

(2008) 09 J&K CK 0023

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 283 Of 2003

Ab.Khaliq Dar (Haji) & Ors.

APPELLANT

Vs

State of J&K & Ors.

RESPONDENT

Date of Decision : 16-09-2008

Acts Referred:

Jammu and Kashmir Agrarian Reforms Act, 1976 — Section 3(a), 4A

Jammu and Kashmir Evacuees (Administration of Property) Act, 2006 — Section 6, 7, 8

Citation : AIR 2009 J&K 1879 : (2009) 1 JKJ 173

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : G.J.Balla, G.A.Lone, Advocates appearing for the Parties

Judgement

1. This petition under article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu & Kashmir has been filed by Haji

Abdul Khaliq Dar and 22 others.

2. Custodian, Evacuee Property Kashmir, Srinagar has vide notification dated 10.9.2002 issued under No. CEPS/JS/2002 17773 dated

17.9.2002 read with Corrigendum No. CEPKJS/2002/229396 dated 29.10.2002 notified land measuring 161 kanals and 9 marlas comprising

khewat No. 143 located at Tengpora, Batamaloo, Srinagar as Evacuee Property under the provisions of Jammu & Kashmir State Evacuees

(Administration of Property) Act, 2006 (for short the Act).

3. By subsequent notifications No. CEPsLtG/2002/352124 dated 3.3.2003, CEPsLtG/2002/353537 dated 4.3.2003, CEPsLtG/2002/361214

dated 8.3.2003, CEPsLtG/2002/361821 dated 8.3.2003, CEPs/LtG/2002/353234 dated 4,3.2003, CEPsLtG/2002/362224 dated 8.3.2003 and

CEPsLtG/2002/352831 dated 4.3.2003, the Custodian has demanded possession

of the land from the occupants thereof. The petitioners are in possession of the land and are aggrieved of the said notifications. They have, therefore, challenged these notifications through the medium of this writ petition.

4. The petitioners allege that sons of one Mirza Fatehullah namely Assdullah, Qudratullah, Azizullah and Allahdad residents of village Bali, Tehsil

Kotley owned and possessed land at Village Batmaloo Tengpora, Srinagar, Tehsil Srinagar. In the record of rights prepared for the area during

second settlement in the year 1966 Samvat all the said four persons were shown as owners of 44 different parcels of agricultural land measuring

201 Kanals & 4 marlas covered by khewat no. 129. The entire land except the land falling under survey Nos. 516 (4 Kanals) 522 (2 Kanals & 5

Marias) & 392 (4 kanals & 10 Marias) was in possession of the tenants as entered in the record of rights dated 1976 Samvat. The same position

was reflected in 'Jamabandi' prepared in the year 1990/91 and it continued as such with the exception that Khewat No. 129 was changed as

Khewat No. 131/134. Out of these Assadullah died leaving behind two sons namely Faqirullah and Naseebullah, Faqirullah died issueless while as

Naseebullah left 4 sons namely Mohd. Sadiq, Mohd. Iqbal, Mohd. Razak and Mohammad Aslam. Qudratullah had one son namely Mohd. Latief

who died issueless. Azizullah too had four sons namely Niyaz Mohd. Khan, Ghularnullah Khan, Hamidullah Khan and Lal Khan while as Allah

Dad left only one son namely Gh. Hussain Khan. The petitioners state that two sons of Naseebullah namely Mohd. Razak and Mohd. Aslam

reside permanently at BaghiMehtab, Srinagar while as Gh. Hussain Khan S/o Allah Dad resides at Shaheed Gunj, Srinagar. A major portion of the

property belonging to Assadullah, Quduratullah, Azizullah and Allah Dad was sold/ gifted away by Gh. Hussain Khan, Mohd. Razak and Mohd.

Aslam to the predecessors of the petitioners. A part of it has been gifted away to the petitioners also. The petitioners have given the details of the

land alienated in favour of their predecessorininterest in their favour by way of sale deed/gift deed in para 4 to 20 of their petition. They state that

after the sale deed and gift deeds were executed and duly registered, the petitioners name was mutated in the revenue record as owners of the

land. The petitioners have further stated that though Assadullah, Quduratullah,

Azizullah and Allah Dad have been shown in the revenue records as resident of Kotley, an area which now falls within the PAK occupied Kashmir, they actually lived in Kashmir and did not left this place in the year 1947. Their decendants also resided in Srinagar and the fact that they have alienated land in favour of the petitioners by way of sale deeds and gift deeds itself shows that they were residing in Srinagar. They have further stated that Gh. Hussain Khan S/o Allah Dad Khan resides at Shaheed Gunj next to the office of Custodian Srinagar while as Mohd. Razak and Mohd. Aslam sons of Naseebullah reside in BaghiMehtab area where they have some land in their ownership and possession.

The petitioners have pleaded as under:

....The residential house belonging to him is fortunately located next to the office complex of Custodian Evacuee Property, Kashmir. The said Ghulam Hassan has executed a sale deed of part of his land measuring 22 kanals 7 marlas under Khewat No. 131 comprised of survey Nos. 527 (3 Kanals 14 marlas), 528 (1 Kanal 1 marla), 529 (1 kanals 18 marlas), 530 (12 marlas), 528 (2 Kanal 4 marlas), 533 (2 Kanal 13 marlas), 539 (2 kanal 5 marlas), 540 (1 kanal 7 marlas), 541 (1 kanal 4 marlas) situa ted at village Batamaloo (Tengpora) Tehsil Khas together with easementary and other rights, in favour of Haji Gh. Rasool Dar S/o Samad Dar, Mohammad Dar S/o Sattar Date and Gaffar Dar residents of Srinagar, predecessors in interest of petitioners 14 to 23, by virtue of sale deed executed by him on 21st July, 1958 and registered by Sub Registrar, Srinagar on the same day. Certified copy of the sale deed is marked as AnnexureC. Mohammad Aslam and Mohammad Razak (alias Ab. Razak) sons of Naseebullah are presently residing at Baghi Mehtab in their ancestral houses and despite being shown as residents of Kotley (Pak occupied Kashmir) continue to actually reside and look after their property in Srinagar. This fact is testified by placing on record copies of electoral rolls of Baghi Mehtab, copy of State subject certificates, copy of certificate being an agriculturist, receipts of charges of electric connections supplying electric energy to their residential houses and other documents. The said documents are collectively marked as AnnexureD.

Both the brothers have gifted their property in accordance with the tenants of Muslim Law in favour of Khaliq Dar S/o Samad Dar to the extent of

land measuring 3 kanals 10 marls covered by survey No. 508Min(2 Kanal 5 marlas) and survey No. 5091 (1 Kanal 5 marlas) situated at

Batamaloo (Tengpora). On the basis of gift made in accordance with Muslim Law, the mutation has been recorded in favour of done on

1.11.1994 being mutation No. 3813. The done has accepted the gift and is in possession of the property as owner thereof. A copy of the mutation

is marked as AnnexureE. Mirza Aslam and Ab. Razak also created further gift in favour of the aforementioned done regarding 1 kanal 17 marlas

of land covered by survey No. 508 (1 kanal 2 marlas) and survey No. 511 (15 marlas). The gift is reflected in mutation No. 3982 attested on 1st

November 1994. The copy of mutation is marked as AnnexureF).

