
(1966) 08 GUJ CK 0011
In the Gujarat High Court

Pirdhandas Parsumal and Another

APPELLANT

Vs

Hajrabai Mahomad and Others

RESPONDENT

Date of Decision : 05-08-1966

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 12(2), 2(d)(ii), 7, 7

Citation : (1968) 9 GLR 24

Hon'ble Judges : P.N. Bhagwati, J;A.D. Desai, J

Bench : Division Bench

Judgement

P.N. Bhagwati, J.—In 1947 one Shakur Haji Suleman, a Cutchi Memon of Upleta died intestate leaving him surviving his widow, the plaintiff, and his only son Sitar Haji Shakur. There was a house belonging to him situate in Upleta in which he was residing with the plaintiff until his death and after his death the plaintiff continued to reside in two rooms in the same house. Soon after the death of Shakur Haji Suleman followed the partition of India and immediately after the partition Sitar Haji Sakur went away to Pakistan. Since by reason of being resident in Pakistan, Sitar Haji Shakur was unable to supervise his property in Upleta, a notice dated 20th November 1950 was issued to him u/s 7 of the Administration of Evacuee Property Act, 1950, calling upon him to show cause why he should not be declared an evacuee u/s 2(d)(ii) of the Act. In response to the notice a written statement dated 23rd November 1950 was submitted by the plaintiff and in the written statement she contended that Sitar Haji Shakur had gone to Pakistan merely for business purposes and he was, therefore, not liable to be declared an evacuee. An inquiry was thereafter held by the Assistant Custodian of Evacuee Property and as a result of the inquiry the Assistant Custodian of Evacuee Property by his order dated 13th January 1951 held that Sitar Haji Shakur was an evacuee u/s 2(d)(ii) of the Act and his properties were evacuee properties. The plaintiff thereupon preferred an appeal to the Custodian of Evacuee Property. In the appeal it seems the the plaintiff put forward a claim to share in the properties left by Shakur Haji Suleman but this claim was rejected by the Custodian of Evacuee Property. The Custodian of Evacuee Property by his

order dated 24th April 1951 held that the plaintiff's claim to the property of Shakur Haji Suleman could not be admitted but as a widow of Shakur Haji Suleman she was entitled to a right of residence in the said property and this right was limited to the accommodation which she enjoyed immediately before Sitar Haji Shakur migrated to Pakistan. Now at the date when Sitar Haji Shakur migrated to Pakistan the plaintiff was residing in two rooms in the suit house and the right of the plaintiff to reside in the said two rooms as the widow of Shakur Haji Suleman was thus recognised and declared by the Custodian of Evacuee Property but since Sitar Haji Shakur was an evacuee and his properties were evacuee properties as held by the Assistant Custodian of Evacuee Property, the order of the Assistant Custodian of Evacuee Property declaring Sitar Haji Shakur as an evacuee and his properties as evacuee properties was affirmed and the appeal was rejected by the Custodian of Evacuee Property. The plaintiff thereafter continued to reside in two rooms in the suit house in which she was residing immediately before Sitar Haji Shakur migrated to Pakistan and there was no disturbance of her possession until 15th November 1953 when the Assistant Custodian of Evacuee Property issued an order fixing the rent of the said two rooms at Rs. 20 per month and requiring the plaintiff to pay Rs. 680 as and by way of arrears of rent in respect of the said two rooms from January 1951 upto October 1953. The plaintiff on receipt of this order immediately approached the Custodian of Evacuee Property and applied for setting aside the said order. The Custodian of Evacuee Property by his order dated 26th February 1954 set aside the impugned order observing:

I find that it is not right to ask the applicant to pay rent for the portion of the house which she is occupying, because her right to residence in the house has already been granted by this Court. The parties are Kachhi Memoes and according to the law applicable to them, widow is entitled to residence in the property of her husband as also for maintenance out of the income of such property. Vide Haji Sabut Siddique v. Ayeshbai 37 Bom. 435. The applicant cannot therefore be asked to pay rent. Her claim for maintenance also has to be allowed. She has been recovering rent for the other portion of the house which is occupied by tenants. The rent amounts to Rs. 30 per month which does not exceed what she can claim by way of maintenance. She may therefore be allowed to recover this rent towards her maintenance.

