Supreme Court of India
Fazal Bhai Dhala vs Custodian-General Of ... on 21 March, 1961
Equivalent citations: 1961 AIR 1397, 1962 SCR (1) 456
Author: K D Gupta
Bench: Sinha, Bhuvneshwar P.(Cj), Das, S.K., Sarkar, A.K., Gupta, K.C. Das, Ayyangar, N. Rajagopala

PETITIONER:
FAZAL BHAI DHALA

Vs.

RESPONDENT:
CUSTODIAN-GENERAL OF EVACUEEPROPERTY, DELHI

DATE OF JUDGMENT:
21/03/1961

BENCH:
GUPTA, K.C. DAS
BENCH:
GUPTA, K.C. DAS
SINHA, BHUVNESHWAR P.(CJ)
DAS, S.K.
SARKAR, A.K.
AYYANGAR, N. RAJAGOPALA

CITATION:
1961 AIR 1397 1962 SCR (1) 456

ACT:
Evacuee Property-Meaning of-Malafide transfer-Effect of -Custodian-Interference with questions not before him in appeal-Revisional Jurisdiction-Notice, if essential before exercising jurisdiction--Non-issue of notice, when fatal-Partnership at will--Dissolution of--Assets, if and when vest in Custodian-Indian Partnership Act, 1932 (IX of 1932), s. 43-Government of India Ordinance No. XXVII of 1949, s. 7(1)-Administration of Evacuee Property Act, 1950 (XXXI of 1950), ss. 2(f), 26, 40.

HEADNOTE:
F, the appellant, and A his brother, were partners in a business of hides and skins. On August 10, 1949, A executed a deed of sale in respect of some immoveable properties in Orissa and Madras in favour of F. A deed of dissolution of the partnership was also executed on August 12, 1949, wherein it was inter alia stated that the partners bad agreed that the said partnership shall stand dissolved as from November 2, 1948.

On receipt of information that A had migrated to Pakistan after transferring his properties to his brother F, the Assistant Custodian of Evacuee Property, issued a notice to F under S. 7(1) of the Ordinance 27 of 1949 in respect of immoveable properties in Orissa including the properties covered by the sale deed and the business in hides and skins and certain immoveable properties standing in the name of the firm.

In reply F contended that he had become the sole proprietor of the business with all assets and liabilities, with effect from November 2, 1948, when the partnership was dissolved

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and that while some of the immoveable properties as mentioned in the notice had been conveyed to him by a deed of sale by A, the rest being assets of the firm, had vested in him after the dissolution of partnership.

The Assistant Custodian held that though the transfer of the properties mentioned in the sale deed was for adequate and valuable consideration it was not at all bona fide; as regards other properties and the hides and skins business itself, A had no interest as the partnership had been dissolved on November 2, 1948.

Against this decision F appealed to the Custodian, who held that these properties were rightly declared as evacuee properties and that as regards the transfer of other properties, the same amount of mala fides was present and as such these should also be included in the list of evacuee properties.

The appeal to Custodian-General was rejected and the appellant moved the Supreme Court by special leave. Four contentions were urged by the appellant:-

Firstly, that the Custodian-General should have held that the Custodian acted without jurisdiction in interfering with the order passed by the Assistant Custodian that the hides business and the properties mentioned in Sch. A III of the notice were not evacuee properties and should be released.

Secondly, that as against the Assistant Custodian's order in respect of the hides business and the immoveable properties in Sch. A III the Custodian Department had not preferred any appeal, so that the Custodian could not interfere with it, in exercise of his appellate jurisdiction. The Custodian's order in respect of these properties could not have been passed, in exercise of the revisional jurisdiction conferred on him by S. 27 of the Administration of Evacuee Property Act as no notice of such intention to examine the records in revision had been issued to F.

Thirdly, once the partnership business was dissolved, there could be no question of declaring the dissolved partnership as an evacuee property, in view of s. 43 of the Indian Partnership Act.

