LEKHRAJ SATRAMDAS, LALVANI

v.

DEPUTY CUSTODIAN-CUM-MANAGING OFFICER & ORS.

May 4, 1965

[A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.]

Administration of Evacuee Property Act 1950, *s.* 10(2)(*b*)—*Manager for evacuee shops appointed by Deputy Custodian of Evacuee Property—Deputy Custodian whether can cancel appointment subsequently.*

The appellant was appointed Manager of two evacuee shops which vested in the Custodian of Evacuee Property. The appointment was made in 1952 under s. 10(2)(b) of the Administration of Evacuee Property Act, 1950. In 1956 the appellant was informed by letter Ex. p.8 written by the Custodian of Evacuee Property that a decision to allot the shops to him had been taken and that subsequently the shops would be sold to him. The letter was based on the orders of the Chief Settlement Commissioner in Ex. p. 5. However the said decision could not be implemented and in pursuance of orders from the Chief Settlement Commissioner the Deputy Custodian by Ex. p. 13 and proceedings Ex. p. 16 cancelled the appointment of the appellant as Manager and asked him to hand over possession of the shops. The appellant filed a writ petition in the High Court praying that the order Ex. p. 13 and proceedings p. 16 be quashed, that the possession of the shops be given to him, and that the sale of the shops be stopped. The High Court granted the first two prayers but not the third. Both parties appealed to a Division Bench of the High Court which held against the appellant on all these counts. By certificate under Art. 133(1)(a) he came to the Supreme Court.

It was contended on behalf of the appellant: (1) that he was not lawfully removed from the management of the shops as the Deputy Custodian had no power to cancel an appointment, (2) that the order of removal in Ex. 13 and Ex. 16 was made by the Managing Officer *cum* Deputy Custodian of Evacuee property under the Displaced Persons (Compensation and Rehabilitation) Act 1954 which conferred no power on such an officer to cancel the appointment of the manager and (3) that by virtue of Ex. p. 5 and Ex. p. 8 the shops stood allotted to the appellant.

HELD: (i) Section 16 of the General Clauses Act provides that the power to terminate is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power. The power of appointment conferred on the Custodian under s. 10(2)(b) of the 1950 Act confers by implication upon the Custodian the power to suspend or dismiss any person appointed. It is manifest that the management of the appellant with regard to the business concerns could be lawfully terminated by the Deputy Custodian by virtue of s. 10(2)(b) of the 1950 Act read with s. 16 of the General Clauses Act. [124 F-G]

(ii) The order cancelling the appellant's appointment as manager could not be said to be invalid on the ground that it purported to have been made under the 1954 Act. The Act of 1950 was not repealed by the Act of 1954 and continued in force. Under s. 10(2)(b) of the 1950 Act the Deputy Custodian is the proper authority to cancel the appointment of a manager and the order of cancellation must therefore be held to be valid. The principle is that the act of public servant must be ascribed to an actual existing authority under which it would have validity rather than one under which it would be void. [125 C-E]

A *Balakotaiah* v. *The Union of India*, [1958] S.C.R. 1052, referred to.

(iii) Even on the assumption that the order of cancellation was illegal the appellant was not entitled to a writ from the High Court. Writs can be issued only to enforce the performance of statutory duties, not duties under a contract. The appointment of the appellant was under a contract. [126 A-B]

B *Commissioner of Income-tax Bombay Presidency and Aden* v. *Bombay Trust Corporation Ltd.*, 63 I.A. 408 and *P. K. Banerjee* v. *L. J. Simonds*, A.I.R. 1947 Cal. 307 referred to.

(iv) Ex. 5 and Ex. 8 did not make any final allotment in favour of the appellant. The letters did not show any concluded contract of sale. [127 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 414-
C 416 of 1963.

Appeals from the judgment and order dated December 6, 1960 of the Kerala High Court in A.S. Nos. 445 and 484 of 1960.

R. Mahalingier and *K. N. Keswai*, for the appellant (In both the appeals):

D *Gopal Singh*, *R. N. Sachthey* and *B. R. G. K. Achar*, for the Respondents (In both the appeals).

The Judgment of the Court was delivered by

Ramaswami. J. The proprietors of two firms styled "Adam Haji Peer Mohd. Essack" and "Haji Ebrahim Kasim Cochinwala"
E had, in the year 1947, migrated to Pakistan and both these firms became vested in the Custodian of Evacuee Properties for the State of Madras under s. 8 of the Administration of Evacuee Property Act, 1950, hereinafter referred to as the 1950 Act. On March 6, 1952 the appellant was appointed as Manager of the two firms
F under s. 10(2) (b) of the 1950 Act. The appellant also furnished security of Rs. 20,000/- before taking possession of the business of the firms as Manager. The order of appointment—Ex. P-1 dated March 6, 1952 states :

> "The Custodian approves the proposal of the Deputy Custodian, Malabar that the Management of both the
G firms of Adam Hajee Peer Muhammad Issack and Hajee Ibrahim Kassam Cochinwala at Kozhikode may be allotted to Sri L. S. Lalvani for the present on the same system as exists now between the Government and the present two managers and on his furnishing a security of Rs. 20,000 to the satisfaction of the Deputy Custo-
H dian. The question of outright allotment as contemplated in Custodian General's letter No. 2811/CG/50 dated 20-3-50 will be taken up in due course."