That the donors, namely, Mirza Aslam and ab. Razak have also gifted 8 kanal of land from survey No. 508 and one kanal of land from survey No.

509 in favour of done Ab. Khaliq Dar for love and affection and for services rendered by him. The part of the land was in the year 2000 BK in

possession of tenants Mohammad, Ahad and Gaffar, Razak and Ramzan sons of Sidiq. The tenants had, however, relinquished their possession in

favour of owners sometime in 1959.

That Mohammad Aslam Khan and Ab. Razak sons of Naseebullah have also gifted further area of 2 kanals 6 marlas of land covered by survey

No. 520 in the year 1998 in favour of Ab. Khaliq Dar. The gift is duly reflected in mutation No. 5938 attested on 6.4.1998 since the donors had

deep live and affection for the done who had rendered them dedicated service though out their lives and continue to do so even now, the donors

gifted further area of 2 kanals 6 marlas of land in his favour covered by survey Nos. 520Min (14 marlas), 510Min (1 kanals 17 marlas). The gift is

duly reflected in mutation No, 6105 attested by Tehsildar Srinagar on 6.4.1998. Copy of the said mutations is marked as AnnexureG and

AnnexureG1.

That the done petitioner No. 1 after acquiring ownership and possession of the gifted properties mentioned above is in possession as absolute

owner thereof and continues to be reflected so in the revenue record. That Mohammad Aslam and ab. Razak continue to reside in Srinagar even

after partition in the year 1947 which is further testified by the fact that the Mohammad Aslam has executed a sale deed in favour of Ali

Mohammad Bangroo and others with regard to 1 kanal and 7 marlas of land from survey No. 524Min situated at Batamaloo (Tengpora). The sale

deed is registered by Sub Registrar, Srinagar under No. 362 on 28.4.1988. The sale deed and the transfer of property by him in favour of Ali

Mohammad Bangroo and other is fully reflected in mutation No. 3968 attested on 25th May, 1988 copy of the mutation is marked as AnnexureH.

That predecessors in interest of petitioner No. 1 were the tenants of land on behalf of owners namely Assadullah and Qudratullah in respect of

survey Nos. 536 (3 kanals 10 marlas), 544 (2 kanals 12 marlas), 524 (2 kanals 4 marlas) and 510(1 kanal 14 marlas) right from second

settlement held in the year 1976 BK. To explain the position in this regard, it is submitted that the father's father of petitioner No. 1 was known as

Samad Dar (alias Khan). The tenancy in favour of Samad Dar and thereafter in favour of his son Ahmad Dar (alias Khan) is duly recorded in the

Record of Rights prepared in the year 1976 BK. On their death, the petitioner no. 1 acquired tenancy rights over the land covered by aforesaid

survey nos. Khasra Girdawari prepared in 2000 BK also reflects tenancy of petitioner No. 1 and his predecessors in interest. Copy of Khasra

Girdawari is marked as AnnexureI. That the land measuring 1 kanald 12 marlas under survey No. 538 was in the Record of Rights of 1976 BK

shown in possession of tenants as reflected in the record of 2000 BK. The tenancy was changed and Sona and Mohammad Sons of Gaffar Khan

became its tenants paying half share of the produce without gross to the owners. Immediately thereafter tenancy was created by the owners in

favour of Ahmad Dar, father of petitioner No. 1. On his death petitioner No. 1 continued to be in possession of the and as tenant and was so on

the crucial date of Kharief 1971. The land was mutated in his favour under Section 4 and 8 of the Jammu & Kashmir Agrarian Reforms Act vide

mutation Nos. 4330 and 4331. Copies of these mutations are marked as AnnexureJ& K. That the land measuring 3 kanals 7 marlas covered by

survey No. 513 was also in possession of tenants from the date of settlement. The tenancy changed hands in 2000BK. It was in possession of

Samad S/o Subhan on payment of half the produce as rent without gross. Samad Dar gave up tenancy and on the crucial date in 1.971, the land

was held by petitioner No. 1 as tenant and the same was accordingly mutated by virtue of mutation No. 4330 and 4331. The land measuring 13

marlas covered by survey No. 546Min has also been in possession of tenants right from the date of settlement. In 2000 BK it was under the tenancy of Ahmad and others. The tenancy changed hands and in the year 2000 BK, Ahmad Dar, grand father of petitioner No. 2, was the tenant and after his death the land fell to the tenancy of father of petitioner No. 2. However, in 1971 and immediately thereafter it came into the possession of petitioner No. 2 in whose favour the land was mutated under Section 4 and 8 recorded under the provisions of Agrarian Reforms act conferring absolute right ownership and title in his favour. That land measuring 1 kanal 81/2 marlas covered by survey No. 548 and land measuring 1 kanal 8 marlas from survey No. 510Min was also in possession of tenants as reflected in the records of Rights of 1976 BK and the Girdawari of 2000 BK. The tenancy changed hands and in the year 1971 it was in possession of Gulla Dar S/o Samad Dar R/o Banapora Batamaloo, petitioner No. 3 herein. The land was accordingly mutated in his favour in terms of provisions of Agrarian Reforms act vide mutation Nos. 3925 and 4532. Copies of mutations are marked as AnnexureL and LI. Petitioner Gulla Dar thus became owner of the land is holding the same in possession to the exclusion of all and sundry. That land measuring 3 kanal 9 marlas covered by survey No. 514 and land measuring 1 kanal 16 marlas covered by survey No. 547min was also in possession of tenants from the date of second settlement. In the year 2000 BK, the land is shown in possession of Ahmad, Khazir and Mohammad sons of Samad Dar. After the death of Khazir, the area of land fell to the tenancy of his son Ahad Dar, petitioner No. 4. It was mutated in his name under the provisions of Agrarian Reforms Act vide mutation Nos. 4330 and 4331 supra. Land measuring 4 kanal 8 marlas was also under the tenancy of Rasool Dar and others. Out of this 1 kanal was in possession of Mohammad Dar S/o Samad Dar. The tenancy is recorded in the revenue record including Khasra Girdawari of 2000 BK. The remaining part of said survey no. has been acquired by Public Works Department for the construction of Srinagar bypass road. On the death of Mohammad, the land has been acquired by succession by Razak, petitioner No. 5. The land has been mutated under the provisions of Agrarian Reforms Act in favour of petitioner No.5 vide mutation Nos.

2490 and 2568. The petitioner Razak has thus acquired ownership rights over the land in question. Mutation is marked as M.

