

(2011) 07 AP CK 0047

In the Andhra Pradesh High Court

Case No : Writ Petition No. 14347 of 2002

Smt. Roshan Minoo Patel, Sri Feroxe Behram Chenoy and Sri
Jahangir Behram Chenoy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Cantonments Act, 1924 — Section 181(3), 185, 256, 274, 280
Cantonments Land Administration Rules, 1937 — Rule 10, 3, 3(1), 3(2), 4
Civil Procedure Code, 1882 — Section 539
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 11, 14, 92
Constitution of India, 1950 — Article 226, 246
Evidence Act, 1872 — Section 13, 40, 41, 42, 43
Government of India Act, 1935 — Section 286, 8(2)
Hyderabad Land Acquisition Act, 1309 — Section 14
Private Street Works Act, 1892 — Section 6, 8
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 10, 2, 2(2),
5(1), 5A
Urban Land (Ceiling and Regulation) Act, 1976 — Section 33

Citation : (2011) 5 ALD 626

Hon'ble Judges : Goda Raghuram, J

Bench : Single Bench

**Advocate : Challa Seetha Ramaiah, for Smt. A. Anasuya, for the Appellant; L.
Prabhakar Reddy, for the Respondent**

Final Decision : Allowed

Judgement

Goda Raghuram, J.—Competing claims to ownership of a property in Secunderabad Cantonment, between the Petitioners and the Respondents has resulted in the Writ Petition, challenging the order impugned.

2. Heard Sri Challa Sitaramiah learned Senior Counsel instructed by Smt. A. Anasuya for the Petitioners and the learned Central Government standing counsel Sri T. Venkata Raju Goud for the Respondents.

3. The Order, dated 30-05-2002, in case No. 21/188/EV/SY. No. 528/B. No. 176,

passed by the 3rd Respondent - the Defence Estate Officer, holding that an extent of Acs.02 - 80 gts comprised in G.L.R. Sy. No. 528 of the Secunderabad Cantonment is a public premises and the constructions carried out therein by the Petitioners and Respondent Nos. 4 to 5 herein as setout in the schedule to the Notice, dated 29-12-1995 are unauthorised; and directing demolition (by the Petitioners and Respondent Nos. 4 & 5 within 30 days); and in the event of their refusal or failure to comply with the Order within the stipulated period, directing the Estate Officer or an officer authorised by him to demolish the constructions, is assailed in this Writ Petition.

THE FACTS PLEADED BY THE PETITIONERS:

[A] Bungalow No. 176 in land admeasuring Acs.2.6224 bounded by a compound wall at Bowenpally, Secunderabad, originally belonged to Mirza Parvarish Ali. Parvarish Ali sold the said property to Sri B.D. Chenoy through a registered sale deed, dated 18 - 08 - 1905. Eversince, the property has been in the ownership, custody and possession of private individuals. On the death of Sri B.D. Chenoy his wife and children succeeded to the property. After death of Sri B.D. Chenoy's wife, Smt. Avabai Chenoy the Petitioners who are the daughter and sons of Late Sri B.D. Chenoy inherited the schedule property and are in exclusive possession thereof.

[B] The Petitioners filed declarations before the Urban Land Ceiling Authorities in 1976. The 3rd Respondent and competent authority (ULC), Secunderabad Cantonment, conducted enquiry and passed an order determining that the Petitioners are holding excess land. The Petitioners preferred an appeal before the Appellate Authority u/s 33 of the Urban Land Ceiling Act -the Director Defence Estate (Lands) Southern Cantonment. The appeal was rejected by the Appellate Authority. Thereagainst the Petitioners filed W.P. No. 5187 of 1982 and batch before this Court. The writ petitions were allowed and the cases remitted to the Appellate Authority; before whom the appeals are pending.

[C] Pursuant to different notifications issued on 02-11-1947 under the provisions of the Hyderabad Land Acquisition Act [Hyderabad Act IX of 1309 Fasli] large extents of land were acquired for expansion of the Begumpet aerodrome. Among the properties acquired were 10,014 Sq.yds. including bungalow No. 164 of Ms. Feroze Nadirsha Chenoy; 11,500 Sq.yds. together with bungalow No. 165-2-B-26 of Mr. S. Madhavarao; bungalow in an area of 8,407 Sq.yds belonging to the Petitioners; a land and bungalow No. 171 belonging to E.P. Chenoy; bungalow No. 161, including the appurtenant land belonging to E.J. Chenoy; bungalow No. 166 -land and out-houses of H.S. Chenoy; and bungalow No. 163 -land and out-houses belonging to F.S. Chenoy. Compensation only for the buildings was paid and not for the land. The claimants sought reference u/s 14 of the Hyderabad Land Acquisition Act and the references came to be numbered as O.P. Nos. 19, 39, 43, 45, 63, 64 & 65 of 1952. By the common judgment dated 01 - 11 - 1961 of the Reference Court of the learned Chief Judge, City Civil Court, Secunderabad, the O.P's were allowed. The Reference Court held that the

acquired properties did not belong to the Cantonment Authorities but belonged to the claimants and they were entitled to compensation for acquisition of the lands as well. The Reference Court clearly held that the ownership of the land vested in and continued with the claimants but not with the Secunderabad Cantonment. In particular a finding was recorded that lands in Thokatta Village belonged to private individuals and neither to the Central Government nor the Cantonment.

[D] The 3rd Respondent issued a notice dated 17-07-1997 to the Petitioners alleging that they are in unauthorised possession of the enumerated premises and asked them to vacate. Aggrieved thereby, the Petitioners filed C.M.A. No. 172 of 1997 before the Chief Judge, City Civil Court, Hyderabad, u/s 10 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter "The 1971 Act"). By the order dated 31 - 01 - 2002 C.M.A. No. 172 of 1997 was allowed and the 3rd Respondent was required to enquire into the matter in detail.

[E] Though the Petitioners claimed ownership of the property, denied any right title or authority of the Government or the Cantonment in respect of the said property, and disputed the very authority and jurisdiction of the 3rd Respondent, the 3rd Respondent by the impugned proceedings determined the land as the property of the Cantonment and directed demolition of the constructions in the schedule property and ordered eviction of the Petitioners.

[F] Since the property in question is not a public premises and belongs to the Petitioners, the 3rd Respondent has No. jurisdiction and the entire initiation, processing and conclusion of proceedings under the provisions of the 1971 Act is unsustainable.

THE RESPONSE:

4. The 3rd Respondent - The Defence Estate Officer [DEO] filed a counter-affidavit, which to the extent relevant and material asserts:

(a) As per the entry in the General Land Register (GLR) of Secunderabad Cantonment, an area admeasuring Acs.02.80gts comprised of G.L.R. Sy. No. 528, situate outside the notified civil area is classified as B(3), i.e., owned by the Central Government (Ministry of Defence) and is placed under the management of the DEO. According to the entries in the GLR only occupancy rights were held by B.D. Chenoy under the terms of an old grant governed by order No. 179 & 700 dated 12-09-1836 and 03-07-1855 respectively, issued by the Governor General-in-Council;

(b) In terms of the above grant the land and the trees growing thereon vest absolutely in the Government and cannot be sold. However, occupancy rights therein together with superstructures are transferable subject to previous sanction of the Government. Under the terms of the old grant the Central Government also reserves their right of resumption by giving one months' notice and paying the value of superstructures, authorised before their erection;

(c) Consequent on the death of B.D. Chenoy the names of his wife and three

children were mutated in the GLR devolving occupancy rights held by late B.D. Chenoy. It is incorrect to state that the Petitioners are in exclusive possession and the Government did not object to the "free-hold enjoyment" of the Petitioners. Mere filing of appeals under the Urban Land Ceiling Authorities or the pendency of the Appeal before the Appellate Authority does not confer title upon the Petitioners in respect to the property;