Pursuant to this order the plaintiff continued to reside in two rooms in the suit house which were in her occupation and to collect the rent in respect of the other portions of the suit house which were in the occupation of the tenants, This state of affairs continued until 8th June 1955 when the Central Government in exercise of its power u/s 12(1) of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, (hereinafter referred to as the Compensation and Rehabilitation Act) issued a notification to the effect that the Central Government had decided to acquire the evacuee properties specified in the Schedule to the notification and amongst the evacuee properties so specified were all urban immovable properties situate in that State within the limits inter alia of a

Municipality which have been declared or are deemed to have been declared as evacuee properties under the Administration of Evacuee Property Act, 1950. Now all the properties of Sitar Haji Shakur were declared to be evacuee properties under the order of the Assistant Collector of Evacuee Property dated 13th January 1951 which was confirmed by the order of the Custodian of Evacuee Property dated 24th April 1951 and the right, title and interest of Sitar Haji Shakur in the suit house which was situated within the limits of Upleta Municipality in the State of Saurashtra was, therefore, covered by the notification dated 8th June 1955. The right, title and interest of Sitar Haji Shakur in the suit house was, therefore, extinguished and that right, title and interest vested absolutely in the Central Government free from all encumbrances u/s 12(2) of the Compensation and Rehabilitation Act. The Central Government thereafter in exercise of its powers u/s 20 of the Compensation and Rehabilitation Act sold the suit house by public auction and at the public auction defendants Nos. 5 and 6 were the highest bidders and they were, therefore, declared the purchasers of the suit house and a certificate of sale dated 20th August 1959 was issued by the Assistant Settlement Commissioner on behalf of the Central Government declaring defendants Nos. 5 and 6 as purchasers of the suit house with effect from 20th August 1959. The plaintiff during all this period continued to reside in the two rooms in the suit house as before. The Central Government, it appears, was of the view that the acquisition of the suit house by the Central Government under the notification dated 8th June 1955 had the effect of extinguishing the rights of residence and maintenance enjoyed by the plaintiff and they, therefore, decided to pay to the plaintiff a sum of Rs. 4110/- in cash as and by way of ex-gratia relief on humanitarian grounds and directed that as soon as the said amount was paid to the plaintiff the plaintiff should be charged rent at the rate of Rs. 20 per month in respect of the portion of the suit house in her occupation. This decision of the Central Government was communicated to the plaintiff by the Registrar of the Office of the Custodian General of Evacuee Property by his letter dated 29th May 1957, Exhibit 20. The plaintiff did not agree with the view of the Central Government that her rights of residence and maintenance were affected by the acquisition of the suit house by the Central Government or the sale of the suit house to defendants Nos. 5 and 6 and she, therefore, filed a suit which was subsequently renumbered Civil Suit No. 25 of 1959 (i) for a declaration that she had a right of residence in the suit house and that she was entitled to maintenance out of the suit house and to enjoy the suit house and its rent for her life; (ii) that the order of the Central Government contained in the letter dated 29th May 1957 Exhibit 20 was illegal and void; (iii) that the order declaring the suit house as evacuee property was bad in law and in any event did not affect the rights of the plaintiff and that the sale of the suit house by Central Government to defendants Nos. 5 and 6 was subject to the rights of residence and maintenance of the plaintiff, and (iv) for a charge on the suit house for securing her rights of residence and maintenance. The Union of India, the Custodian of Evacuee Property, the Assistant Custodian of Evacuee Property and the Additional Regional Settlement Commissioner were impleaded as defendants

Nos. 1 to 4 in the suit since the various orders made by these officers were challenged and defendants Nos. 5 and 6 were also impleaded since the sale of the suit house in their favour was sought to be declared null and void and in any event subject to the rights of residence and maintenance of the plaintiff. The suit was resisted by all the defendants but the main contest took place between the plaintiffs and defendants Nos. 5 and 6. The trial Court held that the plaintiff as the widow of Shakur Haji Suleman had a right of residence in two rooms in the suit house in which she resided with her husband until his death and this right was recognised by the Custodian of Evacuee Property by his orders dated 24th April 1951 and 26th February 1964 and the notification dated 8th June 1955 did not have the effect of extinguishing this right and it was accordingly enforceable against defendants Nos. 5 and 6. So far as the claim for maintenance was concerned, the trial Court held that the plaintiff had no right to be maintained out of the income of the suit house and that in any event on the issue of the notification dated 8th June 1955, such right, if any, was extinguished and the plaintiff was, therefore, not entitled to claim maintenance out of the income of the suit house in the hands of defendants Nos. 5 and 6 nor was she entitled to a charge on the suit house for her maintenance. Regarding the validity of the order of the Central Government contained in the letter dated 29th May 1957, Exhibit 20, the trial Court took the view that the said order was null and void. The order declaring the suit house as evacuee-property was, however, upheld by the trial Court and the sale of the suit house by the Central Government to defendants Nos. 5 and 6 was also held to be valid. The trial Court in the result passed a decree declaring that the plaintiff had got a right of residence free of rent in the two rooms in the suit house which were in her occupation and dismissed her suit in regard to the other reliefs claimed by her.