5. In this background the petitioners are aggrieved of the action of the Custodian Evacuee Property, Kashmir notifying the land falling under

Khewat No. 143 situated at Tengpora, Batmaloo, Srinagar. As noticed above the petitioners allege that this land was earlier in possession of the

petitioners as tenants and with the passage of time they have acquired ownership of the same as major portion of the same has been alienated in

their favour by way of sale deed/gift deeds by the owners of the land. The Custodian has acted in violation of the provisions of land while declaring

the said property as evacuee property. Since the owners of the land were very much present in the Srinagar there was no occasion for the

Custodian to declare the land as Evacuee land. Besides expressing their grievance over the action taken by the Custodian in notifying the land as

Evacuee Property and demanding possession of the land, the petitioner have also challenged the vires of Section 6 of the Act and have stated that

Section 6 and Section 7 of the Act have now become redundant with the passage of time. They are also aggrieved of the provisions of Section

3(a) and Section 4(A) of the Jammu & Kashmir Agrarian Reforms Act, 1976 (for short the Agrarian Act) as according to the petitioners it makes

a hostile discrimination between the tenant of the landlord who resides at Srinagar and the tenant A me landlord who has migrated to Pak

Occupied Kashmir in view of the disturbance during partition. On this basis the petitioners state that the provisions are ultravires to the Constitution

and, therefore, pray that the same be declared as unconstitutional. Besides throwing challenge to the provisions of the Act as well as of the

Agrarian Act, the petitioners have also objected to the conduct of the Custodian in the present matter. The petitioners state that the notification

issued on 17.9.2002 have been issued without proper and due application of mind as wrong provision has been quoted in it and that the

description of the land given in the notices is not correct due to which a corrigendum had to be issued by the Custodian on 29.10.2002, The

petitioners further state that while declaring the land as Evacuee land the Custodian has not conducted any enquiry and has not made a survey of

the land and has not issued any notice to the occupants of the land. They state that the Custodian under this section has unbridled and unrestricted

powers to declare any property as Evacuee Property.

In the circumstances petitioners have prayed for the following reliefs:

A/A writ, order or direction in the nature of Mandamus declaring Section 3(a) and Section 4(A) of the Jammu & Kashmir Agrarian Reforms Act,

1976 and section 6 of Evacuees (Administration of Property) Act as ultravires to the constitution to be removed from the statute book,

B/A writ, order or direction in the nature of certiorari for quashing notification bearing endorsement No. CEPSJS/2002/1877173 dated 19.7.2002

and the surrender notices bearing endorsement Nos. CEPsLtG/2002/352124 dated 3.3.2003, CEPsLtG/2002/352537 dated 4.3.2002,

CEPSLtG/2002/361214 dated 8.3.2003. CEPsLtG/2002/361821 dated 8.3.2003, CEPsLtG/2002/353234 dated 4.3.2002,

CEPS/LtG/2002/362224 dated 8.3.2003 and CEPsLtG/2002/352831 dated 4.3.2003 be also quashed. C/A writ, order or direction in the nature

of Mandamus commanding the respondents not to interfere with the possession and ownership of petitioners over the subject matter of writ

petition and refrain from giving effect to aforesaid notification and surrender notices.

6. The respondents have resisted this petition and in the reply submitted by respondents 3, 4, & 5 they have objected to the very maintainability of

the present petition. They have stated that the pleas raised in the petition have no factual or legal basis at all. The respondents have stated that on

the application dated 25.7.2002 filed by one Gh. Mohd. Bhat S/o Khalil Bhat R/o Tengpora, Batmaloo in respect of evacuee property left by the

evacuees namely Faqirullah Khan & Ors. in the Estate Tengpora, an enquiry was conducted by respondent no. 4 from which it transpired that

evacuees Faqirullah Khan S/o Assadullah Khan, Mohd. Sadiq, Mohd. Iqbal and Mohd. Ishaq sons of Naseebullah Khan and Niyaz Mohd,

Ghulamullah, Hamidullah Khan and Lal Khan sons of Azizullah Khan own landed property comprising of Khewat No. 143 in Estate Tengpora,

Batmaloo to the extent of 160 Kanalas and 19 marlas. Respondent No. 4 accordingly notified the same as Evacuee Property under Sub Section

(1) of Section 6 of the Jammu & Kashmir Evacuees (Administration of Property) Act, 2006 vide notification dated 10.9.2002, issued on

17.9.2002 read with corrigendum issued on 29.10.2002. The Evacuee Property

Department proceeded further in the matter to take possession of the notified land as such surrender possession notices, impugned in the writ petition, were issued by the respondent no. 5 as per SubSection (2) of Section 6 of the Act. The respondents have further stated that the copies of the revenue record appended with the writ petition shows that the land is in ownership of said Evacuees, resident of Kotley now under the operational control of Pakistan and the same is shown in possession of certain persons of village Batmaloo on behalf of the said Evacuees in the capacity of nonoccupancy Tenancy. The respondents state that nonoccupancy tenancy rights are not heritable. Even an occupancy tenant comes to an end in terms of Section 43 of the Tenancy Act if a tenant fails for more than one year without sufficient cause to cultivate his tenancy and fails to arrange for payment of rent thereof if it falls due. The respondents state that the land is not under cultivation for the last several decades as the land in question has been urbanized and the area is mostly covered by residential houses and commercial complexes.

7. Faquirullah and others mentioned in the notification, to whom the land belongs are according to the respondents, evacuees within the definition of 'Evacuee' as such their property has vested in the Custodian under section 5 of the Act, The petitioners are unauthorised occupants of the land in question under clause(g) of Section 2 of the Act as such respondents are within their power and jurisdiction vested under the Act to demand surrender of possession of the land in question vide the notices impugned in the present petition. The respondents have further stated that under Section 3 (a) of the Agrarian Act the provisions of the Agrarian Reforms Act, 1976 have not been made applicable to the Evacuee land and under section 4 (A) of the said Act mutations attested in favour of the petitioners are void abinito as such neither the petitioners can claim any right nor the said mutations can confer any right or interest or title on the petitioners in respect of the notified land in question. The Big Landed Estates Abolition Act also safeguards and protects the rights in evacuee property. The Evacuees form a distinct class from other persons based on an intelligible differentia therefore, there is no violation of Article 14 as is alleged by the petitioners.

8. The respondents have in their supplementary affidavit stated that after

preliminary enquiry it revealed that the Evacuee land in question belongs to Faqirullah khan & Ors. (Evacuees) in a state Tengpora Batamallo, it was notified as such and was renotified in the year 2002, vide notifications impugned in the writ petition and this fact stands already recorded in the records of the Evacuee Property Department, Kashmir. They have placed on file copy of the Form No. 9. Register prepared and maintained under Rule 29 of the Rules framed under the Evacuee (Administration of Property) Act, 2006 in respect of the land in question. They state that notifications issued earlier in respect of the land could not be traced so far.

