

(2001) 09 BOM CK 0024

In the Bombay High Court

Case No : Writ Petition No. 1524 of 1997

Raja Mohammad Amir Mohannad Khan

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 21-09-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Enemy Property Act, 1968 — Section 13, 18, 2, 6, 8

Citation : (2002) 2 BomCR 663 : (2002) 3 BOMLR 248 : (2002) 2 MhLj 425

Hon'ble Judges : R.M. Lodha, J;Nishita Mhatre, J

Bench : Division Bench

Advocate : I.M. Chagla, D.J. Khambata and M.I. Chagla, instructed by Gagrath and Co, for the Appellant; S.B. Jaisinghani, A.S.G. and Girish Kulkarni, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—At the outset, pursuant to the order passed by us on 4th September, 2001 directing respondents to place on record copy of the note put up before the Cabinet regarding release of property of petitioner's father late Raja Mohammad Amir Ahmad Khan of Mahmudabad and decision taken thereon by the Cabinet for release of 25% of the property in favour of legal heirs of late Raja of Mahmudabad. Mr. S.B. Jaisinghani, learned Additional Solicitor General invited our attention to the affidavit of Shri Prabir Sengupta, Secretary to Government of India, Ministry of Commerce and Industry, Department of Commerce, New Delhi claiming privilege in regard to the said documents being placed on record before this court on the ground that public interest requires that the same should not be disclosed, no matter what the individual documents in that class may contain. In support thereof Mr. Jaisinghani also relied upon the judgment of the Apex Court in Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, . In S.P. Gupta Vs. President of India and Others, which read thus

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"It is settled law and it was so clearly recognised in *The State of U.P. Vs. Raj Narain and Others*, that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and despatches from ambassadors abroad vide *Conway v. Rimmer*, 1968 AC 910 and 993 and *Reg. v. Lewes J.K. Ex Parte Home Secretary*, (1973) AC 388 at 412. Papers brought into existence for the purpose of preparing a submission to cabinet vide *Lanyon Property Ltd. v. Commonwealth* 129 Commonwealth LR 650 and indeed any documents which relate to the framing of government policy at a high level vide *re. Grosvenor Hotel, London*, (1964) 3 All ER 354."

2. The Apex Court, thus, held that Cabinet papers are protected from disclosure not by reason of their contents but because of the class to which they belong. In view thereof, we accept the claim of privilege made by respondents in regard to the aforesaid two documents for same being placed on record.

3. Now we advert to the matter. The petitioner by this Writ Petition has prayed for declaration that properties described in the schedule being Exhibit "A" ceased to be enemy property and accordingly, stood divested from the second respondent on 14th October, 1973 and that thereafter, second respondent's possession of the said property was illegal, without the authority of law and unconstitutional and for direction to respondent No. 2 to hand over possession of the said properties to the petitioner. Inter alia in the alternative, the petitioner has prayed that a writ of mandamus or any other appropriate order or direction be issued divesting the second respondent of the said properties with effect from 14th October, 1973 and directing the second respondent to hand over possession of the said properties to the petitioner. The reliefs prayed for by the petitioner arise from the facts which we briefly narrate hereunder.

4. The petitioner was born on 30th November, 1943 at Mahmudabad, District Sitapur, U. P. The petitioner's father Raja Mohammad Amir Ahmad Khan of Mahmudabad (for brevity sake referred hereinafter as "the late Raja") migrated to Pakistan in the year 1957 and became Pakistani citizen. However, the petitioner and his mother Rani Kaniz Abdi (since deceased) continued to reside in India as Indian citizen. On 5-11-1962, the Defence of India Rules made u/s 3 of Defence of India Ordinance, 1962 came into force. The said Rules inter alia provided that with a view to preserve enemy property the Central Government

