

(2008) 03 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal No. 169 Of 2004

Custodian Evacuee Property & Anr.

APPELLANT

Vs

Gh.Nabi Dar & Ors.

RESPONDENT

Date of Decision : 25-03-2008

Acts Referred:

Administration of Evacuee Property (Central) Rules, 1950 — Rule 13(c)

Jammu and Kashmir Agrarian Reforms Act, 1976 — Section 3, 4, 8

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

Citation : (2009) 3 JKJ 645 : (2009) 2 SriLJ 554

Hon'ble Judges : Y.P.Nargotra, J

Bench : Single Bench

Advocate : Vipin Gandotra, Z.A.Shah, G.J.Balla, G.A.Lone, Advocates appearing for the Parties

Judgement

1. In LPA No. 169/2004, entitled, Custodian Evacuee Property vs. Ghulam Nabi Dar, which is pending disposal, two CMPs No. 128/2006 and

525/2006 were filed. Through CMP No. 128/2006 the parties jointly prayed for acceptance of out of court settlement and for adjustment of their

rights in terms thereof in the LPA as well as OWP No.480/2003 and OWP No.454/2005. Whereas in CMP No.525/2006 one of the parties,

i.e., Custodian Evacuee Property, Kashmir, sought to withdraw from the settlement.

2. The learned Judges of the Division Bench being equally divided in their findings have arrived at different conclusions in regard to the acceptance

of settlement vide their separate orders dated 15.9.2007, hence the present reference in terms of Rule 36(2) of J&K High Court Rules.

3. The dispute between the parties relates to the land measuring 37 kanals 5 marlas comprising in Survey No. 1083 (7 kanals 11 marlas); Survey

No. 1100 (2 kanals 18 marlas); Survey No. 1109 (3 kanals 8 marlas); total: 13 kanals 8 marlas, which is subject matter of OWP No.480/2005.

And Survey No.1084Min (4 kanals 14 marlas); Survey No. 1085 (4 kanals); Survey No. 1096Min (1 kanal); Survey No. 1082 (2 kanals 6

marlas); Survey No. 1070 (1 kanal 17 marlas); Survey No. 1073 (2 kanals 16 marlas); Survey No. 1074 (10 marlas); 1075 (9 marlas) and

Survey No. 1101 (5 kanals 16 marlas); total: 23 kanals 8 marlas, which is subject matter of OWP No.454/2005.

4. The Custodian Evacuee Property on 21.11.1980 issued a Notification under Section 6 of the Evacuee Property Act for declaring the aforesaid

land as an evacuee property being in the ownership of one QamarudDin and other evacuees. The writ petitioners in OWP No.480/2003 being the

tenantsatwill of the land involved in the said writ petition decided to do the earth filling. When they were doing so, they were stopped by the

Evacuee Department. It is their case that when they made inquiries, they were able to lay their hands on the record indicating that the land

measuring 11 kanals 6 marlas out of the land comprising in the said survey numbers stood seized by the concerned field staff of the Evacuee

Department and placed at the supurdnama of the Custodian vide three seizure memos dated 22.1.2003 and 1.2.2003. Claiming that they were in

possession of the land in the capacity of tenantsatwill since before the J&K Evacuee (Administration of Property) Act, 2006 came to be enacted,

the petitioners filed OWP No.480/2003 for seeking the following reliefs:

i. It be declared that Section 6 of the J&K Evacuee (Administration of Property) Act, Svt. 2006 is unconstitutional.

ii. It be declared that Section 3 of the Agrarian Reforms Act, 1976 in so far as it excludes the application of Section 4 and 8 to the tenants of evacuee land, is ultra vires the Constitution.

iii. That by an appropriate writ, direction or order including a writ in the nature of certiorari following Notifications/communications be quashed:

1. Notification; dated 21.11.1980

2. Communication No.CEPS/GE/2002/276670 dated 17.12.2002

3. 'Communication No. CG(EP) 1020/2003/167MiscK dated 23.1.2003

4. Three seizure memo dated 2.2.2003

5. Communication No.CEPEJE/2002/334750 dated 6.2.2003

6. Communication No.DFI/SG/378 dated 22.2.2003

iv. That by an appropriate writ, direction or order including a writ in the nature of prohibition respondents be restrained from interfering in the rights

of possession of the petitioners in the land and in their leveling of land and from fencing.

v. Any other appropriate writ, direction or order as the court may deem fit in the facts and circumstances of the case be also passed in favour of

the petitioner and against the respondents.

5. Along with the writ petition, they also filed a CMP for seeking interim relief, in which the following interim direction was granted:

In the meantime, respondents are directed not to dispossess the petitioners from the land in dispute till next date. The petitioners shall also not

raise any construction or change the nature of the land.

6. When Custodian during the pendency of writ petition started construction of a Shopping Complex through a contractor, the petitioners filed

another CMP, in which the following order was passed on 22.4.2004 :

Notice, returnable within four weeks. Till then statusquo.