The respondents have further stated that the said evacuees also owned landed property in Villages Baghi Mehtab and Shanker Pora Tehsil Chadoora, Raithan, Kanir Budgam and Pulwama District. The evacuee property of said evacuees Faqirullah and others was allotted on 9.3.2007 to Abdul Razak (respondent no. 17) and Mirza Aslam Khan (Predecessor in interest of respondents 11 to 16) in terms of Govt. Order No. A653/50 dated 16.5.1950 being immediate heirs and cosharers of the said evacuee. The said allotment in respect of Shanker Pora land was cancelled by the then Custodian vide order dated 28.6.1966. The said allottees feeling aggrieved filed a revision petition before the learned Custodian General who remanded the case to the Custodian for fresh enquiry and orders according to law. The Custodian vide his Order dated 29.11.1971 ordered in respect of Shankerpora property to be managed and administered directly by the Evacuee Property Department and ordered enquiry into other landed property of the Evacuee in Village Tengpora, Batmaloo, Tehsil Srinagar and in villages falling in Tehsil Budgam and Pulwama. The tenants feeling aggrieved of the said order preferred a revision before the then Custodian General who vide his order dated 29.8.1993 upheld the order of the Custodian dated 29.11.1971. The respondents further state that on 10.5.1982 said Mirza Aslam Khan filed an application that Evacuee land belonging to his brothers and Uncle situated at Shankerpora, Baghi Mehtab, Raithan and Tengpora was being damaged by the tenants by downing the same into 'Abi' and 'Khushki'. It was further alleged that they had also raised unauthorised constructions on it. The Custodian conducted an enquiry in the matter and disposed of the application vide his order dated 30.5.1985 holding that the tenants be

dispossessed and the property be managed by the department itself or through the applicant (Mirza Aslam Khan) and his brother (Mirza Mohd.

Raza Khan). They sum that the Government has vide Govt. order No. Rev(EP) 207 of 2005 dated 11.8.2005 in respect of Evacuee Property

Land in question belonging to Faquirullah and others situated at Batmaloo Srinagar among other query ordered respondent³ to identify the

officers/officials of his organisation involved in the case and to take steps to get the stay orders vacated and mutations cancelled. So the

Government accorded sanction to the reference of the case to State Crime Branch for a detailed investigation and to determine criminal liability

against serving as well as retired delinquent officials/officers.

9. Respondent no. 6 has filed his separate objections in which it is stated that the writ petition raises disputed questions/complicated questions of

fact which cannot be looked into by the Court in its extraordinary writ jurisdiction. They have further stated that so far as building permission

referred to in para 21 of the petition is concerned, same was issued under section 10 of the Town Planning Act after considering 'No Objection

Certificates' issued by the concerned authorities in respect of the land comprising survey No. 508/min which permission is subject to specific

condition that the same does not confer any title or ownership right upon the concerned.

Heard. I have considered the matter.

10. Mr. G.A. Lone, Id. Counsel for the petitioners has argued the matter at length. Elaborating the pleas raised in the petition the Id. Counsel

contends that the notifications impugned in the petitions have been issued on extraneous consideration and without proper application of mind. Mr.

Lone would argue that Section 6 gives very vast powers to the Custodian and that not only this section but other provisions of the Act including

Section 7 have become redundant on the same ground as has been given by the Apex Court in respect of section 8 of the Act in Ghulam Qadir v.

Special Tribunal & Others 2002(1) SCC 33. He has also thrown challenge to the Constitutional validity of Section 3 (a) and Section 4 (A) of the

Agrarian Act. From the averments in the petition and the submission of learned counsel for the petitioners the following issues arise for

consideration.

A. Section 6 and Section 7 of the Act have become redundant in view of the Apex Court judgment in Ghulam Qadir's case (*supra*).

B. Provisions of Section 3 (a) and Section 4(A) of Agrarian Reforms Act are ultravires to the Constitution.

C. The notification impugned has been issued without a notice to the petitioners/ owners of the land and without conducting any enquiry in the

matter. Section 6 of the Act gives vast and unbridled powers to the Custodian to declare any property as 'Evacuee Property' without any enquiry

into the matter as such the section offends basic structure of the Constitution of India

D. The impugned notification dated 10.9.2002 has been issued on extraneous considerations. The notice, therefore, is nonest in law.

E. Notice of demand of possession impugned in the present petition has been issued in contravention to the provisions of law.

11. To appreciate the contentions of Mr. Lone it may be appropriate to consider the various provisions of the Act. At the time of partition of the

country, acute law and order problem emerged in the State of Jammu and Kashmir. Most of the families, particularly families from Jammu migrated

from one place of the State to another for safety leaving behind their land and other property. Similarly a large number of displaced persons from

newly created Pakistan came to and settled in various parts of the country including the State of Jammu and Kashmir. This situation gave rise to the

problem of protection and preservation of the property of the people who had migrated from the State to Pakistan or to the other part of Kashmir

which came under the administrative control of Pakistan. Since it was the duty of the State to protect the property of such people, it came out with

an Act for preservation, management and the administration of such property. The Act was called as The Jammu & Kashmir State Evacuees

(Administration of Property) Act, Svt.2005 (X of 2005). This Act was, however, repealed in the Bikrami year of 2006 by means of the Jammu &

Kashmir Evacuees (Administration of Property) Act, Svt. 2006 (Act No. VI of 2006).

12. The Act, (Act No. VI of 2006) as per its preamble is intended to provide for the administration of Evacuee's Property in the State of Jammu

Kashmir. The Act was promulgated by Yuvaraj Shri Karan Singh Ji, under Section 5 of the Jammu & Kashmir Constitution Act, 1996 and it

extended to the whole of the Jammu & Kashmir State. It came into force w.e.f. 21st Bhadon 2006. Section 2 of the Act deals with the definitions

and under clause (c) of the section the expression 'evacuee' has been defined as meaning any person

(i) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances,

leaves or has, before or after the 1st day of March, 1947, left any place in the State for any place outside the territories now forming part of India,

or

(ii) who is resident in any place now forming part of Pakistan or in any such part of the territory of the Jammu and Kashmir State as is under the

operational control of the Pakistan armed forces, and who for that reason is unable to occupy, supervise or manage in person the property in the

State or whose property in the State has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or

managed by any unauthorised person, or

(iii) who has, after the 14th day of August, 1947, acquired by way of allotment or lease or by means of unlawful occupation or other illegal means,

any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in

Pakistan or any such part of the territories of the Jammu and Kashmir State as is under the operational control of the Pakistan Armed Forces,

Clause (d) as substituted by Act XXIII of 2007 defines 'Evacuee Property' as meaning

Any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity), and

includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer unless

such transfer has been confirmed by the Custodian but does not include

(i) any ornaments, arty wearing apparel, cooking vessels or other household effects in the immediate physical possession of an evacuee,

(ii) any property belonging to a Joint Stock Company, the registered office of which was situated before the 15th day of August, 1947, in any

place now forming part of Pakistan or any such part of the territories of the Jammu and Kashmir State as is under the operational control of the

Pakistan Armed Forces and continues to be so situated after the said date.

13. Section 3A as inserted by Act XXIII of 2007, which was substituted by Act VII of 2010 and section 4 as substituted by Act XXIII of 2007

of the Act provide for the hierarchy in the machinery charged with the enforcement of the Act. The hierarchy consists of the Custodian General,

Deputy Custodian General, Custodians, Additional, Dy. and Assistant Custodians. The sections also provide for their appointment and their rights,

powers, duties and liabilities.

