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February 20

THE CUSTODIAN OF EVACUEE PROPERTY, BANGALORE

v.

KHAN SAHEB ABDUL SHUKOOR, ETC.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and K. C. DAS GUPTA, JJ.)

Evacuee property—Order passed by Custodian—State law providing for appeal to the High Court—Later State Act and Central Act repealing it and providing for appeal and power of revision to Custodian-General—Proceedings taken under the earlier State Act—Custodian-General setting aside the Custodian's Order under revision—Validity—Appeal to High Court—Maintainability—The Mysore Administration of Evacuee Property (Emergency) Act, 1949 (XLVII of 1949), ss. 5, 6, 8, 30—Evacuee Property (Second) (Emergency) Act, 1949 (LXXIV of 1949), ss. 22, 23, 25—Administration of Evacuee Property Act, 1950 (XXXI of 1950), s. 27—Constitution of India, Art. 226.

On July 7, 1949, the then State of Mysore passed the Mysore Administration of Evacuee Property (Emergency) Act, 1949, providing, inter alia, for the appointment of a Custodian of Evacuee Property for the State of Mysore for the purpose of administering evacuee property in the State. By s. 6 all evacuee property vested in the Custodian under s. 5 had to be notified by him in the Mysore Gazette, while s. 8 provided that any person claiming any right to any property notified under s. 6 might prefer a claim to the Custodian on the ground that the property was not evacuee property. Section 30 provided for an appeal to the High Court where the original order under s. 8 had been passed by the Custodian, an Additional Custodian or an Authorised Deputy Custodian. This Act was replaced by the Mysore Administration of Evacuee Property (Second) (Emergency) Act, 1949, which came into force on November 29, 1949. Section 53(2) of that Act provided that anything done or any action taken in the exercise of any power conferred by the earlier Act shall be deemed to have been done or taken in the exercise of the powers conferred by the later Act. Under the second Act, instead of the High Court an appeal from the order of the Custodian lay to the Custodian-General, appointed by the Government of India under the provisions of the Administration of Evacuee Property Ordinance, 1949, which had come into force on October 18, 1949; and in addition, s. 25 of that Act provided for revision by the Custodian-General of orders passed by the Custodian. The Administration of Evacuee Property Act, 1950, which was passed by Parliament and which came into force on April 17, 1950, provided substantially for all matters contained in the second

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Mysore Act. Section 27 gave the Custodian-General powers of revision against the orders of the Custodian, and s. 58 as amended and given retrospective operation, provided that "if, immediately before the commencement of this Act, there was in force in any State to which this Act extended any law which corresponded to this Act and which was not repealed.....that corresponding law shall stand repealed."

On September 21, 1949, the Custodian issued a notification declaring the properties of the respondents as evacuee properties, and claims filed by them under s. 8 of the earlier Mysore Act were investigated by the Deputy Custodian who dismissed the same on April 17, 1950. Appeals were filed against the said order before the Custodian and were allowed on August 22, 1950, on the ground that there was not sufficient evidence to prove the respondents as evacuees and consequently the properties in question could not be treated as evacuee properties. On October 3, 1950, the Custodian-General gave notice to the respondents under s. 27 of the Administration of Evacuee Property Act, 1950, in respect of the order of the Custodian dated August 22, 1950, and asked them to show cause why the said order be not revised. On February 11, 1952, the Custodian-General set aside the order and directed the Custodian to dispose of the cases afresh. On December 2, 1952, the Custodian passed an order by which he held that the respondents were evacuees and that their properties were evacuee properties. Against this order the respondents filed two appeals to the High Court, and also two writ petitions under Art. 226 of the Constitution as they had doubts whether any appeal lay to the High Court. The High Court took the view that the Custodian-General had no power under s. 27 of the Act to revise the order of the Custodian and that as the proceedings in these cases began under s. 8 of the first Mysore Act and as there was nothing corresponding to that section either in the second Mysore Act or in the Act of 1950, the High Court was entitled to hear the appeal from the order of December 2, 1952, as that order must be held to have been passed in proceedings under the first Mysore Act. The High Court then went into the matter as an appellate court and came to the conclusion that the order of the Custodian dated December 2, 1952, was erroneous.

Held, that the High Court erred in holding that the order of the Custodian-General dated February 11, 1952, was without jurisdiction. Considering the purpose for which the Administration of Evacuee Property Act, 1950, was passed and the successive saving clauses in the second Mysore Act and in the Act, the Custodian-General had the power under s. 27 to call for the record of the proceeding in which the order of August 22, 1950, was passed and consider its legality or propriety.