was authorised to appoint a custodian of the enemy property in India. On 12-12-1962, the Defence of India Ordinance, 1962 was repealed by Section 48 of the Defence of India Act, 1962. The 1962 Rules, however, made under the Defence of India Ordinance, 1962 were deemed to be Rules made under the Defence of India Act. Thereafter, the Government of India in exercise of powers under Sub-rule (1) of Rule 133-V issued the Enemy Property (Custody and Registration) Order, 1962. In the year 1965, hostilities between India and Pakistan broke out and on 11-9-1965 the Enemy Property (Custody and Registration) Order, 1965 (for short "Enemy Property Order, 1965") was issued by Government of India whereunder all immovable properties in India belonging to or held by or managed on behalf of Pakistani nationals vested in the custodian of enemy property with immediate effect. Pursuant to Enemy Property Order, 1965, the custody of all immovable property in India belonging to the petitioner's father-late Raja was vested in the second respondent as custodian for the purpose of the management, administration and preservation. Thereafter, in the year 1968 the Enemy Property Ordinance, 1968 was promulgated which was replaced by Enemy Property Act, 1968 (For short "Enemy Property Act"). The properties belonging to late Raja which vested in the second respondent pursuant to Enemy Property Order, 1965 continued to be vested under the Enemy Property Act. On 14-10-1973 the petitioner's father-late Raja died in London where he is said to have spent last years of his life. It is petitioner's case that on the death of his father, he exclusively inherited the said properties as sole heir. After the death of his father the petitioner claims to have made several representations between the year 1973 to 1978 to the first respondent for release of the said properties. Thereafter, he continued to make representations to the respondents in that regard. On 25-9-1978 the petitioner addressed the letter to Shri Mohan Dharia setting out the facts relating to the said properties including that the said properties had vested in him as the sole rightful owner after the death of his father and sought restoration of possession of the properties. An application in that regard is also said to have been made to the Prime Minister of India by the petitioner on 12-1-1981. The petitioner on 19-2-1981 wrote to Director Vigilance, Ministry of Commerce of the first respondent inter alia requesting him for expeditious order to be passed to release the said properties. In response thereto, on 7-3-1981 the Director, Vigilance, Ministry of Commerce of the first respondent intimated the petitioner that question regarding release of the said properties had been taken up by the Cabinet and that the Cabinet had decided that 25% of the said property be released in favour of the legal heirs and successors of the late Raja. The Director, Vigilance, Ministry of Commerce thereafter on 24-9-1981 wrote to the petitioner that it was decided by first respondent to release 25% of the said properties to the legal heirs of petitioner's father who had always been a citizen of India. The petitioner was requested to contact the second respondent and complete the necessary procedural and legal formalities before appropriate order of release of the said property could be passed. As per the decision of the Cabinet communicated to the petitioner, the second respondent vide letter dated

10-10-1981 wrote to the petitioner for legal evidence regarding heirs and successors of the petitioner's father to enable divesting of the said properties. The petitioner, then, filed the suit bearing No. 365 of 1981 on 18-11-1981 before the Court of Civil Judge at Lucknow to seek declaration of his status as legal representative of the late Raja. The second respondent herein viz. the custodian of enemy property for India was not impleaded in the said suit. The said suit was ultimately dismissed on 26-3-1984 for non-joinder of the necessary party viz. custodian of enemy property, for India. The petitioner, thereafter, filed second suit bearing Suit No. 219 of 1984 in the court of Civil Judge, Lucknow inter alia for the declaration that he was sole heir and successor of his father the late Raja. The petitioner also sought a declaration in that suit that he was thereby entitled to 25% of the said properties and to such other percentage or the whole of the said properties. The custodian of enemy property of India was impleaded as first respondent in that suit. The said suit decreed on 8-7-1986 and the petitioner was declared as sole heir and successor of his father the late Raja and was thereby held entitled to the 25% or whatever percentage of the properties. The said judgment and decree attained finality as no appeal was preferred against the said judgment and decree. On 17-2-1987, the petitioner wrote a letter to the then Prime Minister of India stating that he has been declared as sole heir and successor of his father-the late Raja and therefore, requested the then Prime Minister to order implementation of the Cabinet decision expeditiously. On 26-2-1987 the then Prime Minister responded to petitioner's letter and informed him that he was asking the authorities to look into the matter concerning the properties of the petitioner's late father. In the meanwhile the petitioner also communicated to respondent No. 2 that the said properties are being misappropriated and mismanaged. In the year 1991 the petitioner's mother expired. The petitioner appears to have continued to address the representations to the authorities and again on 3-8-1995 wrote to the then Prime Minister for release of the properties. Then again on 16-5-1996 he wrote to the then Prime Minister for redressal of his grievance and also on 3-1-1997 to the Governor of the State of U. P. requesting him release of the entire property. Thereafter again the petitioner claims to have made representation to the concerned authorities on 24-1-1997, 1-3-1997 and again to the then Prime Minister of India on 27-4-1997. When nothing was done and the properties were not released, the petitioner was constrained to file the present writ petition.