On October 9, 1954 the Displaced Persons (Compensation and Rehabilitation) Act, 1954 was passed which will hereafter be referred to as the 1954 Act. On April 11, 1956 there was an advertisement published in the Press for the sale of the aforesaid evacuee properties. The appellant applied to the Chief Settlement Commissioner for stopping the sale of the two concerns. On April 25, 1956 the Central Government made an order—Ex. P-5 —which states :

> "I am directed to state that it has been decided in principle that the aforesaid evacuee concerns will be allotted to you. The terms of allotment will be communicated to you separately. Meanwhile, you will continue to function as the Custodian's Manager for these concerns in terms of section 10(2) (b) of the Administration of Evacuee Property Act, read with Rule 34 of the rules made under the Act."

On June 21, 1956 another letter—P-8—was written to the appellant by the Custodian of Evacuee Properties which states :

> "The Deputy Custodian is informed that the Government of India have decided that the two evacuee concerns *viz.*, firms of Adam Hajee Peer Mohammed Essack and Hajee Ebrahim Kassam Cochinwala of Kozhikode are to be allotted to the present Manager Shri L. S. Lalvani and ultimately sold to him. He is also informed that until the question of terms and conditions of allotment of the concerns in question is decided Shri Lalvani will continue to function as Custodian's Manager for these concerns in terms of Section 10(2) (b) of the Administration of Evacuee Property Act, 1950 read with rule 34 of the rules made thereunder. The Deputy Custodian is requested to evaluate the business concerns properly after getting prepared a balance sheet of each year of the vesting of the concerns, evaluating the concerns, the Deputy Custodian should keep in view the other assets and liabilities of the concerns and their goodwill etc. His comment and suggestions as to how and by what easy instalments the value of the concerns if sold to Shri Lalvani is to be realised from him should also be intimated.

The bargain was not concluded and on March 25, 1958 there was an advertisement in the Press about the public auction of the business of the firms. The appellant moved the High Court of Kerala

A for grant of a writ restraining the District Collector from selling the business of the firms by a public auction. The application was allowed and on June 25, 1959 the Kerala High Court directed the District Collector not to sell the properties of the business of the two firms without an appropriate order of the Chief Settlement Commissioner. The decision of the High Court is based upon the B ground that there was no order under the 1954 Act by the Chief Settlement Commissioner for sale of the properties and that in the absence of such an order the sale of the properties cannot take place. It appears that the order of the Chief Settlement Commissioner was subsequently made on September 15, 1959. In pursuance of that order the management of the appellant was terminated and the possession of the business was taken over by the Deputy Custodian—Respondent no. 1. The order—Ex. P-13—dated December 18, 1959 states :

> "Shri L. S. Lalvani is informed that his services as Manager of the business concerns of Adam Haji Peer Mohd. Essack and Haji Ibrahim Kassam, Cochinwala, at Kozhikode, are hereby terminated with immediate effect. He is further required to hand over immediate possession of the premises and the stock-in-trade, account books and other assets of the business including furniture etc."

The appellant filed a writ petition in the High Court of Kerala —being O.P. no. 1438 of 1959 for grant of (1) a writ of *certiorari* for quashing the order dated December 15, 1959—Ex. P-13 —and the proceedings dated December 18, 1959—Ex. P-16, (2) F a writ of *mandamus* directing respondents nos. 1 and 2 to hand over possession of the two business concerns including the premises, stock-in-trade all records etc. to the appellant, and (3) a writ of mandamus or appropriate writ or order directing respondents nos. 1 to 3 not to sell by public auction or otherwise the two evacuee business concerns. S. Velu Pillai, J. by his order G dated June 8, 1960, granted writ to the appellant as prayed for in prayer (1) & (2) but refused prayer (3) for a writ of *mandamus* restraining the respondents from selling the business by public auction. Against the order of the Single Judge the respondents filed an appeal being A.S. no. 484 of 1960 before the Division Bench of the High Court. The appellant also preferred an H appeal A.S. no. 445 of 1960 against the order of Single Judge which was in regard to the refusal of the third relief. By judgment dated December 6, 1960 the Division Bench of the High

Court dismissed Appeal A.S. no. 445 of 1960 filed by the appellant but allowed the appeal A.S. no. 484 of 1960 filed by the respondents. The present appeals are brought on behalf of the appellant by certificate of the Kerala High Court granted under Art. 133(1)(a) of the Constitution.