Held, further, that the High Court was also in error in holding that appeals to it lay from the order of December 2, 1952.

An order made in a proceeding commenced under s. 8 of the first Mysore Act must be deemed to be an order made under s. 5(1) of the second Mysore Act or under s. 7(1) of the Act, in view of s. 53(2) of the second Mysore Act and s. 58(3) of the Act. Consequently, by necessary intendment, the legislature must have intended that the provision as to appeals provided by subsequent legislation should supersede the provision as to appeals under the first Mysore Act.

Garikapatti Veeraya v. *N. Subbiah Choudhury* [1957] S.C.R. 488, referred to.

Since the main question for decision in these cases was whether the respondents were evacuees, and as such a question was one of fact, the High Court was not justified in looking into the order of December 2, 1952, as an appellate court in dealing with applications for a writ of certiorari under Art. 226 of the Constitution.

Hari Vishnu Kamath v. *Syed Ahmad Ishaque and Others* [1955] 1 S.C.R. 1104, applied.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 101 to 104 of 1957.

Appeals from the judgment and order dated February 4, 1954, of the Mysore High Court in Regular Second Appeals Nos. 5 and 6 of 1953 and Writ Petitions Nos. 67 and 68 of 1953 respectively.

H. N. Sanyal, Additional Solicitor-General of India, R. Ganapathy Iyer and *D. Gupta* for the appellant.

A. V. Viswanatha Sastri, M. S. K. Sastri and *T. R. V. Sastri* for *A. G. Ratnaparkhi*, for the respondents.

1961. February 20. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—These are four appeals on certificates granted by the Mysore High Court. They will be disposed of together as the points raised in them are common. The facts of these cases are complicated and may be mentioned in some detail. On July 7, 1949, the then State of Mysore passed The Mysore Administration of Evacuee Property (Emergency) Act, No. XLVII of 1949 (hereinafter called the first Mysore Act). It provided for the appointment of a Custodian of Evacuee Property for the State of Mysore and other officers subordinate to him for the purpose of administering evacuee property in that

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State. Section 2(c) defined an "evacuee" and s. 2(d) "evacuee property". Section 5 laid down that all evacuee property situate in Mysore would vest in the Custodian. Section 6 provided for a notification by the Custodian in the Mysore Gazette of evacuee property vested in him. Section 8 provided that any person claiming any right to or interest in any property notified under s. 6 as evacuee property or in respect of which a demand requiring a surrender of possession had been made by the Custodian might prefer a claim to the Custodian on the ground that the property was not evacuee property or his interest in the property had not been affected by the provisions of that Act. It was further provided that the Custodian was to hold a summary inquiry in the prescribed manner into such claims and after taking such evidence as might be produced, pass an order (stating the reasons therefor) either rejecting the claim or allowing it wholly or in part. Finally, s. 30 provided for an appeal to the High Court where the original order under s. 8 had been passed by the Custodian, an Additional Custodian or an Authorised Deputy Custodian. This Act remained in force till it was replaced by the Mysore Administration of Evacuee Property (Second) (Emergency) Act, No. LXXIV of 1949 (hereinafter called the second Mysore Act), which came into force on November 29, 1949.

On September 21, 1949, the Custodian issued a notification by which he declared the properties of the two respondents as evacuee properties which had vested in him, as the respondents had become evacuees. Thereupon two claims were filed under s. 8 of the first Mysore Act separately by the two respondents. These claims were investigated by the Deputy Custodian who dismissed the same on April 17, 1950, declaring that the properties were evacuee properties. It may be mentioned that in the meantime, the second Mysore Act had come into force by which the first Mysore Act was repealed. But s. 53(2) of the second Mysore Act provided that anything done or any action taken in the exercise of any power conferred by the first Mysore Act shall be deemed to have been done

or taken in the exercise of the powers conferred by the second Mysore Act. It was also provided that any penalty incurred or proceeding commenced under the first Mysore Act shall be deemed to be a penalty incurred or proceeding commenced under the second Mysore Act as if the latter Act were in force on the day on which such thing was done, action taken, penalty incurred or proceeding commenced. There was however one difference in the two Mysore Acts. The first Mysore Act had provided by s. 5 for the vesting of all evacuee property situate in Mysore *ipso facto* in the Custodian; s. 6 then provided for notification by the Custodian and s. 8 for preferring claims. The second Mysore Act however made a departure from this and s. 5 thereof provided that—

> "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."