5. In response to the writ petition, on behalf of respondents, affidavit in reply has been filed by respondent No. 2 opposing admission of the writ petition. After admission of writ petition no counter has been filed by the respondents but we treat the affidavit in reply dated 10th November, 1997 as counter on behalf of the respondents. The respondents in their reply have challenged the jurisdiction of this court on the ground that petitioner is residing out of the jurisdiction of Mumbai and the properties involved in the petition are situated outside the jurisdiction of Mumbai and records pertaining to the matter are also lying in the State of U. P. It is respondents case that no relief can be granted to the

petitioner in writ petition as the properties which have vested in the custodian under the Enemy Property Act, 1968 could only be divested u/s 18 of the Enemy Property Act, 1968 by the Central Government by a general or special order and there is no obligation on the Central Government to divest the properties to the legal representative of deceased enemy person on the death of enemy national. It is respondents' case that the enemy properties were vested in the custodian as a reciprocal measure when the properties of the Indian nationals were seized by Pakistan Government. These properties are required to be returned or used in settlement with the Pakistan/Bangladesh Governments in accordance with Tashkent declaration or otherwise. Since such a settlement has not been reached, the public purpose for which the properties were vested in the respondent has not been exhausted and continue to remain. It is stated that Government has not so far made any policy nor issued any guidelines to release any property under the Enemy Property Act and unless and until some decision is taken or policy framed no property can be released as claimed by the petitioner in the petition. As regards petitioner's representations and decision of the Cabinet communicated to the petitioner by Director, Ministry of Commerce vide their letter dated 24-9-1991, it is stated that the decision of the Government of India was not as stated in the said letter but the decision of the Government was to return the properties to the legal representatives of the late Raja who were Indian citizens all along and the same should be analogous to ex gratia payment and resolution dated 15-3-1981 regarding ex gratia payment was published in the Government of India Gazette dated 10th April, 1971. In that regard it is further stated that the letter written by the then Director, Ministry of Commerce cannot be considered as an order passed by the Central Government u/s 18 of the Act and it was not clear whether the property worth 25% of the value of the total property was to be released or the property worth Rs. 25 lacs was to be released and in that context the matter was referred back to the Government and decision regarding the same is still pending. It is further stated that at no point of time the petitioner ever accepted the offer made by the Director, Ministry of Commerce vide letter dated 17-3-1981.

6. Mr. I. M. Chagla, learned senior counsel appearing for the petitioner strenuously urged that the property which vested in the custodian initially under the Enemy Property Order and thereafter under the Enemy Property Act ceased to be enemy property on the death of petitioner's father-late Raja on 14-10-1973 and thus it divested on that date and thereafter possession of the said properties with custodian is without jurisdiction and illegal. The learned senior counsel submitted that proviso to definition of enemy property u/s 2(c) only provides that where an enemy subject dies in the territories to which Enemy Property Act extends, the property owned by him or managed on his behalf prior to his death would continue to be regarded as enemy property after his death as well and as the late Raja died in London the property owned or managed on behalf of the late Raja ceased to be enemy property after his death. He contended that continued vesting thereafter is ultra vires the provisions of

Enemy Property Act and violative of Article 14. He invited our attention to the relevant provisions of Enemy Property Act and submitted that as soon as the said properties ceased to be enemy property, the custodian cannot continue his possession and if respondent No. 1 does not pass any order u/s 18 of Enemy Property Act, the petitioner's legitimate right to possess the said property cannot be deprived indefinitely and this court needs to grant declaration that the said properties have ceased to be enemy property and stood divested from second respondent.

7. Per contra, Mr. S.B. Jaisinghani, learned Additional Solicitor General vehemently contended that writ petition suffers from gross laches and inordinate delay and therefore, it is not a fit case for invocation of extraordinary jurisdiction under Article 226 of the Constitution of India. The learned Additional Solicitor General argued that issue of release of properties vested under the Enemy Property Act is a matter of policy and until and unless such policy and guidelines are framed, no property can be released. He urged that the court should not exercise writ jurisdiction in respect of the policy matters. In support of his submission he relied upon the judgment of Apex Court in Bhandara District Central Co-operative Bank Ltd. and Others, Vs. State of Maharashtra and Another etc., . The learned Additional Solicitor General also contended that as various questions of facts are involved, the petitioner ought to have filed suit if relief was available and writ petition is not the proper remedy. According to the learned Additional Solicitor General, the writ petition is also barred by res judicata or principles analogous thereto and is abuse of process of law. He relied upon State of U.P. Vs. Nawab Hussain, .