Fourthly, the transaction evidenced by the two deeds, viz., the sale deed and the dissolution were merely in furtherance of the winding up of the affairs of the dissolved

partnership and therefore in determining the validity or otherwise of the transactions, F could not resist the claim of the other partner to wind up.
Held, that where the Custodian had made an order against that portion of the order of the Assistant Custodian which was not before him in appeal it must be taken to have been passed in the exercise of the Custodian's revisional jurisdiction and the mere fact that this was riot expressly stated in the order could 58
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be no ground for holding that he was not exercising his revisional jurisdiction. It was quite another matter whether in the exercise of the revisional jurisdiction, he proceeded in accordance with law.
The Custodian in exercising his revisional jurisdiction must give the party concerned a reasonable opportunity of being heard before any order prejudicial to him is made in revision. If this reasonable opportunity of being heard cannot be given without the service of notice, a notice must be served for otherwise the omission to serve the notice would be fatal, even though s. 26 of the Administration of Evacuee Property Act did not specifically provide for service of notice by the Custodian. But in cases where the party affected is before the Custodian and has knowledge of the proceedings before him and is heard, the failure to issue a formal notice is immaterial or does not vitiate the order passed.
Once the fact of dissolution is accepted, the declaration as regards the business must necessarily be construed as a declaration that the property that remained in the evacuee on the dissolution of the firm was evacuee property.
Held, further, that where a deed of transfer by an 'evacuee' was without good faith, S. 40 of the Administration of Evacuee Property Act would come into operation, making the transfer of no effect and in the case of a firm its property on dissolution would become an evacuee property from the date of the execution of the deed of dissolution of the partnership and vest in the Custodian with all the rights under the provisions of the Partnership Act and the Custodian was not bound by the statements made in the deed of dissolution as regards the settlement of account.
In the present case the Custodian did not act without juris-diction or exercise his jurisdiction irregularly.

JUDGMENT:

CIVIL APPELLATE JURISDICTION:. Civil Appeals Nos. 194 of 1956 and 353 of 1958.

Appeals by special leave from the judgment and orders dated December 26, 1953 and April 30, 1957, of the Custodian- General and Deputy Custodian-General of Evacuee Property in Revision Nos.

5055R/Judl/ 1953 and. 1161/R/Judl/1954 respectively.

Achhru Ram and T. R. V. Sastri, for the appellants. N. S. Bindra and D. Gupta, for respondents. 1961. March 21. The Judgment of the Court was delivered by DAS, GUPTA, J.-Of these two appeals, one (Civil Appeal No. 194 of 1956) is against the order of the Custodian-General of India, declining to interfere with' the order of the Custodian of Evacuee Property, Orissa, in respect of certain properties claimed by the appellant as his; and the other appeal (Civil Appeal No. 353 of 1958) is against the order of the Deputy Custodian-General of India, declining to interfere with the order of the Custodian of Evacuee Property, Madras, in respect of properties situate in Madras, claimed by the same appellant as belonging to him. Though most of the considerations that arise in the two appeals are identical, it will be convenient to take them up one after the other so as not to confuse a clear understand- ing of the facts on which these considerations which are all based on question of law arise.