Section 6 then provided for vesting of any property declared to be evacuee property in the Custodian. Thus while under the first Mysore Act the evacuee property vested in the Custodian and the person who claimed that it was not evacuee property had to make an application under s. 8 and to get it declared that it was not evacuee property, under the second Mysore Act there was no vesting in the Custodian and the Custodian had to give a notice in the manner prescribed (if he thought any property to be evacuee property) and after hearing the persons interested to declare the property to be evacuee property; and it was only thereafter that the property vested in him as evacuee property. Further, the second Mysore Act also defined the "Custodian-General" as the Custodian-General of Evacuee Property in India appointed by the Government of India under s. 5 of the Administration of Evacuee Property Ordinance (Central Ordinance No. XXVII of 1949), which had come

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into force on October 18, 1949. Further there was a change in the forum of appeals and instead of the High Court the appeal lay to the Custodian-General from an order passed under s. 5 of the second Mysore Act where the original order had been passed by the Custodian, Additional Custodian or Authorised Deputy Custodian and in some cases to the District Judge designated in this behalf by the Government under ss. 22 and 23 of the second Mysore Act. In addition, provision was made by s. 25 of the second Mysore Act for revision by the Custodian-General of orders passed by the District Judge or the Custodian on appeal.

It may be mentioned that the Administration of Evacuee Property Act, No. XXXI of 1950 (hereinafter called the Act), came into force on the day the Deputy Custodian passed the order dated April 17, 1950. It may also be mentioned that in the meantime the Constitution of India had come into force on January 26, 1950, and the former State of Mysore had become the new Part B State of Mysore under the Constitution. The Act was to apply to the whole of India except the States of Assam, West Bengal, Tripura, Manipur and Jammu and Kashmir. Thus the Act applied to the Part B State of Mysore on April 17, 1950, and though there was no specific provision then in the Act repealing the second Mysore Act it is not seriously disputed that the Act by necessary implication repealed the second Mysore Act, as the Act substantially enacted all that was contained in the second Mysore Act. However that may be, appeals were filed against the order of April 17, 1950, before the Custodian. These appeals were allowed on August 22, 1950. The Custodian held that there was not sufficient evidence to prove the respondents as evacuees and consequently the properties in question could not be treated as evacuee properties. On October 3, 1950, the Custodian-General gave notices to the respondents under s. 27 of the Act in respect of the order of the Custodian dated August 22, 1950, and asked them to show cause why the said order of the Custodian be not revised. On December 7, 1950, the Administration of Evacuee

Property (Amendment) Act, No. LXVI of 1950, was passed by which *inter alia* s. 58 of the Act was amended and it was provided that if immediately before the commencement of the Act there was in force in any State to which the Act extended any law which corresponded to the Act and which was not repealed by sub-s. (1) it shall stand repealed. This was made retrospective from the date from which the Act came into force (namely, April 17, 1950) and so the repeal of evacuee property laws which were in force in those States to which the Act applied which was implicit in it was made explicit from December 7, 1950, so that from April 17, 1950, only the Act held the field.

On February 11, 1952, the Custodian-General set aside the order of the Custodian dated August 22, 1950, and ordered that further proceedings in these cases should be taken before the Custodian as an original matter and he was directed to dispose of the cases afresh in the light of the evidence already recorded and such other evidence as might be produced before him by the two respondents. When the matter thus came back to the Custodian he ordered the Deputy Custodian on April 7, 1952, to record the evidence and then submit the record to him for final disposal. Eventually, the matter came before the Custodian for final disposal on December 2, 1952. He held that the two respondents were evacuees and their properties were evacuee properties. This was followed by two appeals to the High Court on January 2, 1953. As, however, the respondents felt some doubt whether any appeal lay to the High Court two writ petitions were also filed on September 7, 1953, against the order of the Custodian. The two appeals as well as the two writ petitions were disposed of by the High Court by a common judgment on February 4, 1954. The High Court held that the appeals before it were competent. It further seems to have held that the Custodian-General had no power under s. 27 of the Act to revise the order passed by the Custodian on August 22, 1950. Finally, as the High Court held that the appeals were competent it went into the matter as an appellate court and came to the conclusion that the order of the

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Custodian dated December 2, 1952, was erroneous. It, therefore, allowed the appeals as well as the writ petitions and set aside the order of the Custodian dated December 2, 1952, and restored the earlier order of the Custodian dated August 22, 1950. Thereupon followed applications by the Custodian of Evacuee Property, Mysore, for certificates to file appeals to this Court on which the High Court granted the certificates, and that is how the four appeals have come up before us.