8. We may observe right here that the learned Additional Solicitor General during the course of arguments did not dispute the fact that the petitioner was Indian citizen and he also did not challenge the jurisdiction Of this court and rightly so.

9. The Enemy Property Order was issued on 11-9-1965 by Government of India and accordingly all immovable properties in India belonging to or held by or managed on behalf of Pakistani nationals vested in the custodian of enemy property with immediate effect. The Enemy Property Act came into force with effect from 20th August, 1968. The said Act was enacted to provide for the continued vested of enemy property vested in the custodian of enemy property for India and for matters connected therewith the custodian under the Enemy Property Act has been defined which means the custodian of enemy property for India appointed or deemed to have been appointed u/s 3 and includes the Deputy Custodian and an Assistant Custodian of enemy property appointed or deemed to have been appointed under that section. The enemy or enemy subject or "enemy firm" has been defined u/s 2(b) and enemy property has been defined u/s 2(c). Sections 2(b) and 2(c) read thus -

"2(b) "enemy" or "enemy subject" or "enemy firm" means a person or country who or which was an" enemy, an enemy subject or an enemy firm, as the case may be, under Defence of India Act, 1962 and the Defence of India Rules, 1962,

(or to the Defence of India Act, 1971 and the Defence of India Rules, 1971), but does not include a citizen of India; 2(c) "enemy property means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm:

Provided that where an individual enemy subject dies in the territories to which this Act extends, any property which immediately before his death, belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the purposes of this Act."

10. Custodian of enemy property for India and Deputy Custodian are appointed u/s 3 while appointment of Inspectors of enemy property are made u/s 4. Section 5 provides that property vested in the custodian of enemy property for India under the Defence of India Rules, 1962 to continue to vest in custodian notwithstanding the expiration of the defence of India Act, 1971 and Defence of India Rules, 1971. Section 6 provides that where any property vested in the custodian has been transferred whether before or after commencement of the Enemy Property Act by enemy or enemy subject or enemy firm and if Central Government forms the opinion that such transfer is injurious to public interest or was made with a view to evading or defeating the vesting of the property in the custodian, the Central Government may declare such transfer to be void after hearing the transferee in the matter. Section 8 deals with the powers of custodian in respect of the enemy property vested in him. Section 9 provides that all enemy property vested in the custodian shall be exempt from attachment, seizure or sale in execution of decree of a Civil Court or orders of any other authority. Section 13 makes provision for validity of action taken in pursuance of orders of custodian and it reads thus -

"13. Validity of action taken in pursuance of orders of Custodian.-

Where under this Act, --

(a) any money is paid to the Custodian; or

(b) any property is vested in the Custodian or an order is given to any person by the Custodian in relation to any property which appears to the Custodian to be enemy property vested in him under this Act, neither the payment, vesting nor order of the Custodian nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time. -

(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy firm, had died or had ceased to be an enemy or an enemy firm; or

(ii) some person who was so interested and who was believed by the Custodian to be an enemy or an enemy firm, was not an enemy or an enemy firm."

Section 15 empowers the custodian to call for returns from persons whom, in his opinion have any interest in or control over, any enemy property vested in him. u/

s 16, all returns relating to enemy property submitted to the custodian are required to be recorded in the registers so maintained. Section 18 deals with divesting of enemy property vested in the custodian which reads thus -

"18. Divesting of enemy property vested in the Custodian. --The Central Government may, by general or special order, direct that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall revest in such owner or other person."

Section 19 protects the action taken under the Act and provides that no prosecution or other-legal proceeding shall lie against the Central Government or Custodian or an Inspector of Enemy Property for anything which is done in good faith or intended to be done under the Act. Sections 20 and 21 provide for penalty and offences by companies. Section 22 provides that the provisions of the Enemy Property Act shall have effect notwithstanding anything inconsistent contained in any other law. Section 23 empowers the Central Government to make rules. u/s 24, certain orders made under the Defence of India Rules, 1962 are deemed to continue in force as if having been made under this Act.

11. Having surveyed the provisions of Enemy Property Act broadly it may be noted that sections 6, 8 and 18 thereof indicate that the enemy due to vesting of his property in custodian is not divested of his right, title and interest in the property but the vesting is limited to the extent of possession, management and control over the property and is temporary.