14. Section 5 provides for the vesting of the evacuee property in the Custodian. Sub Section (1) and (2) substituted by Act XXIII of 2007 read as

'Vesting of evacuee property in the Custodian;

(1) Subject to the provisions of this Act, all evacuee property situate in the State shall be deemed to have vested in the Custodian,

(a) in the case of the property of an evacuee as defined in subclause (i) of clause (c) of Section 2, from the date on which he leaves or left any

place in the State for any place outside the territories now forming part of India;

(b) in the case of the property of an evacuee as defined in subclause (ii) of Cl. (c) of Section 2, from the 15th day of August, 1947, and

(c) in the case of any other property, from the date it has been registered as evacuee property.

(2) Where immediately before the commencement of this Act, any property in the State had vested as evacuee property in any person exercising

the powers of a Custodian under any corresponding law in force in the State immediately before such commencement, the property shall, on the

commencement this Act, be deemed to be evacuee property declared as such within the meaning of this Act and shall be deemed to have vested in

the Custodian appointed under this Act, and shall continue to so vest.

Sub Section 3 of the Section reads

(3) Where any property belonging to a joint Stock company had vested in any person exercising the powers of a Custodian immediately before the

commencement of this Act, then, nothing contained in clause (d) of Section 2 shall affect the operation of subsec.(2), but the Government may by

notification in the Government Gazette, direct that the Custodian shall be divested of any such property, in such manner and after such period, as

may be specified in the notification.'

15. Section 6 is one of the most important provisions in the Act dealing with issuance of the notification of the Evacuee property. It provides:

'Notification of evacuee property: (1) The Custodian may, from time to time, notify, either by publication in the Jammu and Kashmir Government

Gazette or in such other manner as may be prescribed evacuee properties which have vested in him under this Act. (2) Where after the vesting of

any evacuee property in the Custodian any person is in possession of any such property he shall be deemed to be holding it on behalf of the

Custodian and shall, on demand, surrender possession of it to the Custodian or any person duly authorised by him in this behalf.'

16. Section 7 gives powers to the Custodian to take possession of the evacuee property vested in him and states as under:

'Power of Custodian to take possession of evacuee property vested in him : If any person in possession of an evacuee property refuses or fails on

demand to surrender possession thereof to the Custodian or, to any person duly authorised by him in this behalf, the Custodian may use such force

as is necessary for taking possession of such property and may, for this purpose, after giving reasonable warning and facility to any woman not

appearing in public to withdraw, remove or break open any lock, bolt or any door or do any other act necessary for the said purpose.

17. Section 8 provides for the claims by interested persons. It reads as: 'Claim by interested persons; (1) Any person claiming any right to, or

interest in, any property, which has been notified under Section 6 as evacuee property, or in respect of which a demand requiring surrender of

possession has been made by the Custodian, may prefer a claim to the Custodian on the ground that,

(a) the property is not evacuee property; or

(b) his interest in the property has not been affected by the provisions of this Act.

2. Any claim under subsec. (1) Shall be preferred by an application made within thirty days from the date on which the notification was issued or

the demand requiring surrender of possession was made by the Custodian; Provided that the Custodian may, for sufficient reasons to be recorded,

entertain the application even if it is made after the expiry of the aforesaid period.

3. On receiving an application under subsection (2), the Custodian shall hold a summary inquiry in the prescribed manner, take such evidence as

may be produced and pass an order, stating the reasons therefor, either rejecting the application or allowing it wholly or in part.

18. Section 9 empowers the Custodian to take measures for the purpose of administering, imposing, preserving and managing any evacuee

property and generally for the purpose of enabling him satisfactorily to discharge the duties imposed on him by or under the Act.

19. Section 10 enables the Custodian to grant vary or cancel leases or allotment of evacuee property.

20. Section 10A inserted by Act III of 1977 provides for revision of Rent.

21. Sections 11 to 13 provide for allied matters like to Custodian to be valid discharge, expenditure by Custodian how to be recouped and

maintenance of accounts by Custodian.

22. Section 14 provides for the restoration of property to an evacuee or any person claiming to be the heir of the evacuee.

23. Section 14A inserted by Act XIV of 1962 provides for the conditions for restoration where the property has been allotted to displaced

person.

24. Sections 15 and 16 provide for certain consequences which are the result of the vesting of the property in the Custodian.

25. Sections 17 to 24 make provisions for the penalties and procedure.

26. Sections 25 to 39 make provisions for miscellaneous matters like restriction on transfer by evacuees, Custodians right to take possession not

affected by death of evacuee and powers of the Custodian while holding enquiry under the Act. Section 30 & 30A deal with appeal, review,

revision and section 39 provides for the power of the Government to make rules. Section 40 repeals the previous Act. Section 41 reserves the

power of the Government to apply this Act to other persons not already covered by the Act.

27. The scheme and object of the Act was examined by a Division Bench of this Court in Mohd Ramzan Bhat v. Custodian General AIR 1983

J&K 55, and it was observed that the object of the Act is to make provision for the administration of the property including any right, title or

interest held by persons who have migrated to the territory now included in

Pakistan or to the territory of the State occupied by Pakistan. In order to advance the object of the Act a legislative scheme has been formulated which contemplates that such property shall be deemed to have vested in the Custodian from the date the evacuee has left the State.

28. From the provisions of the Act, it would appear that the Act applies to three classes of evacuees;

First: a) Any person who on account of the setting up of the Dominions of India and Pakistan has on 1st day of March, 1947 left, the State and went to a place which falls outside the territory of India.

b) Any person who, on account of Civil disturbance or the fear of such disturbances, leaves the state and goes to a place which falls outside the territory of India.

Second: Any person residing in Pakistan or that part of Kashmir which is under the operational control of Pakistan due to which he is unable to

occupy, supervise or manage in person his property in the State. This also includes a person whose property in the State has ceased to be

occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorised person.

Third: Any person who has acquired right or interest in any evacuee property after 14th August, 1947.

29. Under Section 5 of the Act, all evacuee property situate in the State shall be deemed to have vested in the Custodian. Under the section

vesting is automatic and it does not depend upon the notification of such property by the Custodian.

30. Once notification under section 6 of the Act is issued and the Custodian proceeds in the matter under section 6 and 7 of the Act, the Act gives

persons affected right to claim the possession of the property involved or seek its restoration. Section 8 gives right to the interested person to

prefer a claim to the Custodian in respect of the evacuee property on the ground that the property is not evacuee property or his interest in the

property has not been affected by the provisions of the Act. Similarly Section 14 enables an evacuee or his heir to apply for restoration of the

property.