(d) The Petitioners claim that they were paid compensation in respect of the land acquired for the national highway and thus the Government admitted their title is incorrect. Resumption of land was made in respect of GLR Sy. Nos. 441, 417 & 528 by paying compensation for various structures standing on the land. Rs. 3,647/- was paid to the Petitioners by the Military Estate Officer (now D.E.O.) through cheque dated 20-09-1979 and the land was utilized for the national highway. The further contention of the Petitioners with regard to the decision of the Civil Court dated 01-11-1961 in O.P. Nos. 19 of 1952 and batch and that they were paid compensation for the land as well pursuant to the declaration by the Civil Court on their title to the lands is not answered, contending that the Respondents are not parties to the O.P.'s;

(e) The DEO being the Estate Officer under the provisions of 1971 Act initiated steps for eviction of the Petitioners in respect of the public premises by passing an order dated 17-07-1997. Assailing the same the Petitioners filed a statutory appeal C.M.A. No. 172 of 1997 which was remanded to the 3rd Respondent, i.e., the DEO by the Appellate Authority on 31-01-2002 including for consideration of the contentions and claims of the Petitioners. Therefore, the allegation that the DEO has No. locus standi or jurisdiction to decide any issue with regard to the property of the Petitioners is unsustainable. The point of patent lack of jurisdiction of the DEO was not raised by the Petitioners in the earlier round of litigation, i.e., in C.M.A. No. 172 of 1997;

(f) The findings and reasons recorded by the Reference Court in its judgment in O.P. No. 19 of 1952 and batch, particularly with regard to the report of Captain James, etc., is untenable and is, at any rate, not binding on the Respondents who are not parties to the said litigation;

(g) The Petitioners who came into possession of the property in 1960 as L.R.'s of B.D. Chenoy never raised a dispute with regard to the title or ownership of the Government and the lands. Their claim is, therefore, barred by limitation; and

(h) As the Petitioners are substantially seeking a declaration of title in the context of a serious dispute as to title and the assertion of the title is also by the Secunderabad Cantonment and the Government of India, such dispute is not amenable to the jurisdiction of this Court under Article 226 of the Constitution.

The reply by the Petitioners:

5. The Petitioners rely on what is pleaded to be an extract of the Memorandum on tenure of land in the Administered Area by the Government of India sourced

from the India Office Library Records, vide reference No. IOR/R-12 Box 89 Serial No. 22. According to the Petitioner the "Memorandum on tenure" records:

Para 1: The large tract of land roughly 16 square miles in area, known as the Cantonment of Secunderabad has been acquired at different times for the use of the Military authorities, starting from 1806, in which year the Subsidiary Force was permanently stationed at the capital of Hyderabad. There was at No. time any definite assignment of the land: land was taken up as required by the Military authorities. No. payment was apparently ever made. Some of the land was used for barracks rangers and Military buildings generally: some was occupied by bazaars which ultimately grew up into the town of Secunderabad: some remained as grazing waste and agricultural land included in the Cantonment area mainly for sanitary and police purposes. There are 13 villages known as Moglai Villages which were also included in the whole or in part in the Cantonment area for similar reasons. In these villages, the British authorities merely exercise police jurisdiction combined with sanitary control. Civil (judicial), Ecclesiastical, Revenue and general administration in these villages vest in the Nizam's Government. In the rest of the area, the British authorities have full civil and criminal jurisdiction. In areas not actually occupied by the Military authorities or utilized for purposes subsidiary to Military administration, the Nizam's Government still have revenue jurisdiction in respect of areas assessed to land revenue, such jurisdiction being exercised subject to Residency control.

Para 2: No separate record of rights has ever been prepared for the entire area, and it is believed that there is No. actual register of property in Secunderabad town. An attempt was made to compile a register in 1871 but was abandoned owing to the difficulties experienced.

Para 3: A demi-official letter dated 15th June, 1898 may be quoted in this connection. The Foreign Secretary observes: No. land has been assigned to the Government of India by the Nizam's Government for Military purposes. Occupation has been acquiesced in because the British Government wanted it for the Military purpose of cantoning troops....

There is therefore No. land in Secunderabad which absolutely belongs to the Government of India, and the Military authorities are entitled to exercise control only over so as much of the land within the outer boundary line as has been actually assigned for Military purposes. For example the administration of all revenue paying land within this line rests with the Nizam's officials by who the revenue is collected.

The Resident went on to refer to a survey which has been effected in 1884, during the course of which a map was prepared by Major Stevenson assisted by an Officer of the Nizam's Government,, showing all the Military lands in the Cantonment. The result was to show that various block of land scattered through out the entire area were in the occupation of the Military authorities. There was No. compact block which might be surrounded by a ring fence. Sir Chichele

Plowden defined three classes of land in the Cantonment at the time, viz., (i) The Military area which includes all the land actually assigned for Military purposes and in Military occupation (ii) The Moglai villages, 13 in number, (iii) The civil area which, comprises all the land in the external boundary not included in either of the other areas. Sir Chichele Plowden further observed that the Military area also included lands not actually in occupation for Military purposes. As to these, the Government of India in their Public Works Department No. 467-B.M. of 25th April, 1873, laid down the principles that, while the Military authorities could dispose of the lands assigned for specific Military purposes, they were not empowered to permit the occupation of lands in the Cantonment the allotment of which for a specific purposes has not been sanctioned by Government. This pronouncement was followed by the enactment of certain rules which deal with applications for land within the Military Cantonment. They came into effect from the 6th May 1873, and laid down the procedure by which applications for the grant of lands pass through various channels and are finally sanctioned by the Resident. Most of the lands in the civil area is private property and the sovereign rights vest in the Nizam, the British Government occupying much the same status as it does in the Residency Bazaars, ie., the Resident exercises full administrative control in trust for the Nizam's Government. The Government of India in their final pronouncement on the Resident's letter decided not to interfere with the existing system....

Para 5: A new Survey was taken up in 1900 of both the Cantonments, Secunderabad and Bolarum, showing the outer boundary and also the land actually in Military occupation. The Nizam's Government was associated in the operations and a map was finally prepared in 1902, showing the lands under Military occupation and various plots marked green on the map with regard to which the Nizam's representative raised objections on the ground and they were not definitely in Military occupation. The Nizam's Government, at first refused to assign these lands for Military purposes. The question was not definitely settled until 1908 (letter from the Nizam's Minister No. 1930 dated 14th September 1908) when the Minister informed the Residency that the Nizam agreed to 17 of the sites in question being retained within the Military limits of Cantonment, subject to the condition that the Inamdars and Ors. who had lands in the said area were not precluded from enjoying their existing rights on their respective holdings.

Para 7: A revised description of the boundaries of the Cantonment of Secunderabad was published with the approval of the Government of India in the Residency Orders on the 14th October 1911.

Para 8: The area within the Cantonment boundaries of Secunderabad consists of the Moglai Villages and the Civil and Military areas. There is No. question of house accommodation in the Moglai villages.

Para 9: It is regrettable that so far No. register of rights in land within the Cantonment area has been prepared. If such a register were in existence it

would greatly simplify the question of grants of land for building and other purposes. It is obvious that such a register will be necessary if we are to prepare for the Cantonment a clear and definite set of rules such as have been recently framed by the Government of India for Cantonments generally.