The appellant Fazal Bhai Dbala and his brother Abdulla Dhala were partners in a business of hides and skins. A deed of partnership was executed on January 1, 1941, and the firm was registered in the Register of Firms, Cuttack, under s. 59 of the Indian Partnership Act. On August 10, 1949, Abdulla Bhai Dhala executed a deed of sale in respect of some immovable properties at Jharsuguda in Orissa, and also certain properties, at Madras, in favour of Fazal Bhai Dhala. The consideration in the document was mentioned as Rs. 85,000 of which Rs. 50,000 was mentioned as the value of the Madras properties and Rs. 35,000 as the value of the Orissa properties. The sum of Rs. 85,000 appears to have been paid in the presence of the Registrar by Fazal Bhai to Abdulla Bhai on August 11, 1949. A deed of dissolution of the partnership was also executed on the following day-the 12th August, 1949. It was stated therein that the two partners had agreed "that the said partnership shall stand dissolved as and from 2-11-48 and it has further been agreed that as from that day, 2-11-1948, the said business of Fazalbhoy Dhala & Co shall belong to and be continued and carried on by Fazalbhoy Dliala." It was also stated that in view of the fact that "accounts of the said partnership have not yet been taken or settled and cannot be taken or settled without much delay and trouble it has further been agreed that Fazal Bhai Dhala shall pay to Abdulla Dhala a sum of Rs. 40,000 in full settlement and satisfaction of all the claims, as partner of Abdulla Bhai Dhala against the partnership, its assets, goodwill etc., in respect of his share therein". A receipt of the sum of Rs. 40,000 was also acknowledged in this deed. On receipt of information that Abdulla Dhala had migrated to Pakistan after transferring his properties to his brother Fazal Bhai Dhala, the Assistant Custodian of Evacuee Property, Sambalpur (Orissa), issued a notice under s. 7(1) of the Ordinance XXVII of 1949 to Fazal Bhai Dhala on December 30, 1949, in respect of im- movable properties at Jharsuguda including the properties covered by the sale deed of August 10, 1949, and the business in hides and skins under the name of Fazalbhoy Dhala & Co., and certain immovable properties standing in the name of that firm. In reply to the notice, Fazal Bhai contended that Abdulla Bhai was not an evacuee; and that in any case, he, Fazal Bhai, had become the sole proprietor of the business, with all assets and liabilities, with effect from November 2, 1948, when the partnership was dissolved and that while some of the immovable properties as mentioned in the notice had been conveyed to him by a deed of sale by Abdulla Bhai, the rest being assets of the firm of Fazal Bhai Dhala, had vested in him after the dissolution of partnership, he prayed that his "title" in the assets of the firm, and in the immovable properties, mentioned in the notice should be confirmed. The

Assistant Custodian held after consideration of the evidence that though the transfer of the properties mentioned in the sale deed was for adequate and valuable consideration it was not at all bona fide: as regards the other properties' and the hides and skins business itself the Assistant Custodian held that Abdulla Bhai had no interest as the partnership had been dissolved on November 2, 1948. Against this decision Fazal Bhai appealed to the Custodian and prayed that the order of the Assistant Custodian as regards the properties mentioned in Schedule "A" (1) and (II) mentioned in the notice under sub-section 1 of s. 7 of the Government of India Ordinance No. XXVII of 1949 should be sot aside. The Custodian agreed with the Assistant Custodian, in respect of these properties, and held that these had been rightly declared as evacuee properties. He went further and held that there was no justification for the Assistant Custodian taking a different view as regards the other properties. His conclusion was that "in fact, with regard to these properties also the same amount of mala fides was present and as such these should also be included in the list of evacuee properties"; and that "it is but proper that the entire 8 annas share of the properties mentioned in Schedules A and B of the evacuee Abdulla should be treated as evacuee properties". The Custodian finally ordered: "in consequence of my above decision according to s. 6 of the Evacuee Interest Separation Act, the entire properties in Schedules A and B should now be treated as evacuee properties and revised action should be taken to notify as ,such under s. 7(3) of the Administration of Evacuee Property Act and the appellant be directed to get his 8 annas share in the properties separated in the Court of the Competent Officer".

Fazal Bhai moved the Custodian-General of India for revision of this order of the Custodian, Orissa. The Custodian- General, however, refused to interfere.

It is proper to mention at the outset that it is no longer disputed that Abdulla Bhai is an evacuee, though the exact date from which he became such an evacuee does not clearly appear from the record, and that all the immovable properties, which are the subject-matter of the appeal, were the assets of the firm Fazalbhai Dhala & Co. Four contentions were urged in support of the appeal. The first contention, and the one to which Mr. Achhru Ram devoted a considerable portion of his argument, was that the Custodian-General should have held that the Custodian acted without jurisdiction, and at any rate, irregularly in the exercise of his jurisdiction, if he had any, in interfering with the order passed by the Assistant Custodian that the immovable property and the hides business and the properties mentioned in Sell. A III, that is the properties other than those covered by the sale deed, were not evacuee properties and should be released. Mr. Achhru Ram has pointed out that against the Assistant Custodian's order in respect of these two items of properties the hides business and the immovable properties in Sch. A III mentioned in the notice, the Custodian's department had not preferred any appeal, so that the Custodian could not interfere with it, in exercise of his appellate jurisdiction. Learned Counsel then contends that the Custodian's order in respect of these properties-the hides business and the Jharsuguda properties in Sch. A III-could not have been passed, in exercise of the revisional jurisdiction conferred on him by s. 26 of the Administration of Evacuee Property Act (Act No. XXXI of 1950), as no notice of such intention to examine the records in revision, had been issued to Fazal Bhai. While it is true that the order does not clearly mention that in respect of the hides business and the Sch. A III properties it was being made in exercise of revisional jurisdiction, it is clear that the only jurisdiction the Custodian could exercise, in the absence of any appeal against that portion of the Assistant Custodian's order would