The main contention of the learned Additional Solicitor-General on behalf of the appellant is two-fold. He urges firstly that the High Court was in error when it held that the Custodian-General had no power to set aside the order of August 22, 1950, under s. 27 of the Act. In the second place, his contention is that the High Court was in error in holding that an appeal lay to it from the order of the Custodian dated December 2, 1952. Therefore, the High Court could not deal with the matter before it as if it were hearing an appeal; it could only consider the writ petitions before it and in doing so it would not be justified in issuing a writ of *certiorari* against the order of December 2, 1952, because that order was not passed without jurisdiction and there was no error of law apparent on the face of the record to call for interference with it. Mr. Sastri for the respondents in reply submits that as the proceedings in these cases began under s. 8 of the first Mysore Act and as there was nothing corresponding to that section either in the second Mysore Act or in the Act, which replaced successively the first Mysore Act, the High Court was entitled to hear an appeal from the order of December 2, 1952, as that order must be held to have been passed in a proceeding under the first Mysore Act, even if it be that the Custodian-General had the jurisdiction to set aside the order of August 22, 1950, under s. 27 of the Act. Further, Mr. Sastri contends that the Custodian-General had no jurisdiction to set aside the order of August 22, 1950, under s. 27 of the Act.

The first point therefore which falls for consideration is whether the Custodian-General had jurisdiction to set aside the order of August 22, 1950, under s. 27; for if he had no such jurisdiction the High Court may be entitled after holding that the Custodian-General's order of February 11, 1952, was without jurisdiction, to set aside all subsequent proceedings, leaving the order of August 22, 1950, operative and in full force (assuming for this purpose that the High Court had jurisdiction in writ proceedings to set aside the order of the Custodian-General whose headquarters were in New Delhi).

Now the first Mysore Act had no provision relating to the Custodian-General. It was the second Mysore Act which for the first time brought in the Custodian-General and gave him powers of revision under s. 25 with respect to orders passed by the Custodian or the District Judge in appeal. Then came the Act on April 17, 1950, by which the Custodian-General was given the power to call for the record of any proceeding in which any District Judge or Custodian had passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and to pass such order in relation thereto as he thought fit. This provision is wider than the provision in the second Mysore Act and is not confined to orders passed by a District Judge or a Custodian in appeal and would apply even to original orders passed by the Custodian, which term, according to the definition in s. 2(c) includes any Additional, Deputy or Assistant Custodian of evacuee property. We have already pointed out that the Act provides substantially for all matters contained in the second Mysore Act and therefore must be held to have repealed the second Mysore Act by implication. But in any case the question whether the second Mysore Act was repealed by the Act when it came into force on April 17, 1950, has been set at rest by the later Central Act, LXVI of 1950. That Act was passed on December 7, 1950, and s. 2 thereof began thus:

"For section 58 of the Administration of Evacuee Property Act, 1950, the following section shall be

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substituted, and shall be deemed always to have been substituted."

This clearly shows that Central Act LXVI was amending s. 58 retrospectively from the date on which it came into force (namely, April 17, 1950). The new s. 58 which was thus substituted in the Act from April 17, 1950, contained sub-s. (2) which is as follows:—

"If, immediately before the commencement of this Act, there is in force in any State to which this Act extends any law which corresponds to this Act and which is not repealed by sub-section (1), that corresponding law shall stand repealed."

It is clear therefore that the second Mysore Act was expressly repealed as from April 17, 1950, by the Act in view of this substituted s. 58 put into it retrospectively by Act LXVI, for the second Mysore Act was undoubtedly a law corresponding to the Act. The High Court seems to have overlooked the fact that Act LXVI gave retrospective operation to the new s. 58(2) which was inserted in the Act. It seems to think that the second Mysore Act was repealed on December 7, 1950, when Act LXVI came into force. The High Court was further in error in holding that the amended sub-s. (3) of s. 58 which was put into the Act also came into force from December 7, 1950, while as a matter of fact it came into force from April 17, 1950, when the Act itself first came into force.

The position when the Custodian-General gave notice in October, 1950, under s. 27 of the Act therefore was that the first Mysore Act had already been repealed by the second Mysore Act and the second Mysore Act had been repealed by the Act as from April 17, 1950, and therefore in October, 1950, only the Act held the field. The question then arises whether it was open to the Custodian-General to revise the order dated August 22, 1950, under s. 27 of the Act in February, 1952. Now s. 27 is very wide in terms and gives power to the Custodian-General at any time either on his own motion or on application made to him in this behalf to call for the record of any proceeding in which any District Judge or Custodian

