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—
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or Exh. P. 3. We are, therefore, only left with Exh. P. 1, the mutation dated the 12th of December 1936, pertaining to 95 acres, 6 kanals and 15 marlas of land, and Exhs. P. 3 to P. 6 covering 32 acres and 1 marla of land, which property has been held by me to be *wagf* property and out of this property the Augaf Department has taken over only 122 acres, 7 kanals and 12 marlas as per Jamabandi for the year 1955-56. The result is that the appellant has failed to establish that any private property belonging to him has been over by the Augaf Department erroneously as *wagf*. The mutation of inheritance (Exh. P. 2) on which reliance has been placed that it pertains to the inheritance of Pir Muhammad Afzal Shah on his demise with regard to land covered by Exh. P. 1 also does not show that the Augaf Department has in any manner over-stepped its jurisdiction in taking over personal property of Pir Muhammad Afzal Shah, which devolved on his heirs as private property. Whatever property belongs to Pir Muhammad Afzal Shah in his personal capacity stands excluded in the Jamabandi for the year 1955-56 (Exh. P. 9) and has been left untouched.

7. The result, therefore, is that the judgment of the learned District Judge is affirmed, the appeal fails and is dismissed with costs.

K. B. A.

Appeal dismissed.

P L D 1965 (W. P.) Lahore 590

Before Muhammad Yaqub Ali and Sajjad Ahmad, JJ

MUHAMMAD ISHAQ—Petitioner

versus

ABDUL AZIZ AND ANOTHER—Respondents

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v.
Abdul Aziz

Yaqub Ali
and Sajjad
Ahmad, JJ

Review Application No. 3 of 1963, decided on 22nd April 1965.

(a) *Displaced Persons (Compensation and Rehabilitation) Act (XXVIII of 1958), S. 2(3)*—"Displaced person"—Person having temporary residence prior to Partition in territories now forming part of Bharat—Not invested with status of 'displaced person.' [p. 593]A

(b) *Letters Patent (Lahore), Cl. 10 read with Civil Procedure Code (V of 1908), Ss. 114 & 117 and O. XLVII*—All provisions of C. P. C. except those specifically excluded by S. 117 thereof—Applicable to orders passed by High Court including those passed in Letters Patent jurisdiction—Judgments passed by High Court in Letters Patent Appeal—Not immune from review under S. 114, C. P. C. [pp. 594, 595]B & C

Chitale's Commentary on S. 114, C. P. Code, p. 1507, Vol. II, Edn. 1963 and Jawala Prasad v. Jwala Bank Ltd. A I R 1961 All. 381 ref.

S. M. Zafar and S. Abid Hussain for Appellant.

K. E. Chohan and Ch. Qadir Bakhsh for Respondents.

Dates of hearing: 14th January, 16th, 18th February 9th and 10th March 1965.

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JUDGMENT

SAJJAD AHMAD, J.—It is necessary to state the following facts to explain this review application filed by the petitioner Muhammad Ishaq. The petitioner and the respondent Abdul Aziz were rival claimants for the transfer of property bearing No. P/17, Rail Bazar, Lyallpur, the former as a claimant displaced person and the latter as a non-claimant displaced person. The Deputy Settlement Commissioner *vide* his order dated the 21st of December 1959, held that this property, which is situated in a busy trade centre, consists of a shop on the ground floor and a *chaubara* on the first floor and that while the *chaubara* and a part of the shop were in occupation of Abdul Aziz, the remaining portion of the shop was in the possession of Muhammad Ishaq. He transferred the entire property in favour of Muhammad Ishaq as a shop with the following observations:—

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“He (Abdul Aziz) is a non-claimant allottee. His allotment order does not bear the date on which the allotment was made in his favour. I am, therefore, convinced that he is a regular allottee (*sic*) of the shop in question. It is also clear that he was temporarily carrying on his business in India wherefrom he migrated to Pakistan on account of partition. As against him, Muhammad Ishaq is a claimant allottee and has submitted the requisite form for the transfer of the property. Abdul Aziz does not stand covered by the definition of a displaced person as given in the Compensation Act of 1958. He has an inferior claim as against that of the other applicant, Muhammad Ishaq. It is, therefore, ordered that the entire property shall be transferred to Muhammad Ishaq in accordance with law.”

Abdul Aziz preferred an appeal to the Additional Settlement Commissioner who, by his order dated the 11th of May 1960, held that the property in dispute comprised two shops and not one which were occupied separately by two different tenants before Partition. His conclusions may be quoted from his own order:—

“The Taxation record shows that the property comprises of one main shop with another shop (*khokha*) having two different tenants before Partition. I, therefore, treat these as two independent shops. The respondent is entitled to have one which is in his possession. I, therefore, accept the appeal to the extent that the respondent will retain the portion at present with him. As regards the disposal of the shop in possession of the appellant, I want to further thrash out the entitlement of the appellant.”