12. The enemy or enemy subject or "enemy firm" u/s 2(b) means a person or country who or which was enemy, an enemy subject or an enemy firm, as the case may be under Defence of India Act, 1962 and the Defence of India Rules, 1962 or to the Defence of India Act, 1971 and the Defence of India Rules, 1971 but does not include a citizen of India. The "enemy property" under the Act means any property belonging to or held or managed on behalf of an enemy, enemy subject or enemy firm for the time being. Proviso to Section 2(c) provides that where an individual enemy subject dies within the territories to which Enemy Property Act extends, any property which immediately before his death belonged to or held by him or managed on his behalf may continue to be regarded as enemy property for the purposes of Enemy Property Act notwithstanding his death. The question that falls for determination before us is whether the properties in question after the death of the Sate Raja inherited solely by petitioner who is citizen of India can be said to be "enemy property". It was not disputed before us that petitioner was born in India and is an Indian citizen. The petitioner's father - the late Raja migrated to Pakistan in the year 1957 and became Pakistani citizen. As the hostilities between India and Pakistan broke out in the year 1965, under the Enemy Property Order, 1965, the properties of the late Raja got vested with the custodian. In the year 1968, the

Enemy Property Act came into force and properties belonging to the late Raja continued to be vested with the custodian. The late Raja died in London on 14-10-1973. Till 14-10-1973 when the petitioner's father - the late Raja died, obviously, the properties belonged to enemy subject u/s 2(b) and was an enemy property u/s 2(c). But can it be said that after the death of petitioner's father - the late Raja, the petitioner - a citizen of India who has been held to be sole legal heir inheriting the properties of his father - the late Raja is an enemy u/s 2(b) and the properties vested in custodian continue to be enemy property u/s 2(c). Our answer is in the negative. The definition of enemy provided u/s 2(b) clearly excludes citizens of India as an enemy or enemy subject or enemy firm. In this fact situation, the petitioner having born in India and his Indian citizenship being not in question before us, by no stretch of imagination he can be said to be enemy or enemy subject u/s 2(b). After the death of his father on 14-10-1973, the petitioner filed a suit initially on 18-11-1981 before the court of Civil Judge at Lucknow to seek a declaration of the status as legal heir of the late Raja. In that suit, the custodian of enemy property was not impleaded as party defendant and consequently, the said suit came to be dismissed ultimately for want of impleadment of necessary party. Thereafter, another suit was filed by the petitioner in the month of July, 1984 inter alia seeking declaration that he was a sole heir and successor of his father. The custodian was defendant No. 1 in that suit which was decreed on 8-7-1986. The said judgment and decree had attained finality and, thus, before us there remains no dispute, that the petitioner is the sole legal heir and successor of his father - the late Raja and the properties belonging to the late Raja came to be owned exclusively by petitioner. In other words after the death of late Raja the petitioner became sole owner of the said properties. Upon acquisition of title of the said properties by petitioner on death of his father, the properties cannot be said to be enemy property within the meaning of Section 2(c) because enemy property means any property belonging to or held or managed on behalf of the enemy or enemy subject or enemy firm. When the petitioner is not an enemy within the meaning of Section 2(b), the properties owned, held and belonging to him cannot be under the Enemy Property Act be held to be enemy property from any reckoning. We have already noticed earlier that vesting in the custodian under the Enemy Property Act is only limited to the extent of possession, management and control over the property and title, right or interest of owner is not taken away. If the property which vested in the custodian initially under the Enemy Property Order, 1965 and later on continued to be vested under the Enemy Property Act ceased to be enemy property as it ceased to be belonging to enemy, the custodian cannot be permitted to continue with the possession of the said property. Section 13 does not alter the aforesaid legal position. What is provided by Section 13 is that vesting of the property of enemy or, enemy subject in custodian or order of custodian or the proceedings in consequence thereof is not invalidated or affected by reason that at the material time such an enemy subject had died or ceased to be enemy. That means the action of vesting or the order passed by the custodian or the proceeding taken in consequence thereof is not affected or