7. Thereafter vide order dated 30.9.2004 the Registrar Judicial of this Court was appointed as a Commissioner, who visited the spot and

submitted his report on 7.10.2004. The relevant excerpt reads as:

As per the revenue officers/officials, the land in question comprises of Khasra No. 1100 (Abi Awal) measuring 2 kanals & 18 marlas and Khasra

No. 1083 (Abi Dowum) measuring 7 kanals & 2 marls, total 10 kanals, on a portion of which the construction is being carried out by the

respondents. The Shopping Complex has been designed, in the form of letter ""& and total number of 36 shops are coming up on the spot. The

shops are at the stage of lintel level for which two wooden column shatters were ready on the spot but no Carpenter, Mason or Labourer was

working at the site at the time of inspection. However, material for wooden shattering was dumped in one of the shops. The portion of land which

has been brought under construction has been filled by the soil, while as on rest of the land rugged grass ""Peci"" is a natural vegetate. In addition to

the Shopping Complex, three temporary brick sheds have been constructed in

mud and other building material in the form of iron, bajri, bricks and sand stands dumped on spot. One Mixer was also found on the spot. From the construction point of view, it appears that further provision has been kept for raising second storey as R.C.C. Work for columns has been provided with steel reinforcement extra lengths for overlaps over and above the proposed R.C.C. slab of 1st storey.

8. After the receipt of the report of Commissioner, the learned Writ Court after hearing learned counsel for the parties in CMP Nos.961/2004, 1080/2004 and 782/2003 passed order dated 19.11.2004 and thereby directed as follows:

On consideration of the rival contentions of the parties, rights of the parties are, required to be protected with a view to maintain balance. If the respondents are permitted to raise construction, the nature of the land certainly will be changed and if ultimately the petitioners succeed, the respondents will be at disadvantageous position and have to demolish the structure to vacate the land. If feel under such circumstances it shall be just and proper in the interest of justice to restrain the respondents from raising any construction on spot. It is directed accordingly. Since such, orders have earlier been passed and the respondents have not bothered to comply it, therefore, the Station House Officer, Police Station concerned is directed to comply the Court order implementing it on spot till the petition is considered for admission or till further orders.

9. Aggrieved by the above order, the Custodian Evacuee Properly filed LPA No. 169/2004.

10. It may be pointed out here that for rest of the land the writ petitioners in OWP No.454/2005 claiming to be in possession of the same in the capacity of tenants at will and protected tenant also questioned the legal validity of the provisions of Section 6 of the J&K Evacuee (Administration of Property) Act, 2006 and Section 3 of the Agrarian Reforms Act, 1976 in so far as it excludes the application of Section 4 and 8 to the tenants of evacuee land.

11. It is not in dispute that during the pendency of Letters Patent Appeal the parties made efforts for out of court settlement. For this purpose two meetings took place between the parties on 27.3.2005 and 28.3.2005. The first meeting was attended by Commissioner/Secretary to

Government, Revenue Department; Custodian General, J&K Government; Custodian Evacuee Property, Kashmir; Z.A. Shah, Advocate and Haji

Master Ghulam Rasool. From the minutes of the first meeting, it is indicated that the parties, finally agreed in principle to the following:

a. That the persons who claim to be the tenants will not only part with and surrender only 50% of the total land but will surrender, part with and waive all their rights, if any, in respect of the entire land of 1.890 hectare.

b. That the Department of Custodian will be free to deal with the entire land, on the side the construction is raised and as has been earmarked on

the site plan. The exclusive right of the Department of Custodian will extend on the southern side to the extent of 15 from the existing rear wall of

the construction. It is believed (to be verified) the Custodian will be free to deal with approximately 21 kanals of land.

c. That the remaining land, approximately 16 kanals of land on the southern side, will be leased out by the Custodian Department, in the 1st

instance for 40 years, for commercial purposes to the persons mentioned in the representation dated 25.3.2005 by the tenants on mutually.

12. The question of premium in respect of the land to be leased out to the tenants pursuant to the above agreement could not be settled and it was

decided that another meeting would be held. The another meeting was held on 28.3.2005 under the Chairmanship of Revenue Minister in which

issue of premium was also settled. From the minutes of the meeting it is indicated that the parties agreed as follows:

i. That the minutes dated 27.03.2005 were confirmed and approved.

ii. That the prospective lessees would pay one time premium at the rate of 03 lacs per kanal.

iii. That upon signing and presentation of the settlement mentioned in the minutes dated 27th and 28th of March 2005 the prospective lessees

(identified in the representation dated 25.03.2005) would pay some reasonable amount to the Custodian. Upon disposal of the case by the

Hon'ble High Court on the joint request of the parties, where the terms of settlement will be settled by the respective counsels of the parties, the

Custodian would immediately proceed on spot and jointly in presence of Haji (Master) Ghulam Rasool demarcate that portion of the Evacuee land

which the Custodian will be free to use. Thereafter, the Custodian would within

one month execute necessary agreement with the prospective

lessees identified in the representation dated 25.03.2005 in respect of the balance land (Evacuee land left after separation of the land to be used by

the Custodian Department exclusively). The parties would pay the premium and the ground rent as per the land allotted and leased out. Thereafter

the lessees would be entitled to make necessary improvements, built and construct in accordance with the sanctioned plans and use the property as

the lessees of the Custodian Department in accordance with the settled terms and conditions.