2. The plaintiff was aggrieved by this decree in so far as it refused her right to be maintained out of the income of the suit house and she, therefore, preferred Appeal No. 3 of 1960 in the Court of the Assistant Judge, Gondal. Defendants Nos. 5 and 6 appeared to oppose the appeal and they raised a preliminary objection in regard to the jurisdiction of the learned Assistant Judge to entertain the appeal. They contended that the value of the subject matter of the suit was above Rs. 10, 000/- and that an appeal against the decision of the trial Court, therefore, lay to the High Court and not to the District Court and the appeal preferred by the plaintiff was, therefore, not maintainable in the District Court. This was a contention affecting the jurisdiction of the learned Assistant Judge and it was, therefore, heard by the learned Assistant Judge as a preliminary contention. The learned Assistant Judge took the view that what was material to consider for the purpose of determining the forum of appeal was the value of the subject matter of the suit at the date of institution of the appeal and not the value at the date of institution of the suit. He observed that the claim for maintenance made in the suit was Rs. 100 per month and, therefore, u/s 7(H) of the Court-fees Act, 1870, which was in force at the date of institution of the suit, the value of the subject matter of the said claim for computation of court-fees

was Rs. 12, 000/- and the value of the subject matter of the suit for purpose of jurisdiction was also, therefore, above Rs. 10, 000/- at the date when the suit was instituted, but subsequent to the institution of the suit and prior to the filing of the appeal, the Court-fees Act, 1870, was repealed and the Bombay Court-fees Act, 1959, was enacted and u/s 6(ii) of the new Act, the mode of valuation of the subject matter of the claim for maintenance was reduced to Rs. 1, 200/- and, therefore, at the date of institution of the appeal, the value of the subject matter of the suit was less than Rs. 10, 000/- and hence the appeal was rightly filed in the; District Court. Defendant No. 5 did not accept the order of the learned Assistant Judge determining the question of jurisdiction against him and he, therefore, preferred Civil Revision Application No. 766 of 1960 in this Court. Defendants Nos. 5 and 6 in the meantime also preferred an appeal against the decree passed by the trial Court in so far as it declared that the plaintiff was entitled to a right of residence in the suit house in the hands of defendants Nos. 5 and 6 and this appeal was, consistently with the stand taken by them before the learned Assistant Judge, preferred by them in the High Court. That appeal is First Appeal No. 632 of 1960. Defendant No. 5 also thereafter made an application to this Court that the appeal preferred by the plaintiff in the Court of the Assistant Judge, Gondal, should be withdrawn to this Court and by consent of parties that appeal was withdrawn to this Court and was numbered First Appeal No. 450 of 1963. Since the questions arising in these two First Appeals and Revision Application are common, it would be desirable to dispose them of by a single judgment.

3. It would be convenient to first dispose of the Revision Application as that raises a question of jurisdiction, namely, which Court has jurisdiction to entertain an appeal against the judgment of the trial Court: the High Court or the District Court? This question also arises in the appeal of defendants Nos. 5 and 6, for if it is the District Court which has jurisdiction to entertain the appeal and not the High Court, the appeal of defendants Nos. 5 and 6 instituted in the High Court would be in a Court without jurisdiction and would have to be returned for presentation to the proper Court, namely, the District Court. The question obviously depends upon whether Section 26 of the Bombay Civil Courts Act, 1869, applies on the facts of the case or Section 8 of that Act applies. Section 8 provides:

8. Except as provided in Sections 16, 17 and 26 the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force.

The District Court is, therefore, ordinarily the Court of Appeal in all cases where an appeal is sought to be preferred against a judgment of a Civil Judge except where the case falls within any of the three sections, namely, Sections 16, 17 and 26. Sections 16 and 17 are not material for our present purpose and we need not, therefore, refer to them. Section 26 which constitutes the last exception to Section 8 says:

26. In all suits decided by a Civil Judge of which the amount or value of the subject-matter exceeds ten thousand rupees the appeal from his decision shall be direct to the High Court.