invalidated on the ground that such enemy subject was dead or ceased to be enemy when the vesting took place or order came to be passed by custodian or proceeding in consequence thereof was taken. That does not mean that subsequent to the vesting in custodian if the property of enemy subject is "succeeded by a citizen of India, the property can be continued as enemy property under the Act when it is not covered by proviso to Section 2(c). As a matter of law, the vesting in the custodian in respect of the property which belongs to Indian citizen cannot be permitted to be continued because Enemy Property Act provides for vesting or continued vesting of enemy property belonging to or held or managed on behalf of the enemy. Even Section 6 does not absolutely render the transfer of property vested in custodian void ipso facto. It is only in a case where Central Government is of the opinion that such transfer was intended to defeat the vesting of the property in custodian or to evade such vesting or such transfer is injurious to public interest, then declare such transfer void and on such declaration the property shall continue to vest or deemed to vest in the custodian. It is true that u/s 18, the Central Government by general or special order direct that any enemy property vested in the custodian shall be divested from him and be returned to the owner or to such other person as may be specified in the order and thereupon such property shall cease to vest in the custodian and shall revert in such owner but if the Central Government does not take decision for years together, it does not take away the power of the court to pass appropriate order in the facts and circumstances of the case where the property which vested in the custodian had ceased to be enemy property as successor to such property on death of enemy subject is citizen of India. In *Mumtaz Begum Vs. Union of India and others*, , the Division Bench of Calcutta High Court was seized of the matter where in respect of the property which vested in custodian, adjudication of title was made in favour of a person who was not Pakistani national and it was held that such property cannot be held to be enemy property as the property belonged to a person who was not Pakistani national. In para 7, the Division Bench of Calcutta High Court held thus -

"7. After considering the respective contentions of the learned counsel appearing for the parties and giving our anxious consideration to the facts and circumstances of the case as indicated hereinbefore it appears to us that the said Premises No. 36, Circus Avenue had never belonged to the said Alauddin Ahmed and Alamara Begum whose names were recorded in the Register of Calcutta Municipal Corporation. The said persons were declared as trespassers and a decree for eviction of the said trespassers were also passed in the Title Suit No. 57 of 1953 by a Competent Civil Court at Patna. There has been a clear adjudication of the title of Hosseneretuniedra Begum the predecessor-in-interest of the said plaintiffs and it is nobody's case that the said plaintiffs were Pak Nationals or enemy so that the property can at all be held as enemy property. As a matter of fact there is report by the police administration that all the said heirs of Hossenera Begum are Indian citizens. In our view Mr. Banerjee is quite justified in his contention that Custodian of Enemy Property at Bombay had

clearly accepted the title of the plaintiffs in the said Title Suit No. 57 of 1953 but he only indicated the difficulties in handing over possession to one of the decree-holders, in the absence of a power of attorney given by the other co-sharers or in the absence of suitable directions to that effect any Competent Civil Court at Alipore. When relevant facts relating to title to the property including the decree passed by the Civil Court at Patna were made known to the Custodian and Assistant Custodian of Enemy Property, we fail to appreciate how and under what circumstances the Assistant Custodian of Enemy Property at Calcutta could treat the said property as enemy property and continue possession of the same. Such action of the Custodian of Enemy Property and/or Assistant Custodian of Enemy Property at Calcutta, even it was justified at the beginning for want of proper notice, was wholly illegal and unauthorised, when the title of the parties was made know. It was the bounden duty of the Custodian and/or Asstt. Custodian of Enemy Property to ask the plaintiffs and/or their successors-in-interest to take delivery of possession of the said property immediately from the Asstt. Custodian of Enemy Property immediately from the Asstt. Custodian of Enemy Property. Unfortunately, the Asstt. Custodian of Enemy Property at Calcutta had taken a very unreasonable stand in the matter and tried to exercise control and possession over the property as a de jure authority under the said Enemy Property Act, 1968. In the facts and circumstances of the cases it does not appear to us that the writ petitioners and/or other heirs of Hossenera Begum should be relegated to a further suit for declaration of their title and consequential orders on the Custodian and/or Asstt. Custodian of Enemy Property. The decree passed in Title Suit No. 57 of 1953 is very specific and there is no manner of doubt that the title of the plaintiffs in the said suit and/or their heirs and successors-in-interest in Premises No. 36, Circus Avenue, Calcutta stands declared. We, therefore, allow this appeal, set aside the order passed by the learned trial Judge and direct the Custodian and/or Asstt. Custodian of Enemy Property at Calcutta to deliver possession of the said Premises No. 36, Circus Avenue, Calcutta to the appellants and respondents Nos. 4 to 9 or to the authorised representatives of the said appellants and respondents Nos. 4 to 9 within a period of six weeks from date. The Asstt. Custodian of Enemy Property is restrained from inducting any tenant and/or from sub-letting or encumbering the property in any manner whatsoever. He is further directed to send a detailed account of the occupiers of the said premises including the names of the tenants and other persons in possession of the said property together with date of inducting of tenancy or granting of any licence in their favour. The Asstt. Custodian of Enemy Property at Calcutta is also directed to indicate the rents and/or licence fees, if any, in respect of each of such tenants or licensee, or persons in possession of the said Premises No. 36, Circus Avenue, Calcutta. Let such statement containing the names of the tenants, licencees or persons in possession of the said premises together with accounts of rent, licence fees etc. payable by each of such persons and also a detailed account of the collection made from the said premises till October 31, 1990 together with all expenses incurred in connection with the said property be handed over by the Asstt.