be his revisional jurisdiction under s. 26. When we find that the Custodian has made the order it is proper and reasonable to hold that he passed it in the exercise of the only jurisdiction he had-viz., the revisional jurisdiction and the fact that this was not clearly stated in the order can be no ground for holding that he was not exercising revisional jurisdiction. It is quite another matter whether in the exercise of that jurisdiction, he proceeded in accordance with law. Mr. Aehhru Ram contended that under the law, the Custodian was required to issue a notice to the parties concerned before exercising his, revisional jurisdiction. Admittedly, no such notice was issued; and this omission to issue a notice was put by the appellant in the forefront of his grievances both in his petition for revision before the Custodian-General and in the application for special leave to appeal to this Court. Turning however to s. 26 we find that there is no provision for service of any notice. The section runs thus:-

> "26. Powers of review or revision of Custodian etc. (1) The Custodian, Additional Custodian, or(Authorised Deputy Custodian may at any time, either on his own motion or on application made to him in this behalf, call for the record of any proceeding under this Act which is pending before, or has been disposed of by, an officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any orders passed in the said proceeding, and may pass such order in relation thereto as he thinks fit: Provided that the Custodian, Additional Custodian or Authorised Deputy Custodian shall not pass an order under this sub-section revising or modifying any order prejudicial to any person without giving such person a reasonable opportunity of being heard: Provided further that if one of the officers aforesaid takes action under this sub-section, it shall not be competent for any other officer to do so.....

The proviso secures the requirements of the principles of natural justice when it says that any order prejudicial to any person shall not be passed without giving such person a reasonable opportunity of being heard. No specific provision for service of notice in order that such a reasonable opportunity of being heard be given has however been made by any rule. It goes without saying that in the large majority of cases, the Custodian "will, in order to give the party concerned a reasonable opportunity of being beard, first give him a notice of his intention to examine the records to satisfy himself as to the legality or the propriety of any order passed by the subordinate officer and require such person to show cause if any why the order should not be revised or modified, and then if and when the party appears before him in response to the notice, the Custodian has also to allow him, either personally or through counsel, a reasonable opportunity of being heard. In suitable cases it may be proper and necessary for the Custodian to allow the party concerned even to adduce evidence. There may be cases however where the party concerned is already before the Custodian, so that all that is necessary for the Custodian to do is to inform such party of his intention to examine the records to satisfy him,self whether a particular order should be revised, and then to give him a reasonable opportunity of being heard. There would be no necessity in such a case to serve a formal notice on the party who is already before the Custodian and the omission to serve the notice can be of no consequence. What the law requires is that the person concerned should be given a reasonable opportunity of being heard before any order prejudicial to him is made in revision. If this reasonable opportunity of being heard cannot be given without the service of the notice the omission to serve

the notice would be fatal; where however proper hearing can be given without service of notice, it does not matter at all, and all that has to be seen is whether even though no notice was given a reasonable opportunity of being heard was given.

A perusal of the Custodian's judgment makes it reasonably clear that he informed the counsel who appeared on Fazal Bhai. Dhala's behalf, that he proposed to consider whether the order made by the Custodian in respect of the hides business and the Sch. A III properties had been rightly made and to revise the same, if necessary, after giving a reasonable opportunity of being heard to Fazal Bhai on this point. It is equally clear that the appellant's advocate was fully heard in the matter.

We have no doubt therefore that the requirements of law as embodied in the proviso to s. 26(1) of the Act were fully satisfied. The contention that the Custodian acted without jurisdiction or irregularly exercised his jurisdiction must therefore fail.