13. Pursuant to the agreement, the parties drew up the terms of settlement and submitted the same before the Court in the shape of CMP No.

128/2005 praying for adjustment of their rights as per the settlement reached. The settlement presented before the Court is signed by the

Custodian Evacuee Property, Kashmir and by all the writ petitioners of both the writ petitions along with their counsel. What has been stated in.

the CMP, which is in the shape of settlement, is as follows:

I. That the aforesaid Letters Patent Appeal/O.W.P. is pending before this Hon'ble Court. That during the pendency of the appeal/O.W.P. the

parties have arrived at the following settlement:

i. That the persons who claim to be tenants will not only part with and surrender more than 70 of the total land but will surrender and waive of their

all rights, if any, in respect of the entire land belonging to evacuees QamarudDin, Asgari Khanam, SajadunNabi and others at Hyderpora.

ii. That the department of Custodian will be free to deal with the entire land of evacuees said in Para (i) above on which construction is raised and

to be raised as has been earmarked in site plan. The exclusive right of the department of Custodian will extend on southern side to the extent of 15

feet from the surrounding wall of the existing Shopping Complex. It is believed (to be verified) the Custodian will be free to deal with entire land of

evacuee measuring 51 kanals of land, subject to settlement between parties.

iii. That the remaining land approximately 16 kanals out of the total land on southern side will be leased out by the Custodian Department in the first

instance for forty years to be renewed thereafter to the persons mentioned in the representation dated 25.3.2005 on terms and conditions mutually

settled and as provided in rules framed under E.P. Act.

iv. The department also demanded premium and the rent for the land to be leased out by the Department per annum which is subject to provisions

of SRO 149. The decision so arrived at and discussed hereinabove with the conclusion at the hands of the Hon'ble Revenue Minister on

28.3.2005 were on the basis of legal expert advice suggesting settlement, since it was sensed that there are some legal technicalities, admitted facts

of the tenancy rights since 1947, and subletting the land to third person which is complicating the issue which has thereby put the Department on

the defensive.

2. It is recorded by the parties that the settlement arrived pursuant to the discussion held on 27.3.2005 and 28.3.2005. Copy enclosed in

Photostat and the authorization to execute the deed of settlement has been conveyed vide No.CG(EP)01/2005/camp dated 22.10.2005. Copy

enclosed in Photostat.

3. That the aforesaid settlement relates to entire land of Evacuees namely QamaruDin, Asgari Khanam, SajadunNabi Dar and others out of which

site plan annexed to this settlement indicates the area to be retained by the petitioners (tenants) prospective lessees measuring 15 kanals and 5

marlas and the rest area which will be retained by the Custodian Department.

4. That the gap between Farooq Ahmad Bhat's House and surrounding wall of the shopping complex shall remain open as it exists today.

5. That immediately after the settlement and disposal of the aforesaid mater by the Hon'ble High Court the Custodian Department shall take up the

consequential steps within a week's time and draw up necessary agreements and the allottees shall pay the agreed premium within such time as

may be allowed by the Custodian. Thereafter the allottees shall be free to deal with their respective portions of the land as allottees and can raise

any constructions subject to provisions of E.P. Act.

The interim order passed by the Hon'ble Court may also be vacated. It is accordingly prayed that the writ petition ""being O. W.P. No.480/2003,

O.W.P. No.454/2005 and L.P.A. No. 169/2004 along with connected CMPs and LPAs and other litigation pending in any court of law on this

portion of land may be settled and the rights of the parties be adjusted in terms of the settlement recorded hereinabove.

14. While the above CMP was pending consideration, the learned Advocate

General of the State applied and stated before the Court that the agreement reached between the parties has no validity under law and may not be taken on record.

15. The application filed by the Advocate General was opposed by the writ petitioners by filing objections, in which the locusstandi of Advocate

General was questioned. When the matter came up before the Court, the learned Advocate General prayed and was allowed to withdraw the

application with liberty to take other appropriate steps in the matter. After the withdrawal of Advocate General from the proceedings, the

Custodian Evacuee Property, Kashmir filed CMP No.525/2006 praying for withdrawal of the settlement. In the said application the

Custodianappellant has stated that in terms of Letter No.CG(EP)1315/2006 dated 10.10.2006 the Government has conveyed the approval of

Chief Minister (Incharge Revenue) for reversing the earlier decision taken on 27/28 March 2005 to lease out the land to the writ petitioners (illegal

occupants of the evacuee property land).

16. The letter dated 10.10.2006 reads as follows:

I am directed to refer your letter No.CG(EP)PA/2325/2006 dated 09.10.2006 on the subject cited above and to communicate approval of the

Hon'ble Chief Minister (Incharge Revenue) for reversing the earlier decision taken on 27/28 March, 2005 for entering into a settlement with the

illegal occupants of the evacuee property land situated at Hyderpora District Budgam. Further necessary action may kindly be taken accordingly.