31. The issue seeking relief under section 8 came under consideration by the Apex Court in Ghulam Qadir v. Special Tribunal & Others 2002 (1)

SCC. It was felt that the section was being misused by the parties as such the Court found that the section has become redundant now. Feeling

concerned over the abuse of Section 8 of the Act, the Court thought it necessary that resort to the section in future should be put to an end by

declaring that Sections 8 and 14 have served the purpose for which they had been provided in the Act and since they have outlived their utility, the

authorities should not in future entertain any application made under Section 8 for a claim being made to any evacuee property. The Court

observed:

Learned counsel appearing for the respondents have submitted, which we have noticed with distress, that vested interests and unscrupulous

litigants are usurping the evacuee properties in the State by filing frivolous and belated applications preferring state claims under Section 8 of the

Act, which are entertained by the authorities without reference to any period of limitation. We hold that there is no justification for entertaining any

application from a person in the State of Jammu & Kashmir under Section 8 of the Act after the lapse of 12 years from the date when the property

was declared as evacuee property and vested in the Custodian. We further hold that Section 8 of the Act has outlived its utility and is presently a

redundant piece of legislation, still existing on the statutebook. The authorities under the Act are directed not to entertain any application under

Section 8 of the Act hereafter as it cannot be conceived that a person whose property was allegedly wrongly declared or vested in the Custodian

would keep silent for a period spread over five decades. Any such claim preferred hereafter should be deemed to be fictitious, concocted and

malafide intended to destroy and eliminate the evacuee property to the detriment of the evacuee who may ultimately be restored such property if

and when he returns to the State under a valid law in existence, enacted for the purposes. We further hold that the applications under Section 8

which were entertained by the Custodian after the period of 12 years and are still pending shall be liable to be dismissed on the ground of

limitation. We may, however, clarify that any right or claim preferred and settled under Sections, though on application filed after 12 years, shall not

be reopened on the basis of this judgment. This judgment shall only be applicable to the pending claims of the claimants and not finally adjudicated

by the authorities under the Act.

32. Relying on this Authority Mr. Lone contends that Section 8 has outlived its utility and on the same analogy Sections 6 & 7 of the Act too have

outlived utility as such these section have become redundant now.

33. In order to examine the contentions of Mr. Lone regarding the application of the judgment on Section 6 and 7 of the Act, it may be noticed

here that this Court in the year 1978 dealt with a similar issue in Mahmood Ahmed's case S.A NO, 2 of 1978 decided on 21.7.1988 where this

Court too found that section 8 has outlived its utility. The State feeling aggrieved with the judgment filed SLP against it before the Supreme Court

where the Court allowed the appeal and set aside the judgment of this Court. The Court in the case reported as State of Jammu and Kashmir v.

Mahmood Ahmed and ors, AIR 1989 SC 1450, agreed with the arguments of the Advocate General that on the ground that Section 8 is closely

interlinked with Section 6 of the Act which deals with the powers of a Custodian to notify a property as evacuee property under the Act and in as

much as Section 6 has currency even now because notifications could still be made under the Section in appropriate cases to notify a property as

evacuee property, Section 8 also will have to be retained and made use of by genuinely affected parties. The Court further found that the High

Court was wrong in taking the view that Section 8 has outlived its utility. The Court observed:

6. Mr. Altaf Mohmmmed, learned AdvocateGeneral appearing for the appellants stated that the High Court went too far in making the above

pronouncement and therefore the observations made and the directions given by the High Court as extracted above should be set aside. The

learned counsel stated that when the High Court saw no grounds to interfere with the concurrent findings on questions of fact rendered by the

Custodian and the Custodian General, there was no need or necessity for the High Court to have gone into the question whether S.8 has outlived

its utility and whether it continues to have relevance after more than 40 years have passed by since the Act was enacted. Another argument was

that S.8 is closely interlinked with S.6 of the Act which deals with the powers of a Custodian to notify a property as evacuee property under the

Act and in as much as S.6 has currency even now because notifications could still

be made under the Section in appropriate cases to notify a property as evacuee property, S.8 also will have to be on the Statute Book. It was pointed out that still a portion of the State is in the hands of an alien government and hence the possibility of a property becoming an evacuee property even now is very much there. The learned AdvocateGeneral therefore stated that as long as S.6 has relevancy and operative force and notifications could still be made under that Section.

S.8 also will have to be retained and made use of by genuinely affected parties and as such the High Court was wrong in taking the view that S.8

has outlived its utility and the State should delete it by appropriate legislation.

7. We find the contentions of the learned AdvocateGeneral to be well founded. Mr. Thakur, learned counsel for the respondents did not

controvert the contentions of the AdvocateGeneral and in fact he placed reliance on Sec. 8 and sought to contend that the Custodian and

Custodian General ought to have considered the first respondent's application under S.8 as one made with in time and sustained his claim to the property'.

34. In view of this judgment and the law laid down I do not find any force in the contentions of Mr. Lone.

35. The Judgment in Mahmood Ahmad's case (supra) has not been referred to in Ghulam Qadir's case. Both the Benches are of the same strength.

Since Mahmood Ahmad's has not and could not have been overruled by a coordinate Bench in Ghulam Qadir's case, the former judgment still

holds the field. But even if it is held otherwise, as suggested by Mr. Lone, the judgment in Ghulam Qadir's case can be of no help to the petitioners,

as the pleas taken in the present case are entirely different from the one discussed in that case.

36. The argument of Lone is based on the assumption that the process of migration has ended now as the Act related to and governed cases,

arising out of the developments which took place on the eve of the partition of the country in the year 1947 and are not relevant now but the

learned counsel loses sight of the fact that under the definition of 'evacuee' under section 2 (c), the term applies also to a person who leaves the

State even after 1947, on account of civil disturbances or the fear of such disturbances. Thus the provision is continuing one, and if any person

leaves the State on account of civil disturbance or fear of such disturbance, for any place outside the territories now forming part of India, even

now, he will fall within the definition of evacuee and property left by him will automatically come under the definition of 'evacuee property', the

same will assume in the authorities under the Act and they will get jurisdiction to manage it.

37. A person becomes an evacuee not only when he has left the State on 1st of March, 1947 due to the turmoil during partition but even if he

leaves the State after such date on account of civil disturbances or fear of such disturbances. The conditions required to treat a person as Evacuee

in the later case are:

a) He must leave the State;

b) He must leave for any place outside the territories now forming part of India and

c) He must leave on account of civil disturbances or fear of such disturbances.

38. Once these conditions are present the person concerned will be treated as 'evacuee' and his property will become 'evacuee property'. If such a

situation takes place in a particular case, the provisions of the Act including section 6, 7 & 8 will come into play and in a such a case it cannot be

said that these provisions have become redundant hence are inapplicable to the case.

39. Mr. Lone next argues that provisions of the Sections 3 (A) and Section 4A of the Agrarian Act are ultra vires to the Constitution. Ld. Counsel

states that the Agrarian Act is a welfare legislation as it vests in the tenants of the agricultural land, who are in personal cultivation of it, proprietary

rights but this right has been denied to the tenants holding evacuee land. He further submits that the purpose behind conferring ownership rights on

the tenants is very much present in case of tenants of the evacuees as they too hold and cultivate the land in absence of their landlords but by

excluding the Evacuee land from the application of the Agrarian Act, the State has subjected such tenants to a hostile discrimination.

40. Mr. Bala, on the other hand, argues that tenants of evacuees is a class in itself and their exclusion from the benefit from the application of the

Agrarian Act has got a purpose behind it and the same will not amount to any discrimination at all. Since the evacuees are unable to contest claims

of their tenants because of their residence in the area which is under the operational control of Pakistan, the land has been protected from the operation of the Agrarian Act to take care of the interests of such evacuees.