According to this section if the amount or value of the subject matter of the suit exceeds Rs. 10, 000/-, the appeal would lie to the High Court instead of to the District Court. It is, therefore, necessary to consider what was the amount or value of the subject matter of the present suit. One was a claim for maintenance to be charged on the suit house and the other was a claim for various declarations which we have already set out above. The claim for maintenance was for Rs. 100 per month and according to Section 7(ii) of the Court-fees Act, 1870, which was in force at the date of institution of the suit, it was valued at Rs. 12, 000/-, being ten times the amount claimed for one year computation of Court-fees. The claim for various declarations with consequential relief of injunction was valued at Rs. 200/- u/s 7(iv)(c) of the Court-fees Act, 1870. The court-fees were accordingly paid on a total value of Rs. 12, 200/-. Now u/s 8 of the Suits Valuation Act, 1887, in suits falling under paragraphs (ii) and (iv) of Section 7 of the Court-fees Act, 1870, the value of the subject matter of the suit for the purpose* of jurisdiction is to be the same as the value determinable for the computation of court-fees and the subject matter of the present suit was, therefore, valued for the purpose of jurisdiction at Rs. 12, 000/- being the same figure at which the value was determined for computation of court-fees. It was because the value of the subject matter of the suit was Rs. 12, 000/-, this, above Rs. 10, 000/- that the suit was tried by the Civil Judge, Senior Division. It would, therefore, appear that an appeal against the decision of the suit must lie to the High Court u/s 26 of the Bombay Civil Courts Act, 1869. The plaintiff also agreed that such would undoubtedly have been the position if nothing further had transpired but according to the plaintiff an event happened prior to the institution of the appeals by the plaintiff and defendants Nos. 5 and 6 which made a vital difference so far as the forum of appeal was concerned and that event was the enactment of the Bombay Court-fees Act, 1959. This Act repealed the Court-fees Act, 1870, and u/s 6(ii) of this Act a different mode of valuation was provided in regard to a claim for maintenance. Section 6(H) provided that in suits for maintenance (with or without a prayer for the creation of a charge), the value of the subject matter of the suit shall be deemed to be the amount claimed to be payable for one year. The argument of the plaintiff was that at the date of institution of the appeal by the plaintiff the new Court-fees Act was in force and according to it the value of the subject matter of the suit was Rs. 1, 200/- so far as the claim for maintenance was concerned (vide Section 6(ii)) and Rs. 200/- so far as the claim for declarations and consequential relief of injunction was concerned (vide Section 6(iv)) and the value of the subject matter of suit for the purpose of jurisdiction was, therefore, Rs. 1, 400/- made up of Rs. 1, 200/- and Rs. 200/- u/s 8 of the Suits Valuation Act. The plaintiff thus sought to evaluate the subject-matter of the suit for the purpose of jurisdiction by reference to the new Court-fees Act on the ground that it was the new Court-fees Act which was

in force at the date of institution of the appeal. But this approach of the plaintiff is wholly erroneous. The value of the subject matter of a suit is a concept which has relevance only for one of two purposes, namely, court-fees and jurisdiction. Both these purposes contemplate determination of the value of the subject matter of the suit at the date of institution of the suit and the value determined at the date of institution of the suit governs the question of court-fees as also the question of jurisdiction. The determination of the value of the subject matter of the suit for computation of court-fees must necessarily be as at the date of institution of the suit, for court-fees are payable on the plaint and the plaint cannot be received on file without payment of requisite court-fees. So also the value of the subject matter of the suit for the purpose of jurisdiction has to be made at the date of institution of the suit, for on the value would depend the question of jurisdiction of the Court to try the suit. Section 8 of the Suits Valuation Act also emphasises that the value of the subject matter of the suit for the purposes of jurisdiction is the value determined at the date of institution of the suit for the purpose of jurisdiction shall be the same as the value determinable for computation of court-fees and the determination of the value for computation of court-fees is referable only to the date of institution of the suit. The value of the subject matter of the suit for either of the two purposes, namely, court-fees or jurisdiction is, therefore, the value as determined at the date of institution of the suit. If there is any change in the mode of valuation subsequent to the institution of the suit, the value of the subject matter of the suit which is determined at the date of institution of the suit cannot change either for the purpose of court-fees or for the purpose of jurisdiction unless of course the change is made with retrospective effect. It is, therefore, clear that when Section 26 of the Bombay Civil Courts Act, 1869, says that if the amount or value of the subject matter of the suit exceeds rupees ten thousand, the appeal shall lie to the High Court, the reference is to the amount or value of the subject matter of the suit for the purpose of jurisdiction determined as at the date of institution of the suit. Since the amount or value of the subject matter of the suit for the purpose of jurisdiction determined as at the date of institution of the suit was admittedly Rs. 12, 200/-, Section 26 of the Bombay Civil Court Act, 1869, was applicable and an appeal against the decision of the trial Court lay directly to the High Court and not to the District Court. The learned Assistant Judge was, therefore, in error in holding that he had jurisdiction to entertain the appeal. The Revision Application would, therefore, have to be allowed but this has no adverse consequence on the appeal of the plaintiff since that appeal has already been transferred to this Court and since we are of the view that an appeal lies to this Court, we have jurisdiction to hear and dispose of that appeal. We will, therefore, now proceed to consider the two appeals which are before us, one filed by the plaintiff and the other filed by defendants Nos. 5 and 6.