17. Custodian General, Mr. Kifayat Rizvi has also filed affidavit, the relevant portion of which is as follows:

6. That Rule 13 C of the J&K Evacuees Administration of Property Rules provide that premium of the property which is to be leased out can be

fixed either by putting the property to auction or by taking the market value of the property into consideration. In the present case the market value

of the property (which is situated at Hyderpora crossing) is Rs.30 lacs per kanal, this fact is evident from the rates assessed and fixed by Dy.

Commissioner, Budgam for state lands situated in various localities of District Budgam including Hyderpora (A statement of the rates is annexure

as Annexure RI).

7. That deponent had sought instructions from the Government as to how to

proceed in the matter and in terms of communication

No.Rev/EP/50/04/LTG/05 dated 13.9.2006, the Government communicated that Evacuee Property Department being a statutory Organization,

the Revenue Department has no role to play in this. Copy of the same is placed on record as annexure R2.

8. That after the matter was taken up with the Government and on consideration the Government in terms of communication dated 13.9.2006

intimated that Evacuee Property Department being a statutory organization, the Revenue Department has no role to play in this. The matter was

brought to the notice of Hon'ble Chief Minister (Incharge Revenue Minister) and on being apprised about the case, the Hon'ble Chief Minister

(Incharge Revenue Minister) directed the Chief Secretary to convene a meeting of all concerned officers and accordingly the Chief Secretary

convened a meeting of the following officers.

i. Ld Advocate Genera

ii. Secretary to Government, Revenue Department,

iii. Custodian General

9. That on the basis of decision taken in the meeting chaired by the Chief Secretary, it was decided that settlement arrived and filed by Custodian

Evacuee Property Kashmir before the Hon'ble Court in the above referred cases be opposed on the following ground:

i. That ""leasing out"" 16 kanals of land without following due procedure as envisaged under law on the subject will create bad precedent and shall

have far reaching consequences as opined by Learned Advocate General; and

ii. That the ""premium fixed"" is very low as compared with market rate.

10. That decision so arrived was processed and submitted by the Hon'ble Chief Secretary to the Hon'ble Chief Minister (Incharge Revenue

Minister) for approval and in terms of the letter No.Rev/EP/50/04 dated 10.10.2006 the Government has conveyed approval of the Hon'ble Chief

Minister (Incharge Revenue Minister) for reversing of earlier decision taken on 27/28th of March 2005 for entering into a settlement with the illegal

occupants of the Evacuee Property land situated at Hyderpora District Budgam. Copy of the letter is enclosed as annexure R3.

From the above stand of the Custodian Department, it is manifest that Custodian

Kashmir sought to withdraw from the settlement because the new Chief Minister (Incharge Revenue), who had taken over the department after change of guard, desired withdrawal from the settlement. Why the withdrawal was to be sought, as indicated from the affidavit of the Custodian General, was because of the following grounds:

- i. That "leasing out" 16 kanals of land without following due procedure as envisaged under law on the subject will create bad precedent and shall have far reaching consequences as opined by Learned Advocate General; and
- ii. That the "premium fixed" is very low as compared with market rate.

18. Hon'ble Justice Imtiyaz by his order dated 15.9.2007 came to the view that the settlement arrived at between the parties was unlawful and could be declined acceptance by the Court in terms of provisions contained in Order 23 Rule (c) by observing as follows:

On going through the terms of settlement I find the provisions relating to Rule 13(c) have completely been ignored and the Custodian has while arriving at the agreement to allot the land to the respondents taken an arbitrary stand of allotting it on a premium of Rs.3 lacs per kanal. The appellants have placed on file a statement showing the market value of the land in the area issued by the Assistant Commissioner, Budgam. As per the statement the prevalent market rate of the land in the area is Rs.30 lacs per kanal. In view of it I find the premium fixed in the settlement is very low and is in violation of the provisions of Rule 13(c).

Rule 13(c) gives the procedure which the Custodian has to follow while giving evacuee land on lease. The rule gives the manner in which such lease can be granted. The settlement relied upon by the private respondents shows that the Custodian has not, while agreeing to lease out the land in favour of the respondents followed the procedure as the requirements laid down in the rules have not been complied with.

19. Without identifying as to which of the requirements of Rule 13(c) has been violated, the learned Judge has held the settlement relied upon by the parties to be violative of Rule 13(c), for the reason that the procedure prescribed for giving evacuee land on lease by the Custodian has not been followed. Being of the above view, the learned Judge has rejected the payer made in CMP No. 128/2006.

20. However, Hon'ble Justice Mansoor has dissented from the view expressed by

Hon'ble Justice Imtiyaz, primarily on the ground that Rule 13(c)

of the Rules can have application to only such land which is vacant, therefore, it has no application to the land in question being not a vacant land.