41. On going through the scheme, object and scope of both the Acts, I find the tenants of the agrarian land form a class in itself and in view of the settled legal position no grievance can be voiced by the petitioners on the plea of discrimination.

42. In this behalf reference may be made and reliance may be placed on a Division Bench of this Case in *Tilak Raj v. Custodian* 1979 JKtR 179.

The issue before the Court was whether the Evacuees Property Act or any of its provisions makes hostile discrimination against tenants governed by ordinary law, it was held that no such discrimination is made. The Court held in para 20 as under:

This brings us to the question as to whether the Evacuee Act or any of its provisions violate Article 14 of the Constitution on the ground that the

Act makes hostile discrimination against the tenants governed by the ordinary law or by the Rent Control Act. In my opinion it does not, the reason

being that the Evacuee Act has been enacted with the object and for the purpose of preserving, managing, and administering the properties of the

evacuees who left State and were not, therefore, in a position to look after their own properties. The duty of managing and administering their

property assigned to the Custodian who holds the property as trustee on their behalf. The Act is a complete code in itself and provides machinery

for its implementation. The Act, inter alia provides for eviction of tenants to whom the property has been leased out and also lays down the

procedure for making order of restoration in favour of the real owner. In this background, the Act treats the evacuees as a class by themselves.

This classification is reasonable and is founded on an intelligible differentia which distinguishes these persons from those left out of this class. No

doubt Art. 14 forbids class legislation but it does not forbid reasonable classification for the purpose of legislation. The classification of evacuees

governed by the Evacuee Act has a rational nexus with the object sought to be achieved by the Act. On parity of reasoning tenants holding the

evacuee property under the Evacuee Act are also a class by themselves and, therefore, their case is distinguishable on rational basis from those of

the other tenants governed by the ordinary law or by the Rent Control Act. The Evacuee Act and the Rules made thereunder give necessary

guideline as to how to act in cases of leases relating to the evacuee property and also in regard to eviction of the persons in occupation of such

property. The Custodian is not given arbitrary powers in the matter. In that view of the matter, it cannot be said that the Evacuee Act makes a

hostile discrimination against the other classes of tenants governed by the ordinary law or Rent Control Act or that the Act suffers from the vice of

not affording equal protection of laws. The point is not *res integra*. A similar question once arose before the Patna High Court in *Jadunadan Yadav*

versus *R.P. Singh and anr.* reported as *A.I.R. 1958 Patna, 43*. The decision of the Court proceeded on the view that the Administration of

Evacuee Property Act did not violate Art. 14 of the Constitution. Their Lordships observed:

The argument that there is no reason why the tenancy under the Custodian should be treated on a different basis from the other tenancies in the

State of Bihar and, therefore, there was no rational basis for classification has no merit. The object and the scheme of Central Act XXXI of 1950

is mainly to provide for the administration and protection of evacuee property and the property has ultimately to be used for compensating the

refugees who had lost their property in Pakistan Act XXXI of 1950 was promulgated by Parliament in exercise of the powers conferred by items

27 and 41 of the Concurrent list. Keeping in view the object and the scheme of the Act, it is obvious that there is a rational basis for the differential

treatment of the tenancies under the Custodian, therefore, the argument that there is no rational basis for classification or that there has been a

violation of the guarantee of equal protection under Art.14 of the Constitution and hence S.12 of the Administration of Evacuee Property Act

should be held to be void must be rejected.

Standards have been fixed and principles have been laid down and it is, therefore, difficult to accept the argument that there is a violation of the

guarantee of equal protection of the laws under Art. 14. The procedure prescribed by Rule 14(4) is also reasonable. It is true that S.12 does not

prescribe the procedure to be followed by the Custodian in varying or cancelling the lease or allotment of evacuee property, but R. 14(4) states

that the Custodian shall serve upon the persons concerned a notice to show cause before any order of cancellation of a lease or variation of a lease is made.

There is also another safeguard provided by the statute against any arbitrary action taken by the Custodian. It is open to the aggrieved party to apply in revision to the Custodian under S.26 or to the Custodian General under S.27 against any arbitrary order made by the Assistant Custodian under S. 12 of the Act either varying or cancelling a lease or allotment.

For the foregoing reasons, I, therefore, find that the view taken by the learned Single Judge is correct and need not be interfered with.

On the reasoning given in the said judgment I find the Agrarian Act too cannot be held discriminatory in nature.

43. Learned Counsel for the respondents has also referred to State of Bihar v. Bihar Distillery Ltd. AIR 1997 SC1511, where the Court held as under:

The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The

Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language

employed. Indeed, any such deceptions of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment.

After all, Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be

plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose

of an enactment or its scope and application.

44. Similarly in Tar Mohammad v. Union of India AIR 1997 SC 3679, it was held:

'Firstly, we are unable to appreciate the stand taken by the appellants for the reason that there should be a specific finding in the authorities that the

appellants had tenancy granted by Mohd. Hasham Abdulla prior to August 14, 1947 in their favour and that they remained in occupation under

that title as tenants. Then only subsection (2) of Section 12 of Act stands attracted. There is no such finding recorded by the High Court in that

behalf nor any such contention was raised. Their only premise is that they were tenants and, therefore, the property was not covered under the

AEP Act as free from encumbrances. That contention, though raised in the High Court, was negated. The High Court reasoned that by operation of Section 4(1) of the AEP Act, the preexisting law stands excluded by virtue of the non obstante clause. Thereby, tenancy rights also stand extinguished by operation of the non obstante clause. Once Section 4(1) of the AEP Act stands attracted, the alleged right to tenancy also is set at naught; nor does it amount to encumbrance. In consequence, the alleged right to tenancy has no foundation for resisting taking possession of the land. Even the order passed by the Tehsildar and Assistant Custodian has not been made part of the record which was impugned in the High Court. Under these circumstances, there is no case warranting interference'.

45. Mr. Lone contends that the Custodian has not conducted any enquiry in the present matter and that the order made by him without a formal enquiry is a nullity. The learned counsel further states that since under the Act the Custodian has got vast powers, these powers being unbridled are likely to be misused by him. As such the sections vesting such powers in him must be held to be arbitrary and unconstitutional.

46. This argument of Mr. Lone too is without any substance. A reading of Section 6 of the Act alongwith section 7 of the Administration of Evacuee Property Act, 1950 (the Central Act) would show that while an enquiry is required under the Central Act, before a notification under the Section is issued no such enquiry is required under the State Act. The reason being that once a person holding property becomes an evacuee and his property becomes evacuee property under Section 2 (c) and (d) of the Act, the vesting of property in the Custodian under the Act is automatic and it does not require any enquiry in this behalf. In Mohd. Ramzan Bhat v. Custodian General AIR 1983 J&K 55 it was held by a Division Bench of this Court that:

...under section 5 the vesting of the evacuee property in the Custodian is automatic. It does not depend upon the notification of such property by the Custodian. Under Section 6 the Custodian is no doubt required to notify such property from time to time but omission on his part to notify the property does not affect the process of vesting which is automatic and even where there is no notification, the person in possession shall be deemed to hold the property on behalf of the Custodian and he would be under

an obligation to surrender the property, if so required by the Custodian...