The first question arising in this case is whether the appellant was lawfully removed from the management of the business by the order of the respondent no. 1 dated December 18, 1959—Ex. P-13 and P-16. It was submitted on behalf of the appellant that under s. 10(2)(b) of the 1950 Act the Custodian had the power to appoint a Manager for the Evacuee Property for carrying on any business of the evacuee and there was no power conferred by the Act upon the Custodian to remove the Manager so appointed. It was argued by the Counsel on behalf of the appellant that an indefeasible right of management was conferred upon the appellant because of the order of the Custodian—Ex. P-1 dated March 6, 1952. In our opinion, there is no warrant for this argument. The power of appointment conferred upon the Custodian under s. 10(2)(b) of the 1950 Act confers, by implication, upon the Custodian the power to suspend or dismiss any person appointed. Section 16 of the General Clauses Act states :

> "Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power."

It is manifest that the management of the appellant with regard to the business concerns can lawfully be terminated by the Deputy Custodian by virtue of s. 10(2)(b) of the 1950 Act read with s. 16 of the General Clauses Act. The principle underlying the section is that the power to terminate is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power.

It was then contended on behalf of the appellant that the order of removal—Ex. P-13 and P-16—was made by the Managing Officer-*cum*-Deputy Custodian of Evacuee Property of Southern States under the 1954 Act which conferred no power on such an officer to cancel the appointment of a Manager. It was pointed out that the order of removal was made after the provisions of the 1954 Act had come into force. In our opinion, there is no

A justification for this argument. We shall assume that the Managing Officer under the 1954 Act is not the proper authority to cancel the appointment of a Manager but it is not disputed that the provisions of the 1950 Act have not been repealed and still continue to be in force. Under s. 10(2)(b) of the 1950 Act the Deputy Custodian is the proper authority to cancel the appointB ment of a Manager and the order—Ex. P-13 and P-16 dated December 18, 1959 is, therefore, legally valid. It is true that the order Ex. P-13 and P-16 is signed by Mr. Mathur as "the Managing Officer-*cum*-Deputy Custodian of Evacuee Property" but the order of removal of the appellant from the management is valid because Mr. Mathur had the legal competence to makeC the order under the 1950 Act, though he has also described himself in that order as "Managing Officer". It is well-established that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule, and the validity of the impugned orderD should be judged on a consideration of its substance and not of its form. The principle is that we must ascribe the Act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void (See *Balakotaiah* v. *The Union of India.*) (1) We, therefore, reject E the argument of the appellant on this aspect of the case.

In our opinion, the order of the Deputy Custodian—P-13 and P-16—removing the appellant from the management of the business is not vitiated by any illegality. But even on the assumption that the order of the Deputy Custodian terminating the manageF ment of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of *mandamus* under Art. 226 of the Constitution. The reason is that a writ of *mandamus* may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obliG gation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under s. 10(2)(b) of the 1950 Act is contractual H in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling

(1) [1958] S.C.R. 1052 at p. 1059.

upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Art. 226 of the Constitution. In *Commissioner of Income-tax Bombay Presidency and Aden* v. *Bombay Trust Corporation Ltd.*(1) an application was made under s. 45 for an order directing the Commissioner to set aside an assessment to income tax and to repay the tax paid by the applicant; the Bombay High Court made the order asked for but the decision of the Bombay High Court was set aside by the Judicial Committee. At page 427 of the report it is observed by the Judicial Committee :

> "Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal."

A similar view has been expressed by the Calcutta High Court in *P. K. Banerjee* v. *L. J. Simonds.*(2) In our opinion, these cases lay down the correct law on the point.

We pass on to consider the next question presented on behalf of the appellant *viz.*, whether there was a final allotment of the business in favour of the appellant by the Chief Settlement Commissioner. It was contended for the appellant that in view of Ex. P-5 dated April 25, 1956 there was final allotment of the business, though the terms of allotment had to be subsequently determined. In Ex. P-5 the Government of India state that "It has been decided in principle that the aforesaid evacuee concerns should be allotted to you" and the "terms of allotment would be communicated to you separately". Reference was made to Ex. P-8 dated June 21, 1956 wherein it is stated that the Government of India have decided that "the two evacuee concerns *viz.*, firms of Adam Hajee Peer Mohammed Essack and Hajee Ebrahim Kassam Cochinwala of Kozhikode are to be allotted to the present Manager Shri L. S. Lalvani and ultimately sold to him". It is also mentioned in the letter that "until the question of terms and conditions of allotment of the concerns is decided Shri Lalvani will continue to function as Custodian's Manager for these concerns in terms of s. 10(2)(b) of the Administration of Evacuee Property Act, 1950 read with rule 34 of the rules made thereunder". It was submitted on behalf of the appellant that in view of these two letters it must be held that there was a final allotment of the business in favour of the appellant. We do not,

(1) 63 I.A. 408. (2) A.I.R. 1947 Cal. 307.

A however, think there is any justification for this argument. It is manifest that the terms and conditions of allotment were not finally settled between the parties and there was no concluded contract of sale and, therefore, the appellant had no legal right to the business of the two concerns and the High Court was right in holding that the appellant was not entitled to the grant of a B writ in the nature of *mandamus* with regard to the possession of the two business concerns.

In our opinion, there is no merit in these appeals which are accordingly dismissed with costs.

C *Appeals dismissed.*