has passed an order for the purpose of satisfying himself as to the legality or propriety of any order and to pass such order in relation thereto as he thinks fit. *Prima facie*, therefore, these wide words give power to the Custodian-General to revise any order passed by the Custodian. It is urged on behalf of the respondents that the Custodian-General could not revise the order dated August 22, 1950. We are not impressed by this argument. Now the Act was passed in 1950 to set up a central organisation for the custody, management and control, etc., of property declared by law to be evacuee property with the Custodian-General at the head. It is also clear that all similar laws existing in various States on the date the Act came into force (namely, April 17, 1950) were repealed by it. The intention of the Legislature obviously was to provide for the custody and management etc. of evacuee property in the manner provided in the Act with the Custodian-General as the head of the organisation. Further, action taken with respect to evacuee property under the first Mysore Act was deemed under s. 53 (2) of the second Mysore Act to have been taken thereunder and finally any action taken in the exercise of the power conferred by the second Mysore Act was deemed to have been taken in the exercise of the powers conferred by the Act. Therefore, any action taken with respect to evacuee property and any order passed by any Custodian in any proceeding with respect to such property would be subject to the revisory jurisdiction of the Custodian-General under s. 27 in view of the wide language thereof and the fact that proceedings started under the first Mysore Act would not, in our opinion, make any difference to the power of the Custodian-General under s. 27. Obviously the order of August 22, 1950, was passed when the Act was in force in a proceeding relating to evacuee property by the Custodian and the Custodian-General would be competent under s. 27 to call for the record of that proceeding and satisfy himself as to the legality or propriety of any such order and thereafter pass such order in relation thereto as he thought fit. We are, therefore, of opinion that

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considering the purpose for which the Act was passed and the successive saving clauses in the second Mysore Act and in the Act, the Custodian-General had the power under s. 27 to call for the record of the proceeding in which the order of August 22, 1950, was passed and consider its legality or propriety and pass such order in relation thereto as he thought fit. Even if the notice of October, 1950, may be open to question as it was issued before Act LXVI of 1950 was passed, there can be no doubt that the order of February, 1952, under s. 27 was passed after hearing the parties and would be valid and within the jurisdiction of the Custodian-General when it was passed. Therefore, the order of the Custodian-General dated February 11, 1952, being within his jurisdiction would not be liable to be set aside on a writ of *certiorari* as if the Custodian-General had acted without jurisdiction. The subsequent proceedings, therefore, which took place after the order of the Custodian-General would also be with jurisdiction and would not be liable to be set aside on a writ of *certiorari* on the ground that they were without jurisdiction. The High Court, therefore, was in error in holding that the order of the Custodian-General dated February 11, 1952, was without jurisdiction and therefore all subsequent proceedings taken in pursuance thereof were also without jurisdiction, with the result that the order of August 22, 1950, stood fully operative.

This brings us to the next question whether any appeal lay to the High Court against the order of December 2, 1952. There is no doubt that the proceedings in the present case commenced under the first Mysore Act with a notification under s. 6 and claim applications under s. 8. If the original proceedings had finished when the first Mysore Act was in force and the order of December 2, 1952, had been passed during its operation there would undoubtedly have been an appeal to the High Court under s. 30 thereof. But the first Mysore Act was repealed by the second Mysore Act in November, 1949, and the second Mysore Act was in its turn repealed by the Act as from April, 1950. The question, therefore, that arises for consideration

is whether after the repeal of the first Mysore Act an appeal would still lie to the High Court from the order of December 2, 1952. The main contention of Mr. Sastri in this behalf is that if the second Mysore Act or the Act contained provisions which were similar to the provisions contained in s. 8 of the first Mysore Act, it may have been possible to say that the remedy provided by the first Mysore Act under s. 30 had been superseded by the remedy provided in the Act, that remedy being an appeal to the Custodian-General under s. 24 of the Act. The argument further proceeds that neither the second Mysore Act nor the Act provides anything similar to what was provided by s. 8 of the first Mysore Act. Therefore, even though the first Mysore Act was repealed by the second Mysore Act the proceedings in the present case must be deemed to be still under the first Mysore Act which must be deemed to be existing for this purpose and, therefore, the right of appeal being a vested one and arising when the proceedings commenced, there would still be a right of appeal under s. 30 of the first Mysore Act in spite of its being repealed. When the matter came before the Custodian in 1952 it was contended before him that the proceedings should be taken to be under the first Mysore Act. He accepted this contention, though he added that it was immaterial for the purposes of the present cases as the definition of "evacuee" in s. 2(c) of the first Mysore Act was practically the same as in s. 2(d) of the Act. It is urged that in view of the manner in which the Custodian dealt with the case when he passed the order dated December 2, 1952, the proceedings before him must be taken to be under the first Mysore Act and if so an appeal would lie to the High Court under s. 30 of the first Mysore Act. This view has been accepted by the High Court also and that is why it held that the appeals before it were competent; and it is the correctness of this view which has been challenged before us.