Secondly, once the vesting of evacuee property in the Custodian takes place and the Custodian issues notification under Section 6, the affected

property has got remedy available under section 8 to make a claim about the property that the same does not fall within the definition of 'evacuee

land' or that his interest in the property is not affected. The section provides as under:8. Claim by interested persons

(1) Any person claiming any right to, or interest in, any property, which has been notified under section 6 as evacuee property, or in respect of

which a demand requiring surrender of possession has been made by the Custodian, may prefer a claim to the Custodian on the ground that,

(a) the property is not evacuee property; or

(b) his interest in the property has not been affected by the provisions of this Act.

(2) Any claim under subsection (1) shall be preferred by an application made within thirty days from the date on which the notification was issued

or the demand requiring surrender of possession was made by the Custodian:

Provided that the Custodian may, for sufficient reasons to be recorded, entertain the application even if it is made after the expiry of the aforesaid

period:

Provided further that every application under Subsection (2) shall be accompanied by an affidavit to the effect that to property claimed is not

subjudice before any court of law having jurisdiction.

(3) On receiving an application under subsection (2) the Custodian shall hold a summary inquiry in to prescribed manner, take such evidence as

may be produced and pass an order, stating the reasons therefor either rejecting the application or allowing it wholly or in part.

(4) For the purposes of this Section Custodian means the Custodian appointed under section 4 for any province of the State,

Thus in built mechanism is provided by the Act to exclude arbitrariness on the part of the Custodian.

47. Under the scheme of the Act though the Custodian has got powers to issue notifications under Section 6 of the Act but such order is subject to

revision and appeal. Affected parties have even got right to apply for restoration

of the property.

48. In the present case, where a notification has been issued under section 6 of the Act in respect of the land claimed by allegedly in possession of

the petitioners, the petitioners have got remedy available to them under the provisions of the Act. The present petition in these circumstances is not

maintainable. The petitioners contend that the land in question is not an evacuee land as the same has been purchased/got through gift by them from

the original owners. Such issues being issues of fact cannot be looked into by this Court while exercising writ jurisdiction. Otherwise also

jurisdiction to examine that the land is not evacuee property and that the petitioners interests have not been affected, falls within the domain of the

Custodian under Section 8 of the Act and this Court or a Civil Court cannot look into, determine or decide such issues.

49. The powers of the Custodian in this behalf were examined in depth by the Supreme Court in Custodian, Evacuee Property, Punjab v. Jafram

Begum AIR 1968 SC169. It was observed as under:

'9. Under S.7 the Custodian has to determine whether certain property is or is not evacuee property to determine that he is to find out whether a

particular person is or is not an evacuee. Having found that, he is to find whether the property in dispute belongs to that person. If he comes to the

conclusion that the property belongs to that person, he declares the property to be evacuee property. Now there is nothing in S.7 which shows

that the Custodian cannot enter into all questions whether of fact or of law in deciding whether certain property belongs to an evacuee. There is no

reason to hold that under S.7 the Custodian cannot decide what are called complicated questions of law or questions of title. It is difficult to see

how the Custodian can avoid deciding a question of title if it is raised before him in proceedings under S. 7. Nor do we find it possible to make a

distinction between questions of fact and questions of law that may arise before the Custodian under S.7. If he has the power to decide questions

of fact, which the learned Judges in the order under appeal seem to concede we do not see why he should not have the power of deciding

questions of law also. Further if the learned Judges in the order under appeal are correct in saying that if a question of title rests on a simple

allegation of fact it can be finally determined by the Custodian, we cannot see on

what reasoning it can be said that where a question of title depends on a question of law it cannot be finally decided under S.7 by the Custodian. His power under S.7 is to decide whether certain property is evacuee property or not and there is nothing in S.7 which restricts that power to deciding only questions of fact. There can in our opinion be no escape from the conclusion that under S.7 when deciding whether certain property is evacuee property or not, the Custodian has to decide all questions, whether of fact or law, whether simple or complicated, which arise therein. That power cannot be denied on the ground that the Custodian, which term for these purposes includes the Deputy Custodian or the Assistant Custodian may not be an experienced judicial officer and therefore may not be in a position to decide questions of title. His decision is not final and is open to appeal under S.24 and to revision under S.27. If he makes a mistake the two higher authorities who, we are told, have always been recruited from experienced judicial officers can correct him. It is after the matter has been decided under S.7 and S.24 if an appeal is filed and under S.27 if a revision is filed, that S.28 gives finality to orders of the authorities mentioned therein and lays down that such orders shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceeding. As we have already said, the legislature was not satisfied by merely conferring finality on such orders; it went further and expressly barred the jurisdiction of civil and revenue courts under S. 46 to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. These words are very wide and clear and bar the courts from entertaining or adjudicating upon any such question. Where therefore the question whether certain properties are evacuee properties has been decided under S.7 etc., whether that decision is based on issues of fact or issues of law, jurisdiction of courts is clearly barred under S.46 (a). It is difficult to see how a distinction can be drawn between decisions under S.7 based on questions of fact and decisions based on questions of law. The decision is made final whether based on issues of law or of fact by S.28 and S.46 bars the jurisdiction of civil and revenue courts in matters which are decided under Section 7 whatever may be the basis of decision, whether issues of fact or of law and whether simple or

complicated.

10. It may be added that the only question to be decided under S.7 is whether the property is evacuee property or not and the jurisdiction of the

Custodian to decide this question does not depend upon' any finding on a collateral fact. Therefore there is no scope for the application of that line

of cases where it has been held that where the jurisdiction of a tribunal of limited jurisdiction depends upon first finding certain state of facts, it

cannot give itself jurisdiction on a wrong finding of that state of fact. Here under S. 7 the Custodian has to decide whether certain property is or is

not evacuee property and his jurisdiction does not depend upon any collateral fact being decided as a condition precedent to his assuming

jurisdiction. In these circumstances, S.46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under

S.7. This conclusion is reinforced by the provision contained in S. 4 (1) of the Act which provides that the Act overrides other laws and would thus

override S.9 of the Code of Civil Procedure on a combined reading of s. 4, 28 and 46. But as we have said already, S.46 or S.28 cannot bar

the jurisdiction of the High Court under Art. 226 of the Constitution, for that is a power conferred on the High Court under the Constitution'.

50. So far the contentions of Mr. Lone regarding issue of the notification dated 10.9.2002 on extraneous considerations is concerned, the learned

counsel has not referred to any material which could substantiate his plea. Similarly I could not find any ground or force in his plea that the notice of

demand of possession impugned in the present petition has been issued in contravention to the provisions of law. As noticed above section 7 of the

Act gives powers to the Custodian to take possession of evacuee property vested in him under Section 5 of the Act. The Custodian has got

powers even to use such force as is necessary for taking possession of such property.

51. In these circumstances I do not find any force in the pleas raised by Mr. Lone. The result is that this petition is dismissed. Order accordingly.