property. In an appeal under Article 136 we cannot allow a finding of fact to be challenged.

13. For the same reason we hold that the Market Street property found by the Deputy Custodian General to be that of the late Khan Bahadur was his and not that of Noorbanu as claimed by her. As regards Paterghatti lands the contention is that they were orally dedicated by the Khan Bahadur for charitable purposes. The Deputy Custodian General accepted the finding of the Assistant Custodian as well as the Additional Custodian to the effect that the dedication has not been proved and that no evidence was led to indicate either the objects of the wakf or the beneficiaries thereunder. So far as the Rockland is concerned it is included in the will and the Assistant Custodian in his order dated March 31, 1956 has recorded in his finding that the appellants did not dispute the fact that this property belonged to the late Khan Bahadur. As regards the assets of the firm of Messrs Khan Bahadur Ahmed Alladin and Sons we have it from the deed of partnership dated January 5, 1947 that the Khan Bahadur had 1/3rd share therein. 7/48 share in the Khan Bahadur's share would, therefore, vest in the Custodian. It was not seriously contended by Mr. Agarwala that it did not. He, however, strenuously urged that in so far as the firm of Khan Bahadur Ahmed Alladin & Co. is concerned the notification is deficient. We agree. There is no reference to the assets of this company either in the notification or in the will of the late Khan Bahadur. In these circumstances we hold that no part of the assets of this company has vested in the Custodian. Barring this property we are satisfied that the notification sufficiently describes the late Khan Bahadur's property in which Zarina had a share.

14. Reference was made to several cases which lay clown that Khojas belonging to the former State of Bombay are, in the matter of succession, governed by Hindu law. Some of those cases are referred to at p. 20 of Mulla's Principles of Mahomedan Law, 15th edn. in support of the following statement of law occurring therein:

"In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay State were governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu law.' The learned author has further observed that this customary law has been to a great extent abolished by the Shariat Act, 1937. The effect of Shariat Act is said by the learned author to be to abolish, except as" to agricultural land and other matters to which the Act does not apply, the customary law of succession of Khojas and to make them subject to Mohammedan law. Learned counsel, however, argues that since this Act was not extended to the Hyderabad State, the Khan Bahadur was governed by the Hindu law and consequently devised his property by will. In the first place what the various cases deal with is custom applicable to the Khojas living in the former State of Bombay. There is no evidence to indicate that such a custom obtained amongst Khojas living in other parts of the country. Mr. Agarwala faintly contended that all Khojas, wherever they may be must be deemed to have migrated from the former State of Bombay. It is true that the largest number of Khojas are to be found in the former State of Bombay. But in the absence of evidence it is not possible to say that Khojas wherever they may be

resident in India must be deemed to have migrated from that State. Moreover it is not disputed that large number of Khojas lived in that part of India which for some time was known as Saurashtra. It may as well be that Khojas living in other parts of India migrated from the Saurashtra area. There is nothing to show that those who lived in Saurashtra were by custom governed by Hindu law. Apart from that even if the late Khan Bahadur or his ancestor had migrated to Hyderabad from an area in which they were governed by custom by Hindu law, after migration to Hyderabad State it was incompetent to them to plead a custom which is at variance with Mohamedan law. This question has been specifically decided in *Jahandarunnissa Begum v. Mohd. Moinuddin*, AIR 1953 Hyd 117 where it was pointed out as follows:

"This is the state of law so far as the former British Indian Courts are concerned. So far as this court is concerned, the then Judicial Committee has held in the case of *Munwar Begum v. Najib Mirza* reported in 7 Nazair Osmania 463, that any custom which is in direct contravention or in the complete variation of any principle of Mohamedan law could not be proved. They held that it has not been stated in *Sharai Shariff* (Mohamedan Law) that local or family custom would have preference over *Sharai Shariff*. They also held that such a custom could not be allowed to be proved unless such custom is allowed to be proved by enactment."

The Judicial Committee of the former State of Hyderabad was at the apex of the judiciary in that State and the law laid down by it must be deemed to have been the law of Hyderabad till the Shariat Act was extended to it. In the circumstances, therefore, we hold that the Khan Bahadur was incompetent to make a will and that consequently the property left by him must devolve on his heirs as if he had died intestate. It was contended by Mr. Agarwala that the will was accepted by the heirs of the late Khan Bahadur and therefore the question of his capacity to make it could not arise. Apart from anything else, there is no proof of this on the record. We, therefore, reject his contention.

15. The third point raised by Mr. Agarwala concerned property which we have dealt with while dealing with the question as to the sufficiency of the notice. In view of what we have held there the share of Zarina in the interest held by the Khan Bahadur in the assets of "M/s. Khan Bahadur Ahmed Alladin & Co.," could not vest in the Custodian. That portion, therefore, will have to be left out of consideration. Subject to this modification we dismiss the appeal with costs.