4. Of the two appeals we will first take up the appeal of defendants Nos. 5 and 6 for that was the main appeal in which arguments were addressed to us and the determination of the questions arising in that appeal will largely conclude the

questions arising in the appeal of the plaintiff. The appeal of defendants Nos. 5 and 6 challenged the declaration given by the trial Court that the plaintiff was entitled to a right of residence in the two rooms of the suit house in which she was residing immediately prior to the migration of her son Sitar Haji Shakur. The contention of defendants Nos. 5 and 6 was a two-fold one. First they disputed that the plaintiff had any right of residence at all in any portion of the suit house on the death of her husband Shakur Haji Suleman and secondly they contended that in any event even if the plaintiff had a right of residence in two rooms in the suit house, that right was extinguished when the suit house was acquired by the Central Government by virtue of the notification dated 8th June 1955 issued u/s 12(1) of the Compensation and Rehabilitation Act since on the issue of the notification the suit house vested absolutely in the Central Government free from all encumbrances u/s 12(2) of that Act. Now it is obvious that the plaintiff cannot succeed unless she establishes that on the death of her husband Shakur Haji Suleman, she acquired a right of residence in two rooms in the suit house, for that is the right which she seeks to enforce against defendants Nos. 5 and 6 who are the purchasers of the suit house. The plaintiff claimed that since Shakur Haji Suleman was a Cutchhi Memon, she, as his widow was entitled to the same rights of residence and maintenance as a Hindu widow on the death of her husband and since the suit house was the family dwelling house in which she lived with her husband prior to his death, she was entitled to reside in the suit house for her life after the death of her husband. This claim was disputed on behalf of defendants Nos. 5 and 6 on the ground that though it is well-settled law that Cutchhi Memons are governed by Hindu Law in matters of inheritance and succession, there was no custom either pleaded or proved under which a Cutchhi Memon widow could claim to be entitled to the same right of residence as a Hindu widow under Hindu Law. Now this contention disputing the right of the plaintiff to be governed by Hindu Law in the matter of residence was not raised before the trial Court and it was not disputed on behalf of defendants Nos. 5 and 6 that in matters in respect of which claim was made by the plaintiff in the suit, Cutchhi Memons were governed by Hindu Law. If this contention had been raised on behalf of defendants Nos. 5 and 6, the plaintiff might have led evidence for the purpose of showing that by custom, even in matters of residence, a Cutchhi Memon widow was governed by Hindu Law; but this was not necessary in view of the fact, that this position was not disputed on behalf of defendants Nos. 5 and 6. We do not, therefore, see any reason why we should permit defendants Nos. 5 and 6 to raise this contention before us for the first time at the hearing of these appeals. But even if the contention were allowed to be raised, we do not think there is any substance in it. It can no longer be disputed that, in the absence of proof of special usage to the contrary, Cutchhi Memons are governed in matters of inheritance and succession by Hindu Law. Now under Hindu Law as it stood prior to various legislative enactments, a Hindu widow was not entitled to any share in the property of her husband and, therefore, in lieu of share in the property, she was given right of residence in the family dwelling house in which she was residing with her husband prior to his death and maintenance out of the

property of her husband. The rights of residence and maintenance given to the widow directly appertained to inheritance and succession and were matters relating to inheritance and succession. If, therefore, Cutchhi Memons are governed by Hindu Law in matters of inheritance and succession, it must be held that in respect of rights of residence and maintenance of a widow too. Cutchhi Memons are governed by Hindu Law. As a matter of fact a Division Bench of the Bombay High Court consisting of Candy and Whitworth, JJ. held in the case of Haji Saboo Sidick v. Ayeshabai which ultimately went to the Privy Council and the decision of the Privy Council is reported in 27 Bom. 485 that since a Cutchi Memon is governed by Hindu Law in matters of inheritance and succession, his widow was entitled to maintenance out of the properties left by him. If the right of a widow to claim maintenance can be regarded as part of the law of inheritance and succession on the ground that maintenance is given to the widow in lieu of her share in the property of her deceased husband, the right of residence must also, on a parity of reasoning, be regarded as part of the law of inheritance and succession so as to be governed by Hindu Law. Now it was common ground between the parties that the suit house was a family dwelling house in which the plaintiff was residing with her husband prior to his death and it must, therefore, be concluded that the plaintiff was entitled to a right of residence in the suit house after the death of her husband. It may be pointed out that this right of residence of the plaintiff was actually recognised by the Custodian of Evacuee Property by his order dated 24th April 1951. The plaintiff in the appeal which she preferred against the decision of the Assistant Custodian of Evacuee Property claimed a share in the property left by her husband but this claim was negatived by the Custodian of Evacuee Property and the Custodian of Evacuee Property held that the plaintiff had a right of residence in two rooms in the suit house in which she was residing immediately prior to the migration of her son Sitar Haji Shakur. The Custodian of Evacuee Property therefore, while declaring the properties of Sitar Haji Shakur as evacuee properties accepted that the suit house was subject to the right of residence of the plaintiff in respect of two rooms and the declaration of evacuee property made by him applied to the suit house subject to the said right of residence of the plaintiff. Unless, therefore, this right of residence of the plaintiff was extinguished by reason of the acquisition made under the notification dated 8th June 1955 or the sale of the suit house by the Central Government to defendants Nos. 5 and 6 it must be held to exist and if it exists, it must be enforceable against defendants Nos. 5 and 6.