Custodian of Enemy Property at Calcutta to each of the writ petitioners the respondents Nos. 4 to 9 within a period of four weeks from today. The Asstt. Custodian of Enemy Property at Calcutta is further directed to pay the entire sum of money lying in his hand out of earnings and profits and realisation of rent from the property to the authorised representative of the writ petitioners and the respondent Nos. 4 to 9 within the said period of six weeks from today. It is made clear that the writ petitioners and the respondents Nos. 4 to 9 or any of the co-sharers of the said property will be free to take any action against the tenants, licensee or any other persons in possession of the said property in accordance with law. The appeal is accordingly disposed of. There will be no order as to costs."

13. In the present case also, be it noted that after the death of his father, the petitioner in the year 1978 moved the concerned Minister setting out the fact that the properties had vested in him as a sole rightful owner after the death of his father and therefore, the possession of the said properties be restored. He made an application also to the then Prime Minister of India in the year 1981 and to the Director, Vigilance, Ministry of Commerce for expeditious orders to be passed to release the said properties. On 7-3-1981 the Director, Ministry of Commerce wrote to the petitioner that in respect of release of the said properties, the Cabinet had taken decision that 25% of the said property be released in favour of legal heirs and successors of petitioner's father. Again on 24-9-1981 the Director, Ministry of Commerce wrote to the petitioner that the first respondent has taken decision to release 25% of the said properties to the legal heirs of petitioner's father who has always being citizens of India and petitioner was directed to contact respondent No. 2 viz. the custodian. Thereafter, the petitioner filed suit in the year 1981 which was ultimately dismissed for want of impleadment of necessary party but the second suit filed in the year 1984 was decreed on 8-7-1986 and petitioner was held to be sole heir and successor of the properties owned and held by his father-late Raja. Thus no doubt remained thereafter that petitioner was the sole heir and successor of the late Raja and that the properties belonging to late Raja have been inherited by the petitioner. The petitioner being lawful successor to the properties owned by the late Raja which vested in custodian as citizen of India could not be subjected to Enemy Property Act and the custodian at least from the date of decree dated 8-7-1986 could not have deprived the petitioner of possession of the said properties. It is very difficult for us to appreciate how after the decree dated 8-7-1986 the custodian continued to treat the said properties as enemy property under the Enemy Property Act.

14. We may now deal with the contentions raised by the learned Additional Solicitor General. His contention that writ petition suffers from laches and inordinate delay is not of much substance. In our view, the writ petition cannot be thrown out on the ground of laches as from the reply filed by respondents it is clear that even as on that date the matter was under consideration by the respondent No. 1. If the matter is under consideration before respondent No. 1,

obviously, any objection of delay or inordinate delay or laches only deserves to be noted to be rejected. In para 4 of the affidavit in reply it is stated thus -

"With reference to paras (o) and (p) of para 4, I do not admit the correctness of the statements/submissions made therein which are contrary to or inconsistent with what is stated herein. I say that the said letter written by the then Director, Ministry of Commerce being the letter dated 7-3-1981 is issued without issue of a proper Government order under the Constitution of India or without passing any order u/s 18 of the said Act by the Central Government in this regard. I submit that the said letter cannot be considered as an order passed by the Central Government u/s 18 of the said Act. I say that as stated hereinabove, it was not clear whether the property worth 25% of the value of the total property was to be released or the property worth 25 lacs was to be released. The matter was referred back to the Government and decision regarding the same is still pending."

It is, thus, clear that the matter is still pending before the first respondent and, therefore, the writ petition cannot be said to suffer from laches warranting its dismissal on that ground. In this regard we may refer to the judgment of the Apex Court in Sanjay Place Group Housing Association and others Vs. Agra Development Authority and others, wherein the Apex Court observed that if the matter is under consideration, there is no question of delay. In para 4 of the report, the Apex Court held thus -

"4. The learned counsel for the appellants has rightly contended that the writ petition was not liable to be thrown out on the ground of laches. He referred to paragraph 7 of the counter-affidavit filed in this Court wherein respondent No. 1 inter alia has taken a plea that since the objections raised on behalf of the appellants are still to be finally decided by the Chairman, the SLP is not maintainable and is premature. If the objections raised by the appellants are still pending for consideration as stated by respondent No. 1, how is it proper to accuse the appellants of undue delay in approaching the Court? The appellant could not, therefore, be non-suited on that account. The High Court also observed that since the matter requires accounting, the remedy by a suit would be more appropriate. This approach again to our mind is not quite proper. What the appellants have been asking for is to determine the right ? of the respondent No. 1 to make fresh demands, and for deciding this issue one way or the other, it is not necessary to enter into accounting or arithmetical calculations."