The learned Judge being of the view that since it was nobody's case that the settlement arrived at is outcome of fraud or unlawful and having been

arrived at and duly signed and acted upon by the parties cannot be withdrawn unilaterally, the same being binding upon the parties. The learned

Judge has observed:

Keeping in view the mandate of Order 23 Rule 3 Civil Procedure Code (for short CPC), read with discussions made hereinabove, it appears that

the settlement acted upon could not be withdrawn unilaterally. It is nobody's case that the settlement is outcome of fraud and unlawful. As

discussed hereinabove, the parties have acted upon the settlement, therefore, is binding on the parties.

21. The learned Judges comprising the Bench have identified the points of difference in the following manner:

While disposing of CMP No. 128/2006, this Bench is equally divided on the point whether the compromise arrived at between the parties, details

of which is given in the CMP should be allowed or not. We have observed as under:

Per ""II. Imtiyaz, J.

23. The settlement arrived at between the parties cannot be allowed as it contravenes Rule 13(c) of the J&K Evacuee (Administration of Property

Rules). By consent or agreement, the parties cannot achieve what is contrary to law.

Per Mansoor Ahmad Mir, J.

(a) Rule 13(c) of the Evacuee (Administration of Property Rules) is not applicable.

(b) It is nobody's case that settlement arrived at is outcome of fraud or unlawful.

(c) The settlement arrived at is duly signed and acted upon by the parties, cannot be withdrawn unilaterally and is binding on the parties.

In this situation the question arising for consideration are:

(a) Whether Rule 13(c) is attracted to the settlement arrived at between the parties?

(b) Whether the settlement contravenes Rule 13(c)?

(c) Whether the Custodian can withdraw from the settlement unilaterally?

24. The contention of Mr. Lone, learned counsel for appellants/Custodian Evacuee Properly is that the chunk of land comprising in various survey

numbers was the property of one QamaruDin. Said QamaruDin has two brothers, namely, Ahmad Din and Imam Din. In disturbances of 1947

QamaruDin left the State and, therefore, became the evacuee. Thus, the property in question is that of QamaruDin, evacuee. His property was

declared as evacuee property in 1949 or 1950, but no such record is available with the Custodian Department. Later on Ahmad Din submitted

three applications dated 11th Assuj 2009 before the Custodian Evacuee, Kashmir requesting that the three bungalows, namely, Yasmin, Alqamar

and Alfarooq along with the premises be declared as nonevacuee property, stating that the whole property was jointly held by three brothers,

namely, Imam Din, QamaruDin and Ahmad Din, the applicant. The property of Imam Din and QamaruDin was allotted to Ahmad Din, their

brother, in pursuance of Govt. Order No.653/50 dated 6.5.1950, and the property of Sajadun Nabi and Asgari Khanam was ordered to be under

the managership of Ahmad Din. The allotment and managership order was passed by the then Custodian vide his Order No. 186570 dated

10.12.1951. This order of allotment and managership was cancelled by the Custodian vide his order dated 26.10.1956. The three applications

filed by Ahmad Din were earlier dismissed for default on 28.7.1956, whereafter he submitted the review application dated 20.11.1956 requesting

for restoration of order of allotment and managership and review of order of dismissal of his application. The Custodian vide his order dated

5.9.1963 disposed of the application by directing as follows:

As already mentioned elsewhere Kh. Ahmad Din had been appointed as the allottee for the property of Kh. Imam Din and QamauDin and

Manager in the property of Sajadun Nabi and Asgarikhanam vide order of the then Custodian dated 15.12.1956. This position has changed now

due to the death of Kh. Ahmad Din. It is an established fact that only two daughters of Kh. Ahmad Din out of the family are residing in the State

and they are the brothers children to the evacuees. According to the Govt. order they do not come into the category of the near relatives, so

Akhtar Firdaus, Kakub Hamid, the daughters of Kh. Ahmad Din are appointed as

Managers for property of Kh. Imam Din, Kh. QamarudDin,

Sajadun Nabi and Asgari Khanain, evacuees, provided they give an undertaking that they will submit yearly account of income and expenditure to

the Department and deposit the income regularly so that it could be credited against the names of the evacuees. The property of Mastura Begum

as heretofore will remain under the direct control and management of the Department.

25. According to Mr. Lone this above order was reviewed by the Custodian by his order dated 31.10.1964 and modified in the following manner:

I am convinced by the arguments of the learned counsel and so modify my order dated 5.9.1963 to the extent that the applicants Akhtar Firdous

and Kaukab Hameet be also (sick) for the properties of Kh. Imamuddin and QamarudDin and continue as Managers in the case of other evacuees

mentioned in the said order.

26. Mr. Lone submits that in terms of the above order, the property was under the control of Evacuee Department and was being administered

through its allottees and managers appointed by it. The writ petitioners were nowhere in picture. Since the allottees had already died, so the land in

question came directly under the control of Custodian Department. Mr. Lone submits that in order to administer the property more effectively and

to clarify the position, the Custodian issued fresh notification on 21.11.1980 in terms of Section 6 of the Evacuee Property Act for declaring the

property as evacuee property.