5. That brings us to the question whether the right of residence of the plaintiff which was recognised by the Custodian of Evacuee Property and subject to which the suit house was declared to be evacuee property was extinguished by the notification dated 8th June 1955. This notification was issued by the Central Government in exercise of its powers u/s 12(1) of the Compensation and Rehabilitation Act and the determination of the question as to what is the effect of the said notification on the right of residence of the plaintiff must depend on the true construction of Section 12(2) of the Act. Section 12(2) provides that on

the publication of a notification under Sub-section (1):

...the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.

The argument urged on behalf of defendants Nos. 5 and 6 was that on the publication of the notification dated 8th June 1955, the right, title and interest of Sitar Haji Shakur in the suit house was extinguished and the suit house vested absolutely in the Central Government free from all encumbrances and the right of residence of the plaintiff being an encumbrance on the suit house was, therefore, destroyed and it did not follow the suit house in the hands of the Central Government. This argument was based on two postulates, one being that the suit house was the evacuee property specified in the notification and the other being that the right of residence of the plaintiff was an encumbrance on the suit house. Both the postulates are in our opinion not well-founded and the argument based on them must fail. Turning first to examine the validity of the first postulate, let us see what is the evacuee property specified in the notification. The Schedule to the notification specifies all urban immovable properties in the State of Saurashtra situate inter alia within the limits of a Municipality, which have been declared to be evacuee properties under the Administration of Evacuee Property Act, 1950. The immovable property must therefore, be a property which has been declared as evacuee property under the Administration of Evacuee Property Act, 1950, before it can fall within the description of immovable properties specified in the Schedule. Now what is the immovable property in the present case which has been declared as evacuee property under the Act? By the order of the Assistant Collector of Evacuee Property dated 13th January 1951 which was confirmed by the Custodian of Evacuee Property by his order dated 24th April 1951, the properties of Sitar Haji Shakur were declared to be evacuee properties and since the suit house subject to the right of residence of the plaintiff belonged to Sitar Haji Shakur, it was covered by the declaration and must, therefore, be held to be declared as evacuee property. The declaration of evacuee property as pointed out above, covered the suit house subject to the right of residence of the plaintiff and what was declared as evacuee property was not the entire suit house but the suit house subject to the right of residence of the plaintiff. The suit house subject to the right of residence of the plaintiff was the evacuee property specified in the notification and u/s 12(2) it vested absolutely in the Central Government free from all encumbrances.

6. Now it is necessary to consider at this stage what was the nature of the right of residence of the plaintiff, whether it amounted to an interest in suit house or it was merely a right enforceable by the plaintiff against the heir of her husband in respect of the suit house. If it was an interest in the suit house, then obviously what vested in the Central Government was the suit house minus the interest of the plaintiff in the suit house for, as pointed out above, what was declared to be

evacuee property was only the suit house subject to the right of residence of the plaintiff. If on the other hand it was not an interest in the suit house but merely a right enforceable against the heir in respect of the suit house, the entire interest in the suit house-and by interest we mean legal interest-would be evacuee property as property belonging to Sitar Haji Shakur and the vesting in the Central Government would be of the entire interest in the suit house. The question is a jurisprudential one and its determination requires an appreciation of the distinction between two different classes of legal rights, namely, rights in rem and rights in personam. The distinction between rights in rem and rights in personam is based on a difference in the incidence of the co-relative duties. A right in rem is available only against the world at large while a right in personam is available only against a particular person. An interest in land is always a right in rem for it is enforceable against all but a right, for example, to obtain a transfer of an interest in land is a right in personam for it is protected only against the owner of the interest. A safe test for the purpose of determining whether the right of the plaintiff of residence in the suit house was an interest in the suit house would be to consider whether this right was available against the world at large or it was available only against determined individuals.

7. The right of residence of a Hindu widow in the family dwelling house has been the subject matter of a number of judicial decisions and there are two decisions of the Madras High Court which throw considerable light on the true nature of this right. The first decision to which we must refer in this connection is Venkatammal v. Andyappa, 6 Madras 130. In that case one Andyappa died leaving behind him, his widow the plaintiff and his son Krishnaswamy. On the death of Andyappa his properties were inherited by Krishnaswami and with the aid of those properties Krishnaswami acquired some further properties. Krishnaswami thereafter in the course of his business mortgaged all the properties inherited by him as also those acquired by him, in favour of the second defendant to secure a loan of Rs. 25, 000/-. He also mortgaged one of those properties in favour of the third defendant to secure a loan of Rs. 15,000/- and thereafter mortgaged once again all the properties to the fourth defendant to secure a loan of Rs. 15, 000/-. On these mortgages, suits were brought and decrees obtained; and the decreeholders took out proceedings in execution of the decrees. At this stage the plaintiff instituted a suit for a declaration inter alia that she was entitled to retain the accommodation which she had enjoyed in the family house and the decreeholders were not entitled to evict her. The Division Bench of the Madras High Court upheld this claim of the widow observing that the plaintiff was entitled to reside in the house she had occupied till then and although this did not entitle her to resist the sale of it, the house must be sold subject to her right. The right of residence of the widow in the family dwelling house was, therefore, held to be enforceable even when the house went into the hands of a purchaser. This view was affirmed by the Madras High Court in a Full Bench decision given in Ramanadan v. Rangammal, 12 Madras 260. Muttusami Ayyar J., delivering the leading judgment of the Full Bench pointed out that there

was a distinction between a right of residence in the family house and a right of maintenance and so far as the right of residence was concerned, he observed:

The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a bona fide purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her. Prior to the decision in *Lakshman Ramchandra Joshi v. Satyabhama Bai* ILR 2 Bom. 494 Sir Barnes Peacock and Mr. Justice Mitter, held that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adopted mother of her right of residence. *Mangala Debi v. Dinanath Bose* 4 B.L.R. O.S. 72. The same view was taken in a Bombay case reported in *Prankooor v. Devkoonwur* 1 Borr. 2nd Ex. P. 404 In *Gauri v. Chandramani* ILR 1 All. 262, the Allahabad High Court held that the widow had a valid right of residence against the purchaser of the family house at a Court-sale.

Referring to the decision in *Lakshman Ramchandra Joshi v. Satyabhama Bai* 2 Bom. 494, the learned Judge said:

As to the mother's right of residence in the family house, it is a right inherent in her and an incident of her status as mother and the son cannot arbitrarily eject her from it. There is no indefiniteness as to the specific property to which it is referable and as the residence of Hindu females in family houses is a fact well known in this country, a purchaser was held not entitled to eject her, unless he showed that the sale bound that interest. The reason for the distinction between a jus in re over a general fund and a charge on a specific part of that fund did not extend to the right of residence in the family house, and it was therefore held with special reference to the mode in which the theory of a charge in the nature of an existing proprietary right was developed, that the equity of a purchaser for value did not extend to the mother's right of residence in specific property, viz., the family house, unless the sale was binding on her.

It is clear from these two decisions that a widow's right of residence in the family dwelling house is a right which is enforceable not only against the heirs but also against whoever purchases the house, unless of course it is shown that the house was sold in discharge of a debt which was binding on her or it was sold with her consent or in circumstances which would sustain a plea of equitable estoppel against her. The same view was reiterated by a single Judge of the Madras High Court in *Goteti Bayyapparaju Sarma and Others Vs. Tadanki Subba Lakshamma*, , where it was held that so far as the right of residence was concerned:

...it is well established that the purchaser must show that the debt was incurred under such circumstances as would bind her....

and unless the purchaser can show this, the right of residence of the widow

would be enforceable against him. The right of residence of the widow in the family dwelling house is, therefore, enforceable against whoever is the owner of the house and it is no defence for a transferee of the house from the heirs to say that he is a bona fide purchaser of the house for value without notice of the said right. If the widow is disturbed in the exercise of her right of residence in the family house by anyone, she can enforce that right against the person causing the disturbance and she can conceivably sue a trespasser in the portion of the dwelling house in her occupation for injunction or damages. The right of residence of the widow in the family dwelling house is, therefore, a right available against the world at large and is a right in rem and must, therefore, be held to be an interest in the house. If the right of residence were enforceable only against the heirs or against purchasers for value from the heirs without notice of the right, the right would have been of the nature of jus ad rem which is a Right in personam. In that event the right of residence would have come within the same class of legal rights in which, for example, a charge falls and that would not have amounted to an interest in the house. But since the right of residence is enforceable against all, it is an interest in the house. As a matter of fact the right to enjoy possession of the house is one of the rights which go to make up the bundle of ownership and when that right belongs to the widow, owner of the house is excluded, provided of course he is not a member of the family, from the enjoyment of that right and that barrier is removed only on the death of the widow or the widow giving up her right of residence. We are, therefore, of the view that the right of residence of the plaintiff in the suit house was an interest in the suit house and what vested as evacuee property in the Central Government under the notification dated 8th June 1955 was the entire interest in the suit house minus the interest represented by the right of residence of the plaintiff in the two rooms in the suit house.