In a subsequent order dated the 1st of June 1960, he accepted the status of Abdul Aziz as a non-claimant displaced person and held

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that he was entitled to the property in his occupation. Against this order, Muhammad Ishaq went in revision which was decided by the Settlement Commissioner (Policy) on the 3rd of March 1961. The matter had also been referred to the aforesaid officer by the Directorate of Enforcement (Evacuee Property Section) for re-consideration of the validity of the transfer in favour of Abdul Aziz because of the complaint that he was a local. The operative part of the order of the Settlement Commissioner is as follows:—

“It is obvious that his (Abdul Aziz’s) stay was of a temporary nature and he cannot be treated to have settled down at that place. I would not, therefore, treat him as a displaced person and cancel the orders transferring the shop of Abdul Aziz and order its transfer to the informer.”

A further revision was preferred by Abdul Aziz to Mr. Farzand Ali Khan under section 20(2) of the Displaced Persons (Compensation and Rehabilitation) Act, 1958. This was dismissed on the 6th of July 1961 by the learned Settlement Commissioner on the finding that Abdul Aziz was not a displaced person and further that the property contained one shop and not two as contended by Abdul Aziz, although it was temporarily split up into two portions by a wooden partition by the Rehabilitation Department.

2. Abdul Aziz was not contented with this final settlement of the dispute by the Settlement Authorities and he brought a writ petition (W. P. No. 500/R of 1961) to this Court under Article 2(4) of the Laws (Continuance in Force) Order, 1958. The petition was filed on the 8th of July 1961, and was dismissed by a learned Judge of this Court on the 11th of July 1961. A Letters Patent Appeal (No. 198 of 1961) was instituted against this order which was heard by a Division Bench of this Court along with certain other matters (an appeal and writ petitions) which raised the same question as to whether the persons concerned in those matters who claimed to be displaced persons under the Displaced Persons (Compensation and Rehabilitation) Act, 1958, were to be accorded that status. The judgment of the Division Bench against which this review petition has been brought is dated the 2nd of January 1963, whereby all the appeals and writ petitions were accepted and the orders of the Settlement Authorities were declared to be ineffective with a direction to the Settlement Authorities to dispose of the matters in the light of the observations made in the judgment regarding the meaning of the expression “displaced person” occurring in subsection (3) of section 2 of the Act. These observations were summed up in paragraph 10 of the judgment as follows:—

“(a) A person who, though a resident of a place which on Partition of British India fell to the share of Pakistan, was on a casual visit to a place which fell to the share of India cannot be treated as a “displaced person” for the purposes of the Displaced Persons (Compensation and Rehabilitation) Act, 1958,

(b) A person who, though an original resident of a place which on partition of British India fell to the share of Pakistan,

was residing at the time of that partition at a place which fell to the share of India and had no immediate desire of leaving the place but had not made it his permanent abode would be a "displaced person" for the purposes of the Act.

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(c) A person who ordinarily did business at two places and on Partition of British India one such place fell to the share of Pakistan and the other to that of India, such a person would be a "displaced person" for the purposes of the Act if at the time when Partition of British India took place in August 1947 he had to leave the place where he was at that time doing business and where he would have continued to do business if he had not to leave it because it fell to the share of India."

3. Mr. S. M. Zafar, the learned counsel for the petitioner, has contended before us in support of the review application that the acceptance of the Letters Patent Appeal of Abdul Aziz for a re-determination of his status as a displaced person in the light of the observations contained in the judgment of the Division Bench was wholly unnecessary because even according to the observations made by their Lordships of the Division Bench enunciating the qualifications of a "displaced person" under section 2(3) of the Act, the respondent cannot be held to be a displaced person in view of a clear finding of fact reached by the Settlement Authorities that Abdul Aziz is a resident of Chiniot and that his stay in Agra before Partition, as alleged by him, was wholly of a temporary nature. The matter is now settled by the decision of their Lordships of the Supreme Court in several cases upholding the view that a temporary residence before Partition in the territories now forming part of Bharat which a person had to abandon at the time of Partition would not invest him with the status of a displaced person.