15. The learned Additional Solicitor General also urged that it is a matter of policy of Government to release the properties under the Act and until and unless such policy or guidelines is framed, no property can be released and this court should not invoke extraordinary jurisdiction in respect of the policy matters. He also referred to the affidavit in reply wherein it is stated that the enemy properties were vested in custodian of enemy properties as reciprocal measure when the properties of Indian nationals were seized by the Pakistan Government and these properties are required to be returned or used in settlement with the

Pakistan/Bangladesh Governments in accordance with Tashkent declaration or otherwise. This argument cannot be accepted as in the present case the properties in question are owned now by a person who is lawful successor and citizen of India and, therefore, there is no question of any policy matter or that the properties are required to be returned or used in settlement with Pakistan/Bangladesh Government in accordance with Tashkent declaration or otherwise. The property of an Indian citizen cannot be continued to be vested in custodian of enemy property. An Indian citizen cannot be bracketed with an enemy or enemy subject. It is not permissible under the Enemy Property Act to vest the property of Indian citizen in custodian of enemy property. We, therefore, find ourselves unable to accept this submission of the learned Additional Solicitor General.

16. Yet another submission made by learned Additional Solicitor General that once the property is vested in the custodian of enemy property under the Enemy Property Act, 1968 it can only be divested u/s 18 by the Central Government by special or general order and no order can be passed by the court also cannot be accepted. The vesting or continued vesting of the property belonging to or owned or held by Indian citizen in custodian of enemy property is illegal and if Central Government does not pass any appropriate order for divesting the property belonging to an Indian citizen or revesting of such property to the owner of the property who is an Indian citizen, such illegal action cannot be permitted and the power of this court under Article 226 of the Constitution of India deserves to be invoked. Section 18 of the Act cannot be read to take away the Constitutional powers of this court under Article 226 of the Constitution of India in passing appropriate order of divesting in suitable case where continued vesting in custodian is palpably illegal.

17. We are also not persuaded by the contention of the learned Additional Solicitor General that the writ petition is barred by *res judicata* or principles analogous thereto. As "already noticed above, the petitioner initially filed first suit in the year 1981 for declaration of his rights that he was a sole heir and successor of his father - the late Raja. The said suit was dismissed for want of impleadment of necessary party. The second suit was filed in the year 1984 and in the said suit the petitioner *inter alia* prayed for declaration that he was a sole heir and successor of his father and that he was entitled to 25% of the said properties and to such other percentage or the whole of the said properties. In that suit, respondent No. 2 herein was joined as defendant No. 1. The respondent No. 2 contested the said suit and filed written statement. The said suit was ultimately decreed on 8-7-1986 wherein the petitioner was declared as sole heir and successor of his father and also entitled to 25% or whatever percentage it may be of the properties in the suit. The said judgment and decree attained finality. In the circumstances, despite the decree having been passed in favour of petitioner declaring him to be sole heir and successor of his father late Raja and his entitlement to the 25% or whatever percentage of the properties, when the Central Government did not pass an appropriate order divesting the

said properties and revesting the said properties to the petitioner, the petitioner was left with no option but to pursue appropriate legal remedy available to him for redressal of his grievance and in the circumstances, the present writ petition cannot be said to be barred by resjudicata or principles analogous thereto.

18. Consequently, we allow the writ petition and divest the second respondent viz. the custodian of enemy property of the properties described in schedule being Exhibit "A" and direct respondent No. 2 to handover possession of the said properties, actual or juridical, as the case may be, to the petitioner within three months from today. The petitioner's prayer for mesne profits and compensation in respect of the properties in question till today and for a period of three months thereafter is rejected.

19. The oral application made by the learned Additional Solicitor General for certificate of appeal to Supreme Court is rejected.

20. For a period of three months from the date of receipt of the authenticated copy of this judgment and order by the respondents, the operation of this judgment and order shall remain stayed.

21. No costs.

22. The parties may be provided ordinary copy of this order duly authenticated by Court Associate on payment of usual copying charges.