27. Mr. Lone further submits that since the Custodian was having the control over the evacuee properties, so he decided to put this land for a

better use, which had already been urbanized and many houses had come to be constructed around it. The Custodian decided to construct a

Shopping Mall over the land and issued the tender notice, whereafter the work was allotted to the contractor, who started raising the construction.

According to Mr. Lone, the writ petitioners, who were residing in the vicinity of land in issue, filed OWP Nos.480/2003 and 454/2005 claiming

that their ancestors were the tenants in the land and after them they are in possession. The writ petitioners have relied upon Jamabandi of 1970/71

Vikrami, in which they have been shown to be gair marusi tenants in respect of the evacuee land.

28. Mr. Lone submits that the rights of writ petitioners, if any in the land, were extinguished after coming into operation of Evacuee Property Act

and in any case after the issuance of declaration under Section 6 of Evacuee Property Act. Therefore, they were the unauthorized occupants,

admittedly when their possession has not been recognized by the Custodian nor they are paying any rent to it. The land in question, therefore, was

to be construed to be in possession of the Custodian over which he had a right to raise construction. The petitioners being unauthorized occupants

could not be allotted land in terms of the settlement at a price which is less than the market rate. He submits that the settlement to allot the land to

the writ petitioners at the premium of Rs.3 lacs is not in consonance with the spirit of Rule 13(c) of Evacuee Rules. Therefore, the settlement is

illegal and thus rightly was declared to be unlawful by Hon'ble Justice Imtiyaz.

29. On the other hand, the contention of Mr. Shah, learned counsel for writ petitioners is that the settlement between the parties is in the nature of a

contract and has been arrived at by the parties who enjoyed the freedom of contract. The only limitation of law which can legally invalidate the

settlement is that it is prohibited by law or is in contravention of law. He argues that sum total of appellants case is that the agreement contravenes

Rule 13(c). He submits that Rule 13(c) could have applied to the case when the land was vacant for the purposes of lease or allotment. He argues

that the writ petitioners were holding the land in the capacity of tenants at will, therefore, it was not vacant for the purposes of Rule 13(c) of the

Rules. According to him, the view expressed by Hon'ble Justice Mansoor is in consonance with the provisions contained in Rule 13(c), which in

the circumstances of the case could not have any application to the land in issue.

30. His further contention is that assuming that Rule 13(c) was applicable, even then there was no violation of its provisions. According to him,

Rule 13(c) postulates the manner in which the premium can be determined. He submits that in the present case the parties being alive to the

situation determined the premium by faking into consideration the fact that after all the writ petitioners were surrendering their all rights relating to

whole of the land. The fixation of premium thus was made by keeping that fact in view and was fixed as per the rate, which in the opinion of the

members of the Committee, headed by none else than the Minister Incharge of

the Custodian Department, was as per the market value. He submits that the rate of Rs.30 lacs per kanal, referred to by the appellants, is not based upon any relevant material. It is not indicated by the Assistant Commissioner, who opined the market rate of Rs.30 lacs per kanal, as to whether the said rate was for the purposes of sale/acquisition or that was the rate for the purposes of lease. According to him, no material has been placed on record by the appellants to show that the rate was for the purposes of lease. He argues that Rs.30 lacs per kanal for the purposes of lease is preposterous.

31. I have considered the respective contentions of learned counsel for the parties and perused the record of case.

32. Principally, the controversy relates to the applicability of Rule 13(c) with respect to the land in question. While determining the said controversy, it has to be kept in view that the writ petitioners claimed to be in possession of the land in the capacity of tenants at will, while the stand of respondents has been that they were either not in possession of the land or were unauthorized occupants and that the nature of the land had changed to 'pechi', i.e., wild vegetation was growing on the land. It was not being put to any agricultural use and, rather, it had become urbanized due to the fact that around it residential houses had come up.

33. The question as to whether the writ petitioners were in possession of the land in question in the capacity of tenants at will has not been determined and was yet to be determined by the Court being a question of fact. Nonetheless, the fact remains that the writ petitioners claimed to be in possession of the land in question in the capacity of tenants at will and relied upon the entries of revenue extracts in their support. The question as to who, i.e., whether the writ petitioners or the Custodian was in possession of the land is, thus, a disputed question, on which adjudication is still awaiting, yet the parties have entered into the settlement.

Q.No.1. Whether Rule 13(c) is attracted to the settlement arrived at between the parties?

Rule 13(c) of Evacuees' (Administration of Property) Rules, Svt. 2008 reads as follows:

13C. Fixation of premium and rent in respect of vacant land:

(1) Notwithstanding anything contained in rule 13, the Custodian shall put to an

open auction lease of any evacuee vacant land for a period not exceeding 40 years for determination of premium to be charges from the lessee to whom such land is leased out or may charge the premium and ground rent annually after taking into consideration the market value of such land of the locality in which it is situate. The different rates of premium and ground rent shall be fixed for the land put to use for residential, commercial, or industrial, as the case may be:

Provided that the ground rent shall be enhanced by 100% at the time of renewal of lease:

Provided further that the total period of the lease shall not exceed 99 years:

Provided also that the premium shall be charged again at the time of fresh allotment/lease of such land and the ground rent fixed afresh annually on enhanced rates:

Provided also that the allotment/lease of such vacant land shall be made in favour of permanent residents of State only:

Provided also that no allottee shall change the use for which, it is allotted without prior permission of the Custodian. The Custodian shall also obtain approval of the Custodian General before permission is granted by him.