Now there is no doubt that the right of appeal is a substantive right and arises when a proceeding is commenced and cannot be taken away by subsequent

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legislation, except by express provision or necessary intendment. There is no express provision in the present case taking away the right of appeal conferred by the first Mysore Act. We have therefore to see whether it can be said that the right of appeal conferred by the first Mysore Act has been taken away by necessary intendment by the subsequent legislation; and if so whether it has been completely taken away or has been replaced by another right of appeal, though not to the High Court. Under the first Mysore Act, as we have already pointed out, evacuee property *ipso facto* vested in the Custodian under s. 5. Thereafter the Custodian was expected to notify such property under s. 6. On such notification or where the Custodian demanded surrender of possession, a person claiming any right to the property was entitled to make an application preferring a claim before the Custodian. That application was dealt by the Custodian in a summary manner and he had the power either to reject the application or allow it in whole or in part. An order passed by the Deputy or the Assistant Custodian under s. 8 was appealable to the Custodian and an order passed by the Custodian or Additional Custodian or an authorised Deputy Custodian was appealable to the High Court. The contention on behalf of the respondents is that when the first Mysore Act was replaced by the second Mysore Act, there was a vital change in the procedure and therefore cases in which proceedings had commenced under s. 8 could only be dealt with under the first Mysore Act and for that purpose the first Mysore Act would be deemed to be alive under s. 6 (e) of the Mysore General Clauses Act, No. III of 1899, which corresponds to s. 6 (e) of the General Clauses Act, No. X of 1897. Now there is no doubt that the proceedings in these cases commenced under the first Mysore Act though they terminated when that Act was no longer in force. What we have to see is whether there is anything in the repealing legislation which by necessary intendment took away the right of appeal provided by the first Mysore Act and substituted in its place another right of appeal provided by the repealing Act.

The argument of Mr. Sastri is that there is nothing in the second Mysore Act which repealed the first Mysore Act corresponding to s. 8 of the first Mysore Act and therefore in spite of the repeal of the first Mysore Act proceedings commenced under s. 8 of that Act would continue to be governed thereby, including the right of appeal. In this connection he urges that the scheme of the second Mysore Act with respect to evacuee property is vitally different from the scheme which is to be found in the first Mysore Act. In the second Mysore Act there is no provision corresponding to s. 5 of the first Mysore Act by which any property becomes *ipso facto* evacuee property and vests in the Custodian. Under the second Mysore Act the Custodian has first to form a tentative opinion whether the property is evacuee property and after he has formed such opinion he gives notice thereof to the persons interested; after such notice is given he holds inquiry into the matter and thereafter passes an order declaring the property to be evacuee property. Thus under the first Mysore Act the property became evacuee property *ipso facto* and the person claiming any interest in it had to proceed under s. 8 and make a claim which had to be investigated and thereafter the Custodian finally declared whether the property which he had notified under s. 6 was evacuee property or not. Under the second Mysore Act there being no vesting *ipso facto*, the proceeding commences with a notice by the Custodian to the person interested followed by an inquiry after which the Custodian decides to declare the property evacuee if he finds it to be so under the law. Further under the second Mysore Act when an order was passed declaring property to be evacuee property under s. 5 it was open to the person aggrieved by such order to file an appeal to the Custodian where the original order had been passed by the Deputy Custodian or Assistant Custodian and to the Custodian-General where the original order had been passed by the Custodian, Additional Custodian or Authorised Deputy Custodian. There was also in certain cases appeal to the District Judge; but we are not concerned with that in the

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present appeals. The position under the Act was also the same as under the second Mysore Act and the right of appeal was also similar.

It is thus true that there has been a change in the procedure by which evacuee property is finally declared to be evacuee property. Under the first Mysore Act the property became evacuee property and the person had to go and file a claim and establish that it was not. That claim was investigated and after investigation the Custodian had to come to a final conclusion whether the property was evacuee or not. If he came to the conclusion that it was evacuee property, the vesting under s. 5 was confirmed. If on the other hand he came to the conclusion that the property was not evacuee property the legal effect was that there was no vesting under s. 5 of the first Mysore Act. Under the second Mysore Act the property did not *ipso facto* vest in the Custodian as evacuee property but he formed a tentative opinion as to whether it was evacuee property and then gave notices to the persons interested. They appeared before him and the matter was investigated. He then had to come to a final conclusion whether the property was evacuee property or not. If he came to the conclusion that it was evacuee property he declared it to be such; if on the other hand he came to the conclusion that it was not evacuee property the proceedings came to an end. It will be seen therefore on a comparison of the two procedures that though there is difference between the two, the difference is not of a vital or substantial nature. In the one case the law started with the presumption that the property was evacuee property and the person interested had to go and make a claim and establish that it was not evacuee property and the matter had to be investigated and the Custodian finally had to come to the conclusion one way or the other. In the other case the law did not start with the presumption but only a tentative opinion was to be formed by the Custodian who gave notice to the person interested and the matter was then investigated and thereafter the Custodian had to decide finally one way or the other.