8. The only question which then remains for consideration is as to whether the right of residence of the plaintiff in the two rooms in the suit house which constituted an interest in the suit house was extinguished by reason of the provision in Section 12(2) that the evacuee property shall vest absolutely in the Central Government free from all encumbrances. It was urged on behalf of defendants Nos. 5 and 6 that there were two expressions which were of the utmost significance in Section 12(2) and they were "shall vest absolutely" and "free from all encumbrances". The argument was that the words "vest absolutely" were clearly indicative of the legislative intent that the whole of the evacuee property should vest in the Central Government in title as well as possession and in this connection reliance was placed on a decision of the Supreme Court in Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust, . Now we entirely agree that having regard to the context in which the words "vest absolutely" occur, it is clear that what is intended by the Legislature is that the evacuee property should vest in the Central Government not merely for a limited purpose but for all purposes and not merely in possession but also in title and that the vesting should be absolute and complete, but the vesting

which is contemplated by the section is the vesting of evacuee property, that is, of the right, title and interest of the evacuee in the property and not of the interest of a non-evacuee in the property. The section deals only with the right, title and interest of the evacuee in the evacuee property and not with the right, title and interest of a non-evacuee in the property. The definition of "evacuee property" in the Administration of Evacuee Property Act, 1950, clearly shows that only the right, title and interest of an evacuee in the property can be evacuee property and, therefore, when Section 12(2) provides that on the publication of a notification under Sub-section (1), the right, title and interest of the evacuee in the evacuee property shall be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances, what vests in the Central Government free from all encumbrances is evacuee property, that is, the right, title and interest of the evacuee in the property and not the right, title and interest of a non-evacuee. If this object and purpose of the section is borne in mind, the words "free from all encumbrances" do not present any difficulty of interpretation. It is no doubt true that the word "encumbrance" is a word of wide import and it would include *jus in re aliena*, that is, any right which limits or derogates from the right belonging to some other person in respect of the same subject matter and in that sense it would include even a mortgage or a lease which constitutes an interest in immovable property. But that is not the sense in which the word "encumbrance" appears to have been used in Section 12(2). If the word "encumbrance" is given such wide meaning as to include any *Jus in re aliena*, the effect of Section 12(2) would be to affect interests of non-evacuees in evacuee properties, as for example, where a non-evacuee may be a mortgagee or a lessee. The interest of non-evacuee as a mortgagee or a lessee in such case would be extinguished without payment of any compensation and that surely is not a result which could have been intended by the Legislature. Moreover, Section 19 of the Act clearly postulates the continuance of leases of evacuee properties effected prior to the publication of the notification u/s 12(1) indicating beyond doubt that leases of evacuee property are not intended to be within the connotation of the word "encumbrance". The word "encumbrance" in our opinion does not include an interest in the property and more particularly so when we find that the only thing which vests in the Central Government under the section is the right, title and interest of the evacuee in the property and not the right, title and interest of a non-evacuee. The true construction of Section 12(2), therefore, is that on the publication of a notification u/s 12(1), the right, title and interest of the evacuee in the property in question is extinguished and it vests in the Central Government: if any non-evacuee has any right, title or interest in the property, it is not affected and it does not vest in the Central Government and the right, title and interest of the evacuee in the property which vests in the Central Government, so vests free from all encumbrances on that right, title or interest. Anything which, as pointed out by Shah J. as he then was, in *Shree Ambarnath Mills Corporation Vs. D.B. Godbole and Another*, , prevents or impedes action in the exercise of that right, title and interest would be extinguished, but that would not include the right, title or interest of a non-

evacuee in the property.

9. Since in the present case the right of residence of the plaintiff in the two rooms in the suit house was an interest in the suit house and what was declared to be evacuee property was the suit house subject to this interest of the plaintiff, what vested in the Central Government u/s 12(2) was only the right, title and interest of Sitar Haji Shakur in the suit house and not the right of residence of the plaintiff and defendants Nos. 5 and 6 being the purchasers from the Central Government could acquire only the right, title and interest which the Central Government possessed and, therefore, the right of residence of the plaintiff in the two rooms in the suit house did not vest in defendants Nos. 5 and 6 and the plaintiff was entitled to enforce that right against defendants Nos. 5 and 6. The trial Court was, therefore, right in granting the declaration that the plaintiff was entitled to right of residence in two rooms in the suit house.

9.1 That takes us to the appeal of the plaintiff. That appeal raises the question whether the right of maintenance claimed by the plaintiff was enforceable against the suit house in the hands of defendants Nos. 5 and 6. Now it is well-settled that the right of maintenance of a widow is not a charge upon the estate of the deceased husband, whether joint or separate, until it is fixed and charged upon the estate. The widow's right of maintenance is liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value without notice of the widow's right of maintenance. Vide Section 39 of the Transfer of Property Act. It is, therefore, clear that the right of maintenance does not confer any interest in the property of the deceased husband and it is at the highest a right enforceable against the heir in so far as the property of the deceased husband is concerned. This right would certainly be an encumbrance within the meaning of that term as indicated by in above and there is, therefore, no doubt that on the publication of a notification u/s 12(1) it would stand extinguished. The trial Court was; therefore, right in taking the view that the right of maintenance of the plaintiff was extinguished when the notification dated 8th June 1955 was issued by the Central Government acquiring the suit house,

10. The result, therefore, is that the Revision Application is allowed and the rule is made absolute with costs and so far as the appeals of the plaintiff and defendants Nos. 5 and 6 are concerned, they are both dismissed with costs.