The next contention raised in the appeal is-to use the learned counsel's own words-that in view of s. 43 of the

-Indian Partnership Act the partnership stood dissolved from November 2, 1948 and the Custodian had no jurisdiction to declare the "business" to be an evacuee property. It does not appear to have been disputed either before the Assistant Custodian or the Custodian that the partnership of Fazalbhai Dhala & Co., was a partnership-at-will. The deed of dissolution' was dated August 1.2, 1949 and it has been found by the Custodian that the deed of dissolution was purposely concluded to provide a common safeguard for properties to remain in the hands of the brothers. The mention of the date November 2,1948 as the date of dissolution cannot therefore be accepted. The firm must however be held to have been dissolved on August 12, 1949 on which date the deed of dissolution was executed. The argument of the learned counsel appears to be that once the partnership-business, was dissolved there could be no question of declaring the dissolved partnership as an evacuee property. Once the fact of dissolution is accepted the declaration as regards the business must necessarily be construed as a declaration that the property that remained in Abdulla Bhai on the dissolution of the firm was an evacuee property. It seems to us clear that that was really what is intended to be meant by the order made by the Custodian.

A further contention of the appellant is that the transactions evidenced by the two deeds, viz., the sale deed and the dissolution were merely in furtherance of the winding up of the affairs of the dissolved partnership and therefore in determining the validity or otherwise of the transactions it has to be borne in mind that Fazal Bhai could not resist the claim of the other partners to wind up. The story that the dissolution of partnership had taken place earlier and the two deeds were excited later on has not been accepted by the Custodian and we can see no reason to interfere with his conclusion. The deeds of sale were executed prior to the actual dissolution which was effected by the deed of dissolution there is no scope therefore for saying that the sale deed was in the course of the winching up of the affairs of the dissolution of partnership. As regards the deed of dissolution itself it is wholly beside the point whether Abdulla Bhai could have resisted the claim to wind up; for the declaration merely is that Abdulla Bhai's share in the dissolved partnership as it stood on the date of dissolution is an evacuee property. The validity of the dissolution is not touched. It is hardly

necessary to add that the dissolution of the partnership did not by itself mean that Abdulla's share stood transferred to Fazal Bhai any more than that Fazal Bhai's share stood transferred to Abdulla Bhai. A purported transfer of Abdulla's share was made by the deed itself. But this having been held to be without good faith, had in view of s. 40 of the Evacuee Property Act, no effect. It has to be made clear that the Custodian would not be bound by the statements made in the deed of dissolution as regards the settlement of the accounts of the firm and that the Custodian, in whom the evacuee properties vest will have in respect of the dissolved business all the rights which Abdulla had under sections 37, 46, 47, 48 and other sections of the Partnership Act.

There remains for consideration the appellant's contention that in any case the Custodian acted illegally in the exercise of his jurisdiction in ordering that "the entire properties in Schs. A and B should now be treated as evacuee properties". It appears that the order by the Custodian was made in these terms even though his conclusion was that "the entire 8 annas share of the properties mentioned in Schs. A and B of the evacuee Abdulla should be treated as evacuee properties", in view of the fact that under the original definition of evacuee property in s. 2(f) of the Administration of Evacuee Property Act (Act XXXI of 1950) it meant "any property in which any evacuee has any right or interest". This definition has however since been amended and now evacuee property means "any property of an evacuee" instead of "any property in which an evacuee has any right or interest". The legal position after the amendment therefore is that it is only the 8 annas share of Abdulla set out in the Schedule in the Assistant Custodian's order dated the 28th January, 1950, which is evacuee property. It is therefore necessary to state in clarification of the position that instead of the entire Schedules A and B properties being treated as evacuee property only 8 annas share of these properties which belonged to the evacuee Abdulla should be treated as evacuee properties.