But in both cases the question whether the property was evacuee property or not was investigated and it was only after investigation that it could be finally said whether the property was evacuee property or not. Therefore, though there may be an apparent difference between what is provided by s. 8 in the first Mysore Act and by s. 5 in the second Mysore Act as also by s. 7 in the Act, the difference is not material and it is only after investigation whether under s. 8 of the first Mysore Act, or under s. 5 of the second Mysore Act or under s. 7 of the Act that the Custodian comes to the final conclusion whether the property is evacuee property or not. Under the circumstances it would not in our opinion be unreasonable to say that the investigation provided under s. 8 of the first Mysore Act and the subsequent remedies following on an order under s. 8 are in substance the same as the investigation provided under s. 5 of the second Mysore Act or s. 7 of the Act and the subsequent remedies following on an order thereon. We cannot, therefore, agree with the High Court that there is nothing in the second Mysore Act to correspond to s. 8 of the first Mysore Act and therefore these proceedings which began under the first Mysore Act must continue to be governed by that Act in spite of its repeal by the second Mysore Act. As we have pointed out above the proceedings under s. 8 of the first Mysore Act are in substance equal to proceedings under s. 5 of the second Mysore Act and therefore proceedings commenced under the first Mysore Act must in view of s. 53(2) of the second Mysore Act, be deemed to be proceedings under s. 5 of the latter Act. Once that conclusion is reached—and it seems to us that it is inevitable—it follows that an order made in a proceeding commenced under s. 8 of the first Mysore Act must be deemed to be an order made under s. 5(1) of the second Mysore Act or under s. 7(1) of the Act. In this connection it is relevant to point out that it could not have been the intention of the Legislature to keep the first Mysore Act alive for certain purposes for all time; the whole object of passing the subsequent Acts is plainly against such an assumption.

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The next question that arises is whether the second Mysore Act and the Act took away the right of appeal which lay to the High Court under the first Mysore Act and substituted for it another right of appeal by necessary intendment. As we have already pointed out, there is no express provision either in the second Mysore Act or in the Act in this behalf. But once it is held that proceedings which commenced under s. 8 of the first Mysore Act must, when the second Mysore Act came into force, be deemed under s. 53(2) thereof to be proceeding under s. 5(1) or when the Act came into force be deemed under s. 58(3) thereof to be proceeding under s. 7(1) and must be continued under those provisions, it follows that the legislature necessarily intended that all subsequent action following an order under s. 5(1) or s. 7(1) must be taken under the second Mysore Act or under the Act as the case may be. It could not have been intended by the legislature when it was expressly providing for appeal from an order under s. 5(1) of the second Mysore Act or under s. 7(1) of the Act that a proceeding commenced under the first Mysore Act (which was equivalent to a proceeding under s. 5(1) or s. 7(1) should continue to be governed in the matter of appeal by the first Mysore Act. This is therefore in our view a case where by necessary intendment (though not by express provision) the legislature intended that the provision as to appeals provided by subsequent legislation should supersede the provision as to appeals under the first Mysore Act. We may point out that this is not a case where the right of appeal disappears altogether; all that happens is that where the order is passed by the Custodian the appeal lies to the Custodian-General instead of to the High Court. The legislature has provided another forum where the appeal will lie and in the circumstances it must be held that by necessary intendment the legislature intended that forum alone to be the forum where the appeal will lie and not the forum under the first Mysore Act. Reference in this connection may be made to *Garikapatti Veeraya* v.

N. Subbiah Choudhury (1), where this Court held that the vested right of appeal was a substantive right and was governed by the law prevailing at the time of the commencement of the suit and comprised all successive rights of appeal from court to court which really constituted one proceeding but added that such right could be taken away expressly or by necessary intendment. In the present cases we are of opinion that once proceedings under s. 8(1) of the first Mysore Act are held to be similar to proceedings under s. 5(1) of the second Mysore Act or s. 7(1) of the Act, it must necessarily follow that the legislature intended that all subsequent proceedings in the nature of appeal, after the first Mysore Act came to an end, must be in the forum provided by the subsequent legislation. We are therefore of opinion that the High Court was in error in holding that appeals to it lay from the order of December 2, 1952.