4. The second point which was argued before us by the learned counsel for the petitioner is that the property was disposed of by the Deputy Settlement Commissioner as shop under the second proviso to section 2(12) of the Displaced Persons (Compensation and Rehabilitation) Act, 1958, in his delegated authority as the Chief Settlement Commissioner which could not have been interfered with by the Additional Settlement Commissioner in appeal. This point is not of practical importance now as the order of the Deputy Settlement Commissioner has been finally restored by the Chief Settlement Commissioner, reversing that of the Additional Settlement Commissioner. The property being of a composite character, consisting of residential and business units, having been finally transferred by the Chief Settlement Commissioner as a single unit of a shop to the petitioner, who is admittedly a claimant displaced person cannot be contested by the respondent who, as a non-claimant, cannot have an equal or a superior claim against the former even if it were to be conceded that he is a displaced person. We feel that the contention of the learned counsel for the petitioner must prevail, and we are constrained to recall the order of the Division Bench dated the 2nd of January 1963, which is the subject-matter of the review application by which the respondent's appeal was accepted for a re-consideration of his status as a displaced person,

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as it is no use to re-open that question which is already concluded on points of fact as well as on legal considerations, as stated above.

5. The learned counsel for the respondent has, however, challenged the competency of this review application on the ground that an appellate judgment passed by the High Court in its jurisdiction as conferred by the Letters Patent is immune from review. His main argument is that a review application is the creation of a statute and none exists for review of appellate orders or judgments made by the High Court in its jurisdiction under the Letters Patent and that section 114 read with section 117 of the C. P. Code, as also Order XLVII, of that Code, cannot be invoked in this behalf, as they are available only in respect of appellate decrees and orders made under the Civil Procedure Code. It was further argued that section 141 of the C. P. Code cannot also be pressed into service for making the review provisions contained in the C. P. Code applicable to review of orders passed in Letters Patent Appeals because the aforesaid provision permits the applicability of the procedural provisions of the Code to other proceedings in Court of civil jurisdiction and not the substantive provisions such as those relating to proceedings of review. We consider that, as laid down in section 117 of the Code, all the provisions of the Civil Procedure Code other than those specifically excluded by that section are applicable to the orders passed by the High Court, including those passed in Letters Patent jurisdiction. Section 114 would, therefore, apply to the judgments of the High Court for purposes of the review, provided the limitation mentioned in the section do not stand in the way. Section 114 reads as follows:—

“114. Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (*See Chitale's Commentary* on section 114 of the C. P. Code—headnote 1, at page 1507 Vol. II, 1963 Edition. In a recent Full Bench decision reported in *Jwala Prasad v. Jwala Bank Ltd.* (1) the Allahabad High Court has held that the High Court can review its own judgment passed in the exercise of appellate jurisdiction under the Letters Patent and has overruled an earlier decision to the contrary given by another

(1) A I R 1961 All. 381

Full Bench of the same Court reported in *Mst. Abhilakhi v. Sada Nand* (1). An extract from this recent Full Bench judgment of the Allahabad High Court may be usefully reproduced:—

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“By virtue of section 117, section 114, Civil P. C. applies to proceedings taken by the High Court in the exercise of its appellate jurisdiction. Thus the High Court may (subject to the conditions and limitations to be found in Order XLVII) review its judgment in all cases except where an appeal from a decree or order founded upon that judgment is allowed under the Code and has been preferred. Where, therefore, no appeal has been preferred, a decision given by the High Court in a special appeal is open to review.”

The argument that the section applies only to those decrees and orders from which an appeal is allowed by the C. P. Code and that the appellate judgments of the High Court in the Letters Patent jurisdiction do not fall in that category raised before us by the learned counsel for the respondent was examined in the same judgment and was met with the following observations:—

“The words ‘appeal allowed by this Code’ in section 114, Civil P. C. do not refer to the appeal the judgment in which is sought to be reviewed. The requirement of clauses (a) and (b) of section 114 is that the prospective appeal is one which is allowed by the Code (but not preferred), or one which is not allowed by the Code.

In considering the question whether or not review lies under section 114 a reference to the jurisdiction in the exercise of which the judgment sought to be reviewed is made is not relevant. That jurisdiction may or may not have been derived from the Code. What is really to be seen for the application of section 114 is whether the decree or order which followed the judgment was or was not appealable under the Code. Irrespective of the source of the jurisdiction under which the matter came to the Court, if the procedure to be followed was that laid down in the Code the test for deciding whether the order or judgment passed was reviewable or not was whether under the Code the decree or order was appealable. If it was, the additional condition required to be fulfilled was that no appeal should actually have been preferred.”

6. We are in respectful agreement with these observations and hold that section 114 in terms applies to review of judgments passed in appeal by the High Court in its jurisdiction under the Letters Patent, subject to the limitations as contained in that section. The present review application, is not hit by any of the limitations contained in section 114, an appeal against the Letters Patent judgment sought to be reviewed not being available under the Code, its competency is quite clear. In the result, we accept the review application, review the order dated the 2nd of January 1963, of the Letters Patent Bench, and restore that of the learned Single Judge, dismissing the writ petition of the respondent. There will be no order as to costs.

Petition accepted.

K. B. A.

(1) A I R 1931 All. 244