Para 10: A very important distinction must be drawn between the status of government as regards land within the Cantonment of Secunderabad and land in Cantonments in British India, or in Indian States, where land has been definitely assigned for purposes of a Cantonment. In the later case, most of the land was the property of Government at the outset, having been specially acquired for the cantonments. In the case of Secunderabad, there has been No. definite assignment; land has been handed over from time to time free of charge by the Nizam's Government for occupation by the Military authorities: This procedure has been followed only in cases of land actually in Military occupation, such as barracks, officers' bungalows and military buildings generally, the rest of the lands being included within the Cantonment boundary for purposes subsidiary to Cantonment administration namely Sanitary and Police purposes, bazaars, markets, etc.

Para 11: In the Civil area outside the Military areas properly so called, and excluding the Moglai Villages, the control of building rests with the Cantonment authority. They can give permission to build, but this amounts merely to a license and does not convey a title to the land. The land may be owned by private individuals or by the Nizam's Government: It may be Revenue paying land or waste and used for grazing or otherwise. It is owned by the Nizam's Government, an application for permission to buy or lease should be addressed to that Government through the Residency. If the applicant owns the land either by purchase or by hereditary rights there is No. difficulty, unless the land pays revenue to the Nizam's Government. In this case the sanction of the Nizam's Government would be necessary. They might permit the land revenue to be redeemed or convert it into a ground rent. The resident might refuse to take up the case even if the Cantonment authority had sanctioned the building. In the case of non-revenue paying land owned privately the consent of the Nizam's Government would not be necessary. In the town of Secunderabad apparently most of the land is held privately.

Para 13: The land affected by the rules would comprise the entire Cantonment area excluding the 13 Moglai Villages and other villages in which the Cantonment Authority merely has a right to control the sanitation ie., the Military area and the Cantonment area....

6. The Petitioners further contend that in the Gazette Notification issued by the Government of Nizamul Kul Asif Jar 1286 HIJRI set out in volume No. 38, Hyderabad Deccan, it is clearly recorded that by the resolution passed by the Nizam Government and the Firman-e-Mubarrak issued on 28-08-1906, only the power of criminal and police jurisdiction were transferred to Government of India and all rules and Regulations formulated for the Cantonment are not applicable

to the villages; and further, the Government of Hyderabad shall utilize all the power of judiciary, civil as usual in these areas. On the amalgamation of these lands into the Cantonment the rights and easements which vested in Government of Hyderabad Jagirdars or owners, possessors of the land of the 13 villages, the rights, enjoyments and power are not effected. As per the Firman the rights of jagirdars and owners and possessors shall be continued and they would enjoy the rights and the Secunderabad Cantonment shall provide ample facilities for the use of these rights.

7. The State Government acquired some portions of the building in Thokatta village including those adjacent to Bungalow No. 176 purchased by Sri.B.D.Chenoy and the State paid compensation only for the structures but refused to pay compensation for the lands. In O.P.43 of 1952 Mr. Chenoy therefore claimed compensation for the land as well, before the Chief Judge, City Civil Court, Hyderabad. This OP was clubbed with other OPs and by a common judgment dated 1-11-1961 the reference court directed payment of compensation for the land as well. The Defence Estate Officer was examined as RW.1 in the batch of OPs. This Officer filed the entire report pertaining to the Secunderabad Cantonment and GLR. The reference Court considered the notification issued by the Nizam Government and the evidence of the Defence Estate Officer (RW.1) and held that the title of the Bungalow rests with the private individual and the Secunderabad Cantonment has No. title and further held that GLR entries are not based on any report. Bungalow No. 176 (the subject matter of the writ petition) is situated in Thokkataa village which is one of the 13 Moglai Villages covered by judgment in O.P.43/1952 and batch.

8. The owners of Bungalow No. 181 and 219 of Secunderabad Cantonment had applied to the Central Government to delete those bungalows from GLR as they were private properties. The file was referred for the opinion of the then Attorney General for India, who rendered an opinion that all properties in Secunderabad Cantonment do not belong to the Government as No. title was transferred through the notification by the Nizam Government in 1904 and 1906. The learned A.G. concluded that Government should declare the property as private land to avoid unnecessary litigation. The Legal Advisor (Defence) after perusing the opinion of the A.G recorded that the Ministry considered the individual facts of the case on the application submitted by the Bungalow Owner. Similarly, with regard to Bungalow No. 205, an application submitted by its owner was rejected in the year 1991 by the Ministry of Defence by contending that the site of the bungalow was an old grant, belonging to the Government of India. Subsequently however the Ministry of Defence vide letter dated 28-01-2002 declared that Bungalow No. 205 be treated as private property and necessary correction in the GLR of the Secunderabad Cantonment should be made.

9. The owner of Bungalow No. 216 applied for rectification of records in the GLR. The Defence Estate Officer, Secunderabad vide letter dated 12-09-1988 addressed the Director of Defence Estates, Southern Command, Pune stating that

as per the GLRs maintained by the Secunderabad Cantonment office, the bungalow is held to be an old grant but No. old grant papers are available in the record to establish the title of the Government. In this letter Notification 41/1906 was also mentioned to state that this Bungalow (216) will come within the 13 Moglai Villages. Thereafter the Ministry of Defence addressed a letter to the Director General, Defence Estates by forwarding the application pertaining to bungalow No. 216, in which it was categorically stated that the Bungalow No. 216 should be declared as private property as it is in Thokatta village. Bungalow No. 216 was recorded as Class "B" as per the Land Administration Rules. The classification was subsequently changed to "B-2". The Director, Defence Estates in his letter to the Director General clarified that the change of Classification from B to B.3 was not justified. On application by the Owner of Bungalow Nos. 216, 200, 201, 176 etc., to delete these bungalows from GLR, the Joint Secretary, Ministry of Defence observed that the Cantonment of Secunderabad cannot be compared with other Cantonments and recommended to take necessary action for rectification in consultation with the A.G. Bungalow No. 176 which is the subject matter of the present W.P. is also included in the file.

10. The certified copy of extract of the GLR prepared in accordance with Schedule-I under Rule III of the Cantonment Land Administration Rules, discloses that in the entry made in 1933, the class of building is mentioned as "B" and the name of the land lord is kept vacant. The entry in 1956 for the same building was mentioned as Class "B3" and the name of the landlord as "Central Government". In Column 10 of the 1933 extract, the holder's right was kept blank. In 1956 in column No. 10 it is enumerated as an old grant. These deficiencies and discrepancies show that the Secunderabad Cantonment altered its records and recorded these buildings as old grants, in 1956.

11. Since the scheduled property situate in Thokatta village is private property and does not belong to the Central Government or to the Secunderabad Cantonment, initiation of proceedings under the provisions of the 1971 Act; the order of the 3rd Respondent; and the consequent impugned order by the 3rd Respondent 30-5-2002 is patently without jurisdiction and is liable to be questioned before this Court under Article 226 of the Constitution of India.

Chronology of relevant dates:

29-12-1995: The DEO issued notice to the Petitioner contending that they unauthorisedly commenced construction in Bungalow No. 176 in S. No. 528 classified as B3 land in GLR, which is an old grant.

17-07-1997: The DEO directed demolition of the construction commenced in the land u/s 5(B) of the 1971 Act.