(2) In the case of indigent person a lower rate of rent may be fixed by the Custodian at the time of revision of rent in respect of evacuee houses used for residential purposes only.

Explanation. Indigent person means who has no reasonable source of income and have bodily infirmity and includes disabled, orphan, widow.

(3) Where the rent is fixed by the Custodian General or the Government and if the Custodian feels that the rent so fixed is not consistent with the market value or such rate as are prevalent in the locality, the Custodian shall report the fact to the Custodian General or the Government, as the case may be, for refixation of rent in all such cases.

(4) In respect of a house used by any Educational Institution, the rent may be fixed at 6+% of the capital cost and Rs.2/ per marla per annum for the land appurtenant thereto shall be changed.

34. From the title appended to Rule 13(c) it is quite manifest that it deals with subject of fixation of premium and rent in respect of vacant land. The expression 'vacant land' obviously would mean the land which is available for

being leased out or for being allotted. The land available for lease or allotment would be that land which is either not in occupation of any person or is in occupation of the person to whom it is to be leased out or allotted.

35. Section 6(1) of Evacuees;(Administration of Property) Act, Svt. 2006 vests the power in Custodian to notify the evacuee properties vested in him under the Act, and in terms of Section 6(2) he is empowered to demand surrender of possession of any such property from the person in whose possession it is. Under Section 7 the Custodian is empowered to take possession of the property if the person in possession fails to surrender possession on demand. Rules 9 & 12 provide for the modes in which possession of such properties may be taken. Rule 9(2) provides as follows:

9(2) Where such property is, at the time aforesaid, in the possession of one or more tenants or one or more lessees or licensees, whom the Custodian cannot eject or for any reason does not want to eject, possession may be taken by serving on the tenants or the lessees or the licensees a notice directing them to pay the rent or the lease money or the licence fee, as the case may be, to the Custodian or to any person authorized by him to receive such payment. The notice may be served in any manner provided in rule 18.

36. From the bare reading of above rule, it would transpire that where the evacuee property, which has vested in the Custodian, is in possession of one or more tenants or one or more lessees or licences, whom the Custodian does not for any reason want to eject, he may by a notice direct them to pay rent or lease money/licence fee, as the case may be; meaning thereby that the Custodian may in his discretion regularize their possession treating them tenants, lessees or licensees under him subject to their paying of the amount demanded as rent, premium or licence fee.

Therefore, such land which is in occupation of some person as a tenant or lessee would also be deemed to be vacant land for the purposes of Rule 13(c), if the lease or allotment is to be made in favour of the same person.

37. In the instant case, the lease was to be made in favour of the writ petitioners, who were claiming themselves to be tenants at will, therefore, Rule 13(c) would be applicable for determination of premium. Even otherwise

going by the view that Rule 13(c) applies to the land which is vacant and not in possession of any person, still said rule shall apply in respect of the land in issue; because as per the settlement reached, firstly the writ petitioners would have to surrender their all rights whatever they have over the entire land in issue in favour of Custodian, whereafter out of the said land a portion of it has to be given to them on lease. Therefore, at the time when the lease is to be granted by the Custodian, the entire land free from all encumbrances would be available with the Custodian for being leased out and, as such, the said land would be a vacant land within the meaning of Rule 13(c).

38. I, therefore, hold that Rule 13(c) shall be attracted for determination of the question of premium in respect of the lease to be granted to the writ petitioners/respondents under the settlement.

Q.No.2. Whether the settlement contravenes Rules 13(c)?

For answering this question, it is important to understand the true scope and purport of Rule 13(c).

39. Mr. Shah, learned counsel for writ petitioners submits that from the bare reading of subrule 1 of Rule 13(c) it would transpire that notwithstanding the general power of Custodian to lease or allot the land on the conditions specified by the Government vested in him in terms of

Rule 13, the Custodian is required to follow the procedure prescribed by Rule 13(c) for determination of premium and ground rent. The procedure

prescribed by subrule (1) of Rule 13(c) envisages two alternate modes for determination of premium and ground rent in respect of the land to be

leased out one; to put the lease to open auction for determining the premium to be charged, or, two; to opt for charging premium and ground rent

to be determined by him by keeping the market value in view of the land use to be permitted.