With this clarification of the Custodian's order the appeal is dismissed. There will be no order as to costs. Pi The other appeal-C. A. No. 353 of 1958 is in respect of properties in Madras. Fazal Bhai made an application on July 21, 1950 purporting to be under s. 40 of the Administration of Evacuee Property Act (Act XXXI of 1950) in reply to a notice which had been issued on him under s. 7 of the Act. His case, as in respect of the Orissa properties mentioned earlier, was that the dissolution of the firm took place in November, 1948 and that the final transaction and settlement of accounts was brought about by a deed of sale dated August 11, 1949 in respect of Orissa and Madras pro- perties and a deed of dissolution dated August 12, 1949 for a consideration of Rs. 40,000 making in all the entire amount of Rs. 1,25,000 which in this final settlement had been agreed to be paid to Abdulla. He prayed for a declaration that the properties mentioned in the notice be held to have been legally and properly passed to him, and that the transfer in his favour may be confirmed. The Assistant Custodian of Evacuee Property, Madras, accepted Fazal Bhai's case that the transfer was only a step in the apportionment of the assets of the firm and not a transfer outside the partition of the assets of the firm. He held that the transfer was bona fide and made an order in these terms:-

> "I therefore accept the dissolution of the firm of Fazalbhai Dhala and Company covered by the dissolution deed dated 12-8-49 and confirm the transfer of the immoveable properties covered by the deed dated 10-8-49 under section 40(5) of the Administration of Evacuee Property Act, 1950."

When this matter came to the notice of the Custodian-General of Evacuee Property in the course of the proceedings before him in respect of the Orissa property, he observed:- "As for the Madras properties, I notice that Mr. Rathanam's order was allowed to go unchallenged by the department and as it is not before me, therefore, I am not called upon to express my opinion."

This was on December 26, 1953. It appears that the Custodian-General also made a suggestion to the Custodian, Madras, that he might examine the propriety of the order passed by the Assistant Custodian., Madras. Accordingly, the Custodian, Madras, examined the records and issued notice to interested parties including Fazal Bhai Dhala to show cause why the Assistant Custodian's order should not be set aside in revision. Cause was shown by Fazal Bhai Dhala and thereafter after hearing arguments on his behalf by his Advocate, Mr. T. S. Raghavachari, the Custodian held that "the transactions covered by the sale deed dated August 10, 1949 and the deed of dissolution dated the 12th August, 1949 were not bona, fide". Accordingly, he set aside the order of the Assistant Custodian which confirmed the transfer of properties covered by these two deeds. He directed the Assistant Custodian, Madras, to take steps under the Evacuee Property Act in respect of these evacuee properties consequent on the cancellation of the confirmation of transfer. Fazal Bhai's application to the Custodian-General of Evacuee Property, India, for revision of the Custodian's order was heard by the Deputy Custodian-General of Evacuee Property, India, and was rejected.

The only additional ground urged by Mr. Achhru Ram in support of this appeal is that the notice issued on Fazal Bhai to show cause why the Assistant Custodian's order should not be revised did not say anything as regards the Assistant Custodian's order in respect of the business and so the Custodian had no jurisdiction to interfere with the Assistant Custodian's order in so far as that order was in respect of the business' Turning now to the Assistant Custodian's order we find that in addition to confirming the transfer of immovable properties covered by the deed of August 10, '1949 he also said:-"'I therefore, accept the dissolution of the firm of Fazal Bhai Dhala & Company., covered by the dissolution deed dated August 12, 1949. The Custodian in his order dated July 5, 1954, has held that the transaction covered by the deed of' dissolution also was not bona fide. It has to be borne in mind that the purported dissolution of the firm in November, 1948, the settlement of accounts recorded in the deed of August, 1949 and the transfer of properties effected were all integral and indivisible parts of the same transaction. While it is true that the notice issued to Fazal Bhai made no reference to the deed of dissolution, it is clear from Fazal Bhai's own statement filed in response to this notice that he clearly understood that the revising authority would be considering the question of bona fides in respect of the numerous statements about the settlement of accounts in connection with the dissolution of business made in the deed of dissolution.

We are satisfied, therefore., that the appellant Fazal Bhai had reasonable opportunity of being heard as regards the bona fides of the transactions mentioned in the deed of dissolution. As we have already mentioned in connection with the other appeal, the fact that the firm stood dissolved with effect from the date on which the deed of dissolution was executed can no longer be disputed. The effect of the Custodian's order in regard to the deed of dissolution merely is that the transactions mentioned in that deed on the purported basis of an earlier dissolution has been declared to be not bona fide and confirmation was refused of whatever transfers of properties were purported to have been effected by that deed.

This appeal, is, therefore,, dismissed with costs.

Appeals dismissed.