31-01-2002: In CMA 172/97, filed by the Petitioner against the order dated 17-7-1997, the learned Chief Judge, City Civil Court, Hyderabad allowed the Petitioners' appeal and remitted the matter to DEO for fresh enquiry in the light of observations made in the CMA. It is observed in the CMA that the DEO failed

to discuss the case of the Appellants (Petitioners herein); the contents of the sale deed and the land revenue demand notices; and relied only on the documents produced by the DEO. It is further observed that before holding that the scheduled land belongs to the Central Government it is necessary to give a finding whether the Appellants are in occupation of the schedule premises under the registered sale deed, either as owner or with occupancy rights. As the DEO must decide this point, a detailed enquiry alone can answer this question. The DEO must also verify whether is a fact that the report of Capt. James and Mr. Barton discloses that the scheduled premises is not the land owned by Government of India and whether there is any mention in the said report prior to 1956. In the CMA it is also clearly recorded that it is the Appellant case that as the authority of occupation of the site is not known, how the GLR of 1956 was prepared by recording that the Central Government is the owner and the Appellants are only having occupancy rights. In view of this contention of the Appellant (Petitioner herein) in the CMA it was directed that all these claims must be decided by the DEO through a detailed enquiry after considering the documents on both sides, examining the relevant record and witnesses if any produced by the parties. Since the order of the DEO was laconic and the claim of the Appellants that the property is private land is not considered, the issue was remitted to the DEO by the order dated 31-01-2002, in CMA.172/97.

30-05-2002: The DEO passed an order under the 1971 Act (impugned order) that all constructions specified in the schedule to the notice dated 29-12-1995 and further constructions on the land or bungalow No. 176 should be demolished. The basic premise of the DEO for this order is that the land belongs to the Cantonment and it is not private land. It is further held that it is an old grant as per the GLR and therefore, he has jurisdiction in the matter. He further held that the reports of Capt. James and Mr. Barton do not have any statutory force and do not bind the Government. The DEO rejected the contention that Thokatta village was one of the 13 Moglai Villages covered by Notification dated 28-8-1906.

08-07-2002: The DEO issued a notice for demolition.

02-08-2002: The present WP is filed 07-08-2002 An order of status quo was passed and that the Petitioners were also directed not to make any constructions.

21-02-2008: After the order in C.M.A. No. 172 of 1997, the 3rd Respondent - DEO issued a show-cause notice, exercising powers u/s 7(2-A) of the 1971 Act, proposing a liability on the Petitioners to payment of damages of Rs. 5,35,500/- for unauthorised use and occupation of the schedule premises and indicating a further liability to pay simple interest on the said amount, for having dug out an extent of 170"x210"x10" in the land appurtenant to Bungalow No. 176 in G.L.R. Sy. No. 528, admeasuring 2.6224 acres and for having removed approximately 1785 truck loads of soil (equivalent to 3,57,000 cft) without authority; thereby causing loss to the Government.

07-08-2002: The Writ Petition was admitted and interim order of status quo was ordered, for a period of two weeks, while directing the Petitioners not to make any construction.

17-03-2008: The Petitioners responded to this notice clearly asserting that the schedule property is not a public premises but is purely a private property and therefore the proceedings under the 1971 Act are inapplicable. Several averments in support of the principal contention that the property belongs to the Petitioners; is not public property; and is therefore not a property falling within the jurisdiction of the 1971 Act were also pleaded in this reply, to the show-cause notice dated 21-02-2008. It was further contended that the notice dated 21-02-2008 does not satisfy the requirements of the provisions of the 1971 Act and therefore the demand made thereby is unsustainable.

Relevant reasons and findings recorded by the Defence Estate Officer in the [impugned] order dated 30-05-2002:

1. According to the entries in the GLR in respect of lands in the Secunderabad Cantonment bungalow No. 176 in GLR S. No. 528 admeasuring Ac.2.80 cts belongs to Government of India, is classified as B-3 and is placed under the management of DEO, AP Circle, Secunderabad.

1. As the property is recorded as an old grant and occupancy rights over the land are recorded to be held by Smt. Avabai Chenoy; Smt. Roshan Minoo Patel; Sri.Feroze Behram Chenoy; and Sri.Jahangir Behram Chenoy the land and the trees grown thereon vest absolutely in the Central Government and cannot be sold. Only occupancy rights together with super structures are available to the Petitioners. Before any transaction for sale or purchase of any old grant prior permission of the Government is imperative. The premises is therefore a public premises as defined in Section 2(e) of the 1971 Act.

2. As land is held by the Petitioners on old grant terms, the land is governed by GGO (General Order by the Governor General-in-Council), No. 179, dated 12-09-1836, amended by GGO No. 700, dated 3-7-1855 and GGO No. 1001, dated 8-12-1854 and constitutes a public premises.

3. The report of Capt.James and Barton (referred to in the Order, dated 1-11-1961 of the Chief Judge, City Civil Court, Secunderabad in OP.19/1952 and batch) do not have statutory force and are not binding on the Government. Under Rule 3(1) of the Cantonment Land Administration Rules 1937, framed u/s 280 of the Cantonment Act, 1924 the DEO is required to maintain GLR's of all lands in the cantonment. The DEO Secunderabad is maintaining the GLR in respect of all lands in the Cantonment Secunderabad as required under Rule 3 r/w Rule 10 as per GLA Rules, 1937, other than the land in Bazaars, the management of which has been entrusted to and vest in the Cantonment Board.

4. Thokatta village in which Bungalow No. 176 of Secunderabad Cantonment (the scheduled premises) is claimed to be situated in, is not included in the 13

villages covered by Notification No. 41, dated 28-8-1906 issued by the Nizam's Government. Further, the notification dated 28-8-1906 was superseded by subsequent notification (SRO 451, dated 12-12-1956) published in the Gazette of India, dated 22-12-1956.

5. After coming into force of the Constitution of India, all the constituent units in the Indian Territory were classified into Part A-States--corresponding to the former Governor Provinces; Part B-States, comprising the Union of States, States of Hyderabad, Mysore, Jammu and Kashmir; and Part C States -which correspond to former Chief Commissioner's Provinces. Thus with effect from 21-01-1950, the merged States are No. longer separate entities. With the accession and conclusion of territorial and financial integration and Part B States forming part of the Indian Union, the lands and buildings in the use or occupation of the former Indian State Governments were extinguished and vest in the Government of India and became its property.

6. Therefore, the property of an extent Ac.2-80cts comprising bungalow No. 176 in GLR S. No. 528 of Secunderabad Cantonment is a public premises; and the construction carried therein as specified in the notice dated 29-12-1995 are unauthorised and required to be demolished. If the Respondents (Petitioners herein) desire to claim title they must file a suit in the court having jurisdiction.

12. The contentions urged by the learned Senior Counsel for the Petitioners Sri. Challa Sitaramaiah are manifold:

a) that the judgment dated 1-11-1961 of the learned Chief Judge, City Civil Court, Secunderabad in OP. No. 19/52 and batch [in which lands of the Petitioners' predecessor in title Sri.B.D. Chenoy, appurtenant to the scheduled property was also in issue in OP.42/1952] constitute res judicata u/s 11 Explanation VIII of the Code of Civil Procedure, 1908; that this judgment and the judgment of the learned Division Bench of this Court in Union of India (UOI) and Others Vs. Vasavi Cooperative Housing Society Limited and Others, in so far as lands in the 13 Moglai villages in Secunderabad including Thokatta are declared not to constitute property belonging to Union of India or Secunderabad Cantonment is a judgment in rem and operates as an issue estoppel.

b) having regard to the serious and bona fide dispute between the Petitioners and Respondents as to title to the scheduled property, summary proceedings for eviction on the presumption that the property indisputably belongs to Union of India and Secunderabad Cantonment cannot be initiated and pursued under the provision of the 1971 Act; and

c) Since in the context of abundant material to exclude a bona fide claim of title to the schedule property by the Union of India and the Secunderabad Cantonment and ample material in favour of the Petitioners to establish that the property in question is private property and not a public premises, provisions of the 1971 Act do not apply and the DEO suffers a patent lack of jurisdiction, this Court has jurisdiction to entertain the Writ Petition challenging the validity of the

impugned order of the DEO, dated 30-05-2002 and has further the jurisdiction to declare the title of the Petitioners to the schedule property.