40. Rule 13(c)(1) read as whole in my considered opinion does not admit the interpretation suggested by Mr. Shah. Plain reading of subrule (1) of

Rule 13(c) would show that it provides for the procedure to be followed for determination of premium and ground rent in respect of the vacant

land to be leased out for a period not exceeding 40 years. The rule starts with nonabstante clause so overrides the general power of Custodian to

fix the premium and ground rent in the manner prescribed by the Government

vested in him in terms of Rule 13 in the first place and mandates the Custodian to put the lease to open auction for the determination of premium to be charged from the lessee to whom such land is leased out. The rule further empowers the Custodian that instead of charging the premium from the lessee at the amount determined by open auction, to charge such premium, and ground rent annually to be fixed by him by keeping in view the market value of the land and the land use to be permitted. From the expression ""Custodian shall put to an open auction"" used in the rule, one thing is certain that before opting for charging premium and ground rent annually for the lease determined by keeping in view the market value of the land and the land use to be permitted, the Custodian is bound to put the lease to open auction for determination of the premium. It is only after fulfilling the statutory obligation of determining the premium for the lease to be granted for a period not exceeding 40 years by putting the lease to an open auction in his discretion can validly opt for charging the premium and ground rent annually fixed by keeping in view the market value and the land use to be permitted instead of the premium which may have been determined by putting the lease to open auction. The Custodian legally cannot under the rule dispense with the requirement of putting the lease to an open auction for directly opting for fixation of premium and ground rent to be charged annually after being determined by keeping the market value and the land use to be permitted in view. The Custodian in every case where lease of a vacant land is to be granted for a period not exceeding 40 years is bound to put the lease to an Open auction for determination of the premium. It is another matter that while granting the lease he may opt for charging the premium and ground rent annually determined by him by keeping in view the market value and the land use to be permitted. For fixing the premium in respect of the lease to be granted for a vacant land the requirement of putting the lease to open auction for determination of the premium is mandatory and binding upon the Custodian.

41. In the present case the stipulation in the settlement regarding leasing out of approximately 16 kanals of land out of the total land reads as follows:

That the remaining land approximately 16 kanals out of the total land on southern side will be leased out by the Custodian Department in the first

instance for forty years to be renewed thereafter to the persons mentioned in the representation dated 25.3.2005 on terms and conditions mutually

settled and as provided in rules framed under E.P. Act.

42. Thus the parties agreed that the lease shall be on the terms and conditions mutually settled and also in terms of the rules framed under the E.P.

Act; meaning thereby that the question for fixation of premium was agreed to be settled in accordance with the rules framed under E.P. Act as well

as mutually settled terms and condition. The parties mutually settled one time premium at the rate of rupees three lacs per kanal. The question

therefore arising for consideration would be as to whether the settlement of premium satisfies the requirement of Rule 13(c), the answer to the

question cannot be in affirmative for the reason that the premium to be payable for the lease to the respondents writ petitioners under the settlement

has not been determined by putting the lease to an open auction. The settlement, therefore, is in contravention of said mandatory requirement of

Rule 13(c).

43.1, therefore, answer the question by holding that the settlement contravenes Rule 13(c) on the point of determination of premium.

Q.No.3. Whether the Custodian can withdraw from the settlement unilaterally?

It is not in dispute that the Custodian was party to the above settlement. He sought permission from the court by filing CMP No.525/2006 for

seeking permission to withdraw from the settlement. Learned Justice Imtiyaz has come to the view that in view of the provisions contained in Rule

3 of Order 23 the Court can decline the acceptance of agreement or compromise which is unlawful.

Rule 3 of Order 23 of Code of Civil Procedure reads as follows:

3. Compromise of suit

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, in writing

or signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subjectmatter of the suit, the Court

shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far it relates to the

parties to the suit whether or not the subjectmatter of the agreement, compromise or satisfaction is the same as the subjectmatter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide

the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit

to grant such adjournment.

Explanation. An agreement or compromise which is void or voidable under the Contract Act, Svt. 1977, shall not be deemed to be lawful within

the meaning of this rule.

44. Thus, under the above rule the agreement which is found to be not lawful can be refused to be accepted for passing a decree by the Court. As

per explanation, an agreement, compromise/settlement shall not be deemed to be lawful within the meaning of this rule if it is void or voidable under

the Contract Act.

45. Section 23 of the Contract Act defines what considerations and objects are lawful and what not. It provides:

23. What considerations and objects are lawful and what not

The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the

provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another, or

the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be

unlawful. Every agreement of which the object or consideration is unlawful is void.

46. The present settlement is directly hit by Section 23 of the Contract Act because if it is allowed/permitted it defeats Rule 13(c). The same,

therefore, is to be deemed to be unlawful for the purposes of Rule 3 of Order 23. As such it cannot be accepted for adjustment of the rights of the

parties involved in the litigations. The settlement being unlawful the Custodian can withdraw from the settlement unilaterally.

47. I, therefore, answer the question by holding that the Custodian is empowered to withdraw from the settlement unilaterally.

48. For the reasons stated above, I agree with Brother ImtiyazJ that the

settlement arrived at between the parties cannot be allowed as it contravenes Rule 13(c) of J&K Evacuee (Administration of Property) Rules. By consent or agreement the parties cannot achieve what is contrary to law. However, I cannot persuade myself to agree with the view expressed by Brother MirJ. I answer the reference accordingly.

49. This reference shall stand disposed of.

50. A copy, of this order along with the record of this case shall be sent back to the Registrar Judicial of High Court, Srinagar Wing.