The result of the view we have taken is that the High Court was not justified in looking into the order of December 2, 1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Art. 226 of the Constitution for issue of a writ of *certiorari*. The limit of the jurisdiction of the High Court in issuing writs of *certiorari* was considered by this Court in *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque and Others* (2) and the following four propositions were laid down :—

(1) *Certiorari* will be issued for correcting errors of jurisdiction ;

(2) *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice ;

(3) The court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous ;

(4) An error in the decision or determination itself may also be amenable to a writ of *certiorari* if

(1) [1957] S.C.R. 488. (1) [1955] 1 S.C.R. 1104.

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it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by *certiorari* but not a mere wrong decision.

In the present case, the Custodian had jurisdiction to decide the matter once it is held that the Custodian-General had jurisdiction to set aside the order of August 22, 1950. The main question for decision in these cases was whether the respondents were evacuees within the meaning of s. 2(c) of the first Mysore Act. The questions that fall for decision under s. 2(c) are questions of fact and as pointed out in *Hari Vishnu Kamath's* case (1) it is not open on a writ praying for *certiorari* to review findings of fact reached by an inferior court or tribunal even though they may be erroneous. Further, unless there is a patent error of law there can be no interference by a writ of *certiorari*. While dealing with the writ petitions the main argument that appealed to the High Court was that the Custodian-General had no jurisdiction in revision to reopen the earlier proceedings and in consequence all subsequent proceedings were null and void. The High Court was further aware of the fact that the ordinary remedy of the respondents in these cases against the order of December 2, 1952, was to appeal to the Custodian-General under s. 24 of the Act; but as it was of the view that the order of the Custodian-General under s. 27 was without jurisdiction it held that it should interfere and set aside the order of December 2, 1952, which was also without jurisdiction and restore that of August 22, 1950. In the view we have taken, the order of the Custodian-General was with jurisdiction and therefore there was in our opinion no reason for the High Court to interfere in the exercise of its jurisdiction under Art. 226 of the Constitution with the order of December 2, 1952, as this is a case where only a writ of *certiorari* could issue and that is not justified in view of the decision in *Hari Vishnu Kamath's* case (1).

(1) [1955] 1 S.C.R. 1104.

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We therefore allow the appeals, set aside the order of the High Court and restore that of the Custodian dated December 2, 1952. This of course will not take away the right if any of the respondents to approach the Custodian-General, for we have not considered the merits of the order of December 2, 1952. In the circumstances of this case we pass no order as to costs.

Appeals allowed.

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February 20.

SARDA PRASAD AND OTHERS

v.

LALA JUMNA PRASAD AND OTHERS.

(P. B. GAJENDRAGADKAR and K. C. DAS GUPTA, JJ.)

Limitation—Execution—Decree for joint possession in favour of Hindu father and minor sons—Failure of father to execute within the period of limitation—Right of sons, if barred—Indian Limitation Act, 1908 (9 of 1908), s. 7—Code of Civil Procedure, 1908 (5 of 1908), O. 32, rr. 6, 7.

A decree dated September 2, 1938, in a suit for partition of joint Hindu family property awarded a house to the share of one J and his four minor sons. J failed to execute the decree. On November 23, 1949, an application was made by the appellants, the four sons of J, for execution of the decree stating that three of them had been minors till then and one of them was still a minor and so no question of limitation arose. The respondent objected that the application was barred under s. 7 of the Indian Limitation Act. The appellants contended that s. 7 did not apply to a partition decree and that s. 7 was no bar as J could not have given a valid discharge of the liability under the decree in view of the provisions of O. 32 of the Code of Civil Procedure.

Held, that the application for execution was barred by limitation. J, the managing member of the family could have given a discharge of the liability under the partition decree by accepting possession on behalf of his minor sons without their consent and so time ran against them under s. 7 from the date of the decree. Order 32, rr. 6 and 7 were no bar to J giving a discharge of the liability under the decree as it was neither a case of receipt of any money or movable property nor was there any question of entering into an agreement or compromise on behalf of the minors.

Ganesha Row v. *Tuljaram Row*, (1913) L.R. 40 I.A. 132, *Parmeshwari Singh* v. *Ranjit Singh*, A.I.R. 1939 Pat. 33 and *Letchmana Chetty* v. *Subbiah Chetty*, (1924) I.L.R. 47 Mad. 920, referred to.