13. In the context of the competing pleadings, assertions and contentions, the following issues arise for determination:

Issue No. 1: Whether the judgment dated 1-11-1961 of the learned Chief Judge, City Civil Court, Secunderabad in OP.19/1952 and batch and the judgment of the learned Division Bench of this Court in Vasavi Cooperative Housing Society and the findings recorded in these decisions (that title to the 13 Moglai villages [including Thokatta] are not vested in the Union of India or the Secunderabad Cantonment), constitute *res judicata*, a judgment in rem or issue estoppel;

Issue No. 2: Whether proceedings under the 1971 Act are precluded; in view of the bona fide and serious claim by the Petitioners, of title to the schedule property and the summary procedure provided for determination, under the 1971 Act?

Issue No. 3: Whether in view of the available alternative remedy, of appeal u/s 9 of the 1971 Act against the [impugned order], the Writ Petition is maintainable? and If so, what appropriate relief could be granted ?

Issue No. 1

Whether the judgment dated 1-11-1961 of the learned Chief Judge, City Civil Court, Secunderabad in OP.19/1952 and batch and the judgment of the learned Division Bench of this Court in Vasavi Cooperative Housing Society Limited and the findings recorded in these decisions that title to the 13 Moglai Villages [including Thokatta] has not vested in the Union of India or the Secunderabad Cantonment, constitute *res judicata*, judgment in rem or issue estoppel ?

a) *Res judicata*:

14. It is contended on behalf of the Petitioners that the judgment dated 1-11-1961 of the learned Chief Judge, City Civil Court, Secunderabad in OP.19/1952 and batch and the conclusion therein [that the 13 Moglai Villages including Thokatta do not constitute property of Government or Secunderabad Cantonment and that the title to these villages does not vest in the Government or the Cantonment] constitutes *res judicata* qua explanation VIII to Section 11 of Code of Civil Procedure. Even though the judgment dated 1-11-1961 is by a Court of limited jurisdiction [authorised to hear an appeal against the decision of the competent authority under the provisions of 1971 Act] and thus bars consideration of the Respondents' claim of title to the schedule property. For this contention reliance is placed on the judgment of the Supreme Court in *Sulochana Amma Vs. Narayanan Nair*, The Supreme Court held on a construction of the scope and ambit of Explanation VIII of CPC that Section 11 must be read in combination and harmony with Explanation VIII. Consequently, an order or an issue which had arisen directly or substantially between the parties or their privies and decided finally by a competent court or Tribunal, though of limited or

special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise between the same parties or their privies. The court further held that the object underlying to Explanation VIII fortified by an obstante clause is to attach finality is attached to a civil court of limited pecuniary jurisdiction, to put an end to vexatious litigation and to accord conclusiveness to the issues tried by a competent court and the same issue directly and substantially in issue in a latter suit between the same parties or privies to the parties are precluded for trial.

15. In *Church of South India Trust Association vs., Telugu Church Council* 3 the issue before the Court was whether the competence of the Court, contemplated in Section 11 C.P.C, extends to territorial jurisdiction as well; and the Court which decided the earlier suit should be a court having territorial jurisdiction to try the subsequent suit, for res judicata to apply. The Supreme Court held that Section 11 of the CPC (excluding Explanation VIII) envisages that the judgment in a former suit would operate as res judicata if the court which decided the said suit was competent to try the same by virtue of its pecuniary and subject matter jurisdiction to try the subsequent suit; and that it is not necessary that the said court should have had territorial jurisdiction to decide the subsequent suit. The earlier judgment in *Sulochana Amma*, wherein the scope and ambit of Explanation VIII to Section 11 CPC was considered and determined, was also referred to with approval.

16. In the context of the law declared in *Sulochana Amma*, the question is whether the principle of res judicata is at all applicable and bar the claim of the Respondents to title to the schedule property, in view of the judgment dated 1-11-1961. The judgment dated 1-11-1961 is a common judgment in a batch of original petitions referred to the Civil Court by the Collector of Hyderabad u/s 14 of the Hyderabad Land Acquisition Act, 1309 Fasli. OP.43/1952 was filed by the legal representatives of B.D Chenoy including Petitioners 2 and 3 herein, impleading the Collector, Land Acquisition, Hyderabad District as the sole Respondent. It is

to be noticed that in none of the six O.P.'s any other Respondent other than Collector, Hyderabad was impleaded as a Respondent. The claim in the several O.P.'s is for compensation for the land acquired for expansion of the Begumpet Aerodrome. The lands of the several claimants along with the buildings thereon were acquired but compensation paid only for the buildings. Compensation for the land acquired was declined on the premise that the lands belong to the British Military Authority, formed part of the Secunderabad Cantonment area, was a Cantonment tenure and that the Lessees or Licensees who put up the buildings did not acquire any title to the property. In this context the reference court framed an issue: whether the Plaintiff was the owner of the land (suit premises-bungalow) and whether the suit land is free-hold. The reference court

observed that the acquisition notification was issued not by the British Cantonment Authority but by the erstwhile Hyderabad Government after rendition of the Cantonment. The reference court found:

(a) that the date on which the Secunderabad Cantonment was established in Secunderabad was not available; according to the Government a Cantonment was formed in 1803 while according to the DEO [who testified as RW.1-Sri.A.S.Puri] it came into existence some time around 1836;

(b) That there is No. evidence to show, on what date a Cantonment was constituted and extent of area handed over by the Nizam's Government to the British Cantonment Authority for establishing a Cantonment;

(c) That indisputably from time to time some of the areas around the original Cantonment were being given by the Nizam under Ferman to the British Military Authority and that is how the Secunderabad Cantonment expanded and developed;

(d) That except a notification, dated 28-08-1906 by the Resident, dealing with the handing over of some villages to the British to expand their Cantonment limits, the Government placed No. other document before the Court. The notification dated 28-08-1906 reads:

In exercise of the powers conferred by Section 4 of the Cantonments Act, 1889 as applied to the Cantonment of Secunderabad, the Resident at Hyderabad, with the previous sanction of the Governor-General-in-Council and with the concurrence of His Highness's Government, is pleased to declare that solely with a view to enable the Resident to exercise the Criminal and Police jurisdiction already transferred to the Government of India, by His Highness, the Nizam in the resolutions of His Highness's Government in the Judicial, Police and General Departments, Nos. 1-1-J., and 13-7-J., dated 8th October, 1904, and 14th September, 1905, respectively, in the 13 villages hereinafter named (whose limits shall be the limits fixed by the Revenue Department of His Highness's Government), viz., Peddatokatta, Chinnatokatta, Sitarampur, kaguda, Maredpalli, Chakliguda, Tawaipura (Chandu Lal Baoli), Balamrai, Rasulpur, Trimulgherry village, Basareddiguda, and Lalapet, and aforesaid villages shall be held to be included in the limits of the Cantonment of Secunderabad. Provided always that Civil, Judicial and Ecclesiastical and Revenue Jurisdiction, together with all the cognate matters and all rights and privileges heretofore exercised or enjoyed by His Highness's Government or the Jagirdars, owners or occupiers of the land in the aforesaid villages, and all other persons not specifically mentioned shall in No. way be affected by the said inclusion, but are reserved to and shall continue to be exercised or enjoyed therein by the said Highness the Nizam's Government and the Jagirdars, owners or occupiers and other persons in accordance with the laws of the Hyderabad State.

The Courts in the Cantonment of Secunderabad shall at all times afford reasonable facilities for the exercise of the jurisdiction reserved.

(e) The counsel for the Respondent/Government contended that the area now acquired [in Thokatta village] was already in possession of the Military authority even prior to the notification dated 28-08-1906 and by virtue of the 1906 Notification the Nizam's Government handed over some other villages in addition to a portion of Thokatta village, not previously handed over. The Government counsel relied on a resolution dated 17-10-1904 of the Nizam's Govt. wherein Pedda Thokatta and Chinna Thokatta besides 9 other villages were referred to. The 17-10-1904 resolution of the Nizam's Government reads:

Sub: Grant of Criminal jurisdiction to Hon''ble The Resident in certain Jagir, villages within the limits of Cantonment, Secunderabad.

Letter of Secretary, Revenue Department, No. 2325, dated 6th September, 1904, was perused.

In one case, the Resident was addressed that in those villages referred to in the margin, which are situated within the Cantonment of Secunderabad, have No. jurisdiction and therefore, arrangements be made by the Nizam's Government for exercise of jurisdiction.

In reply, the Hon''ble the Resident informed that in these villages, the Cantonment authorities are exercising powers but there is No. record whether these powers were granted by H.E.H. the Nizam's Government and the order passed in the case referred to above was with the object of knowing whether the powers exercised by the Cantonment Authorities is not based on any lawful ground. On account of these reason, the Hon''ble the Resident gave his opinion in these villages the Cantonment authority be granted permission to exercise those powers which they have been exercising already though formal sanction was not obtained. Whereupon this matter was submitted to H.H.the Nizam, H.E. the Prime Minister Maharja Kishan Pershad Bahadur has issued the following order:

That full and complete Criminal and Police Powers in the 13 Jagir villages referred to in the margin are granted on behalf of H.H. the Nizam's Government to the Hon''ble the Resident. In future such powers will be exercised in the said villages by the Contonment authority of Secunderabad but they will not exercise any Civil jurisdiction or powers therein.

1. Pedda Thokatta
2. Chinna Thokatta
3. Tavaipura
4. Kakguda
5. Marredpalli
6. Sikh Village
7. Trimulgherry

8. Rasoolpura

Sd/- Sar Buland Jung, Offg.Secretary.

On the basis of the Notification dated 28-08-1906 of the Resident at Hyderabad and the earlier resolution of the Nizam's Government dated 17-10-1904, it is clear that the Nizam's Government had reserved certain rights and handed over the area only for certain purposes and the jurisdiction exercised by the Cantonment Authority was a limited one. It was confined, as per the notification to ecclesiastical, criminal, police and sanitary jurisdiction and No. civil jurisdiction was conferred on the Resident. The reference court concluded:

It is obvious that the Nizam's Government did not intend to part with its suzerainty or sovereignty over these areas and that the handing over of these areas was to enable the Cantonment Authorities to extend their limits and exercise such jurisdiction as may be necessary for maintaining law and order and also for maintaining the Sanitary conditions of the places. It is No. doubt true that if these areas fell within the scope of Cantonment tenures, then the burden would be on the Petitioners to show that they enjoyed the land acquired as freeholds.

(f) The Military Estate Officer [now re-designated as DEO] admitted in his chief-examination that he was not able to trace the registers managed by the Assistant Quarter Master General, and that in spite of his correspondence with the Defence Ministry, he was not able to trace the original register which could show the date of grant, to whom it was granted and under what circumstance and under what tenure. The DEO produced certain copies testified to be the copies prepared by one Capt. James who was the Special Officer appointed for the purpose of making out a full and complete record of Military land in the Secunderabad Cantonment area. These certified extracts [Ex.R.1 to Rule 4] were not prepared from any original Military Registers.

(g) Distinguishing the judgment of the Privy Council in

AIR 1931 1 (Privy Council) the reference Court observed that it would be futile to apply the principles laid down by the Privy Council applicable to the Cantonment Stations in the British India to a Station in a Native State like Hyderabad. In the words of the Reference court: It is well known that the Laws of British India were made applicable and very often adopted by the Cantonments in the British administrative areas. A reading of the notifications issued by the Nizam's Government in 1904 and 1906 would show that there is essential difference between the Cantonment of Secunderabad and the Cantonments situate in the British Indian area, and that the Nizam has reserved certain rights for himself and handed over possession of the areas on condition that the British Cantonment Authorities would not exercise any other jurisdiction other than what was handed over to them under the two notifications, reserving for himself all other jurisdictions over the villages noted in the margin of the notification of 1906.

(h) There were No. notifications earlier to 1904 and 1906 showing that Pedda Thokatta and Chinna Thokatta villages [relevant for the OP's] were handed over to the British Military Authority on any earlier date. On a perusal of the resolution of the Nizam's Government dated 10-10-1904 however, it appears that these villages were handed over to the Military for certain purposes even prior to 1904. As British Military Authorities did not have even the ordinary criminal jurisdiction prior to the 1904 resolution, the Resident had to address the Nizam's Government for vesting of Criminal Jurisdiction for the British Military Authorities to maintain law and order in the Cantonment area. It is thus clear that whatever powers or jurisdiction the Cantonment authority exercised prior to the 1904 resolution were not exercised on any lawful ground i.e., by virtue of any jurisdiction conferred by the Nizam's Government; and

(i) That the acquired property in Thokatta village was part of the estate of Salarjung [vide Ex.B.22] and for certain purposes only the Cantonment authority was permitted to exercise their jurisdiction, as per the notification of 1904 and 1906; and therefore, the claimants are entitled to compensation for the lands acquired as well.

17. Though the Petitioners contend that the judgment dated 1-11-1961 and findings therein that the property in 13 Moglai Villages including Thokatta did not vest in Secunderabad Cantonment is a finding which bars a contrary claim by the Respondents now, in view of the established principles of res judicata, this Court is unable to countenance the said contention. Though the DEO [earlier the MEO] was a witness in the batch of OP's [as RW.1], neither the Union of India nor the Secunderabad Cantonment nor even the DEO/MEO were arrayed as Respondents in the batch of OP's including OP.43/1952. The Respondents herein are not claiming title to the scheduled property through the Respondent in the OP's. Their claim that the entire area belongs to the Secunderabad Cantonment is not on the basis of title assertedly derived from the Nizam's Government. In the circumstances the provisions of the Section 11 including Explanation VIII thereto have No. application and the claim of the Respondents, to title to the scheduled property, which is the foundation for the impugned order is not barred by application of principles of res judicata; and the impugned order of the DEO is not liable to be invalidated on that account. The plea of res judicata is accordingly answered.

JUDGMENT IN REM:

18. Sri. Sitaramaiah contended that the judgment of the reference court dated 1-11-1961 and of the learned Division Bench of this Court Vasavai Cooperative House Building Society, to the extent of the finding that title to the 13 Moglai villages does not vest in the Secunderabad Cantonment is a judgment in rem. Reference is made to Section 40 and 41 of the Evidence Act, certain precedents and commentaries on the relevant aspects.

19. One of the most important maxims pertaining to the law of evidence is: res

inter alias acta alteri nocere non debet (a transaction between two parties ought not to operate to the disadvantage of a third party). The effect of this principle (maxim) is to prevent the litigant party from being concluded or even effected by the acts, conduct or declarations of strangers. Even on a principle of good faith and mutual convenience, a man's own acts are binding upon himself and are as well as his conduct and declarations evidence against him; and it would be not only inconvenient but manifestly unjust that a person should be bound by the acts of mere unauthorized strangers. Thus, the acts or conduct of strangers ought not to be used against a person. To this general principle which is a foundation for judgment in personam leading to the effect that such judgment is binding only between the same parties and their privies, judgments in rem form an exception. By a judgment in rem the subject matter adjudicated upon is rendered, ipso facto, such as it is thereby declared to be, and the judgment, therefore, is of effect as between all persons, whether parties or privies to the earlier judgment or otherwise.

20. Sections 40 to 44 occur in Chapter - II of the Indian Evidence Act, 1872 ("the Evidence Act"). The chapter deals with relevancy of facts and Sections 40 to 44 specify where Judgments of Courts of Justice are relevant. Section 40 renders admissible judgments which operate as pleas in bar of the action of the kind as plea of res judicata or otherwise, and some other rule of law. This provision has nothing to do with questions of evidence beyond the admissibility of judgments, because of plea of res judicata it is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of the Evidence Act - Collector of Gorakhpur v. Palakdhari 12 ALL Pg.1 (FB) per Mahmood, J.

21. Section 41 of the Evidence Act adumbrates the principle and scope of a judgment in rem as -Relevancy of certain judgments in probate, etc., jurisdiction. Under this provision a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to such character, or to be entitled to any specific thing, not against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant. The contours and scope of such judgment, order or decree constituting conclusive proof is delineated in this Section.

22. The general principle is that ordinarily a judgment binds only parties to it, known as judgment in personam. Judgments for which provision is made in this Section are usually called judgments in rem, a phrase which means that certain judgments are conclusive not only against the parties to them but against all the world. A judgment in rem is not defined in the Evidence Act. In view of the specification in Section 41 only a final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction would constitute conclusive proof as to the matters pertaining to the legal

character or title specified in the provision.

23. Section 42 of the Evidence Act specifies the relevancy and effects of judgments, orders or decrees, other than those mentioned in Section 41. It enacts that judgments/orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

24. Taylor states in his commentary on the Law of Evidence:

The exception [to the rule that judgments inter partes, are not admissible either for or against strangers in proof of the facts adjudicated] is allowed in favour of verdicts, judgments and other adjudications upon subjects of a public nature, such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications - which for this purpose are regarded as a species of reputations - will also be received, and this too, whether the parties in the second suit be those who litigated the first or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive [Taylor Section 1686].

25. Section 43 enjoins that judgments, orders or decrees other than those mentioned in Sections 40 to 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of the Evidence Act.

26. In State of Bihar Vs. Radha Krishna Singh and Others, Murtaza Fazal Ali, J analysed the principle and stated:

120. Taking the first head, it is well settled that judgments of courts are admissible in evidence under the provisions of Sections 40, 41 and 42 of the Evidence Act. Section 43, which is extracted below, clearly provides that those judgments which do not fall within the four corners of Sections 40 to 42 are inadmissible unless the existence of such judgment, order or decree is itself a fact in issue or a relevant fact under some other provisions of the Evidence Act:

43. Judgments, etc., other than those mentioned in Sections 40 to 42, when relevant - Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

121. Some Courts have used Section 13 to prove the admissibility of a judgment as coming under the provisions of Section 43, referred to above. We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other

general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant u/s 13 of the Evidence Act. The words "other provisions of this Act" cannot cover Section 13 because this section does not deal with judgments at all.

122. It is also well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter partes or not. In the instant case, however, all the documents consisting of judgments filed are not judgments in rem and therefore, the question of their admissibility on that basis does not arise. As mentioned earlier the judgments filed as Exhibits in the instant case, are judgments in personam and, therefore, they do not fulfil the conditions mentioned in Section 41 of the Evidence Act.

123. It is now settled law that judgments not inter partes are inadmissible in evidence barring exceptional cases which we shall point out hereafter. In *State of Bihar Vs. Radha Krishna Singh and Others*, Ind App 494, Lord Justice Bruce while dealing with the question of admissibility of a judgment observed as follows:

With regard to the judgment of the Supreme Court, it is plain, that considering the parties to the suit in which that judgment was given, it is not evidence in the present case... We must recollect, however, not only that that suit had a different object from the present, independently of the difference of parties, but that the evidence here is beyond, and is different from, that which was before the Supreme Court upon the occasion of delivering that judgment.

124. It is true that in the above-mentioned case their Lordships felt that in some cases a decision proceeding from a Tribunal must be given due deference but in cases like the one which was being dealt with by their Lordships the judgment was not admissible.

125. In *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut* (1870) Moo Ind App 367 the following observations were made:

If such a suit, as the first suit, was brought here and tried according to the law of this country there could not be a pretence for saying, that the judgment in it was anything like a judgment in rem or that it could bind any but the parties to the suit... It is sufficient for their Lordships to say, that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English Law or from the law and practice of India, which can be applied to it.

126. In the case of *Gujju Lall v. Fateh Lall* (1881) ILR Cal 171 a Full Bench exhaustively considered the ambit and scope of Sections 40 to 43 of the Evidence Act and observed thus:

On the other hand, when in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prefaced by the title

"Judgments of Courts of Justice when relevant," that seems to be a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

...

I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well as the observations of my brother Pontifex, in both of which I generally concur, and for the reasons there stated, and those which I have shortly given, I consider the evidence inadmissible.

And Garth, C.J. made the following observations:.

It is obvious that, if the construction which the Respondent's counsel would put upon Section 13 is right, there would be No. necessity for Sections 40, 41 and 42 at all. Those sections would then only tend to mislead, because the judgments which are made admissible under them would all be equally admissible as "transaction" u/s 13, and not only those, but an infinite variety of other judgments which had never before been admissible either in this country or in England. and it is difficult to conceive why, u/s 42, judgments though not between the same parties should be declared admissible so long as they related to matters of a public nature, if those very same judgments had already been made admissible u/s 13, whether they related to matters of a public nature or not.

....

I am, therefore, of the opinion that the former judgment was not admissible in the present suit.

(Emphasis ours)

127. In *Gadadhar Chowdhury and Others Vs. Sarat Chandra Chakravarty and Others*, it was held that findings in judgments not inter partes are not admissible in evidence. In this connection a Division Bench of the Calcutta High Court observed as follows:

Though the recitals and findings in a judgment not inter partes are not admissible in evidence, such a judgment and decree are, in our opinion, admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed.

128. This, in our opinion, is the correct legal position regarding the admissibility of judgments not inter partes.

129. In AIR 1937 69 (Privy Council) the Privy Council made the following observations:

Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has

long been accepted as a general rule in English law.

....

Their Lordships find themselves in agreement with the observation of Ross, J.:

The judgment is not inter partes, nor is it a judgment in rem, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue; and if the existence of the judgment is relevant under some of the provisions of the Evidence Act it is difficult to see what inference can be drawn from its use under these sections.

Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much "indirect laying" might be expected to follow therefrom.

(Emphasis supplied)

130. This principle was reiterated in the case of *Coco-Cola Company of Canada Ltd.* AIR 1942 PC 40 (already referred to on the question of relevancy of dictionary while dealing with Ex. J) where their Lordships in most categorical terms expressed the view that No. judgment which was not inter partes or the one to which neither the Plaintiff nor the Defendant were parties could be used in evidence for any purpose. It appears that in the case referred to above the President of the Exchequer Court had relied on facts found in the judgment of the Chancellor and had drawn support from the uncontradicted evidence given by the Chancellor. The Privy Council deprecated this practice of relying on judgments which were not inter partes in the sense that a judgment in which neither the Plaintiff nor the Defendant were parties, and in this connection Lord Russell observed thus:

The learned President relied on this judgment as very formidable support to the Plaintiff's contention that... there is likelihood of confusion"; but in their Lordships' opinion he was not entitled to refer to or rely upon a judgment given in proceedings to which neither the Plaintiff nor the Defendant was a party, as proving the facts stated therein.

(Emphasis supplied)

131. We entirely agree with the observations made by the Privy Council which flow from a correct interpretation of Sections 40 to 43 of the Evidence Act.

132. Same view was taken by a Full Bench of the Madras High Court in *Tripurana Seethapati Rao Dora Vs. Rokkam Vencanna Dora and Others*, where Kumaraswami Sastri, J. observed thus:

I am of the opinion that Section 35 has No. application to judgments, and a judgment which would not be admissible under Sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a

fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice.

133. The cumulative effect of the decisions cited above on this point clearly is that under the Evidence Act a judgment which is not inter partes is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit.....

27. The interplay and scope of Section 13 and Sections 40 to 44 of the Evidence Act again came to be considered in Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah, The Plaintiff/Respondent - Krishnaiah filed a suit in 1968 in the Court of the District Munsif,

Tirupathi, seeking permanent injunction against the Appellant - TTD in respect of Acs.02-29 cents in Tirumala Hills. The Trial Court dismissed the suit holding that the Plaintiff failed to prove either his title or possession and that since he trespassed into the property in October, 1967, was not entitled to injunctive relief against the true owner of the property - the TTD. The Plaintiff obtained temporary injunction in the appeal only until 28-08-1969 and was dispossessed by the TTD on 30-08-1969. On 25-07-1970 the Plaintiff applied under Order 6 Rule 17 CPC (beyond six months from the date of his dispossession) for amendment of the plaint and converted the suit into one for possession. The Appellate Court eventually dismissed the appeal, concurring with the Trial Court that the Plaintiff failed to prove either title or possession, by the judgment dated 05-08-1982. Both the Courts relied on the judgment of the Sub-Court, Chittoor, dated 15-06-1942 (an earlier suit filed by the TTD against the Hathiramji Mutt in 1937) wherein that Court declared TTD's title to this property, on the basis of title deeds of 1887 and evidence of the Deity's possession from 1846. Consequent on that decree, TTD had obtained delivery through execution process. The Plaintiff Krishnaiah, having failed before two Courts preferred a second appeal in 1982 before this Court. The appeal was allowed in 1987 and a decree for possession was passed in favour of the Plaintiff, observing that the suit was to be treated as one based on possessory title, and that the Plaintiff who was dispossessed on 30-08-1969 could recover possession, unless the Defendant TTD proved its title. According to this Court in the second appeal, the oral evidence adduced by both sides was to be rejected and the TTD's title in respect of the scheduled extent of land was been extinguished since the delivery receipt dated 12-01-1946 (exhibited in the other suit) showed some encroachers were in possession of the scheduled property. The High Court for the first time in the second appeal and even in the absence of any such issue either before the Trial Court or the First Appellate Court recorded the above findings. Against this judgment of the High Court the appeal was preferred before the Supreme Court. One of the issues considered by the Supreme Court was whether the judgment in O.S.51 of 1937, dated 15-06-1942, of the Sub-Court, Chittoor, declaring the title

of the TTD, was admissible and could be relied upon by the TTD as evidence in the present case, even though the present Plaintiff (the Respondent in the Supreme Court) was not a party to that suit. In the context of this issue (falling for consideration), the scope of Sections 13 and 40 to 44 of the Evidence Act were considered by the Supreme Court which held:

9. In our view, this contention is clearly contrary to the rulings of this Court as well as those of the Privy Council. In *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, speaking on behalf of a Bench of three learned Judges of this Court, Venkatarama Ayyar, J. held that a judgment not inter partes is admissible in evidence u/s 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under Sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K. Mukherjea, J. (as he then was) speaking on behalf of a Bench of four learned Judges in *Sital Das Vs. Sant Ram and Others*, held that a previous judgment not inter partes, was admissible in evidence u/s 13 of the Evidence Act as a "transaction" in which a right to property was "asserted" and "recognised". In fact, much earlier, Lord Lindley held in the Privy Council in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* ILR (1902) 29 Cal 190 (PC) (ILR at pg.198) that a previous judgment, not inter partes was admissible in evidence u/s 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the judgment in *Dinomini v. Brojo Mohini* and *Ram Ranjan Chakerbati v. Ram Narain Singh* ILR (1895) 22 Cal 533 : 22 IA 60 (PC) by Sir John Woodroffe in his *Commentary on the Evidence Act (1931)*, p. 181) was not accepted by Lord Blanesburgh in AIR 1934 157 (Privy Council)

10. For the aforesaid reasons, we reject the contention of the learned Counsel for the Respondent-Plaintiff and hold that the TTD could rely on the judgment in O.S. No. 51 of 1937 as evidence to prove its title in regard to the suit property, even though the present Plaintiff was not a party to that suit. Point 1 is held accordingly against the Respondent.

28. The Supreme Court held in favour of the Appellant - TTD and against the Plaintiff-Respondent on other issues formulated by it as well. The appeal of the TTD was allowed.

29. It requires to be noticed that in *Sri Radha Krishna Singh* the observation in Para 133 (extracted above) that: a judgment which is not inter partes is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit, were observations made in the context of the facts of that case, where the question was whether recitals in judgments not inter partes are relevant or admissible in evidence and in the further context of the fact that what was sought to be relied on were findings in judgments not inter partes relating to genealogy of the disputing parties. As apparent from para - 19 of the judgment in *Sri Krishna Singh*, the

principles governing admissibility of genealogies or claims set out in recitals, depositions or facts narrated in judgments or in oral evidence was the issue. It also requires to be noticed that Tirumala Tirupathi Devasthanams is a judgment again dealing directly with the interplay of Sections 13 & 40 to 44 of the Evidence Act, where the Supreme Court clearly held that a judgment not inter partes is admissible in evidence u/s 13 of the Evidence Act as evidence of recognition of a right to the property in dispute and that notwithstanding Sections 40 to 44 of the Evidence Act, is admissible as a "transaction" in which a right to property was "asserted" and "recognized". The pronouncement of law to this effect in Tirumala Tirupathi Devasthanams was on the basis of rulings of the Supreme Court and of the Privy Council. Srinivas Krishna Rao Kango v. Narayan Devji Kango, the judgment of the Supreme Court (a Bench of three Learned Judges) per Venkatarama Ayyar, J.; of a Bench of four Learned Judges in Sital Das v. Sant Ram and earlier of the Privy Council in Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani; were considered by the Supreme Court in Tirumala Tirupathi Devasthanams. The Apex Court also noticed that the learned author Sir John Woodroffe in his 1931 edition on the Commentary of Evidence Act had criticized the judgment in Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani and Ram Ranjan Chakerbati v. Ram Narain Singh ILR (1895) 22 Cal 533 (PC) . But the criticism was not accepted, again by the Privy Council in AIR 1934 157 (Privy Council) wherein Lord Blanesburgh observed:

The question whether statements in judgments and decrees are admissible u/s 13 read with Section 43 is elaborately discussed by Sir John Woodroffe in his new edition of the Evidence Act (1931), p.181 et seq. He would hold that they are not admissible at all u/s 13; but this view is not in accordance with Ram Ranjan Chakerbati v. Ram Narain Singh, LR 22 IA 60 and Dinomoni v. Brojomohini, LR29IA24. At the bottom of p.194, however, the learned author treats judgments as evidence of admissions by ancestors. There are great difficulties about Section 13, but Dinomoni's case (sup) is express authority for the position that "on general principles and u/s 13" orders made under the Cr P Code are admissible for the purpose mentioned in the passage quoted at p.191 from the Board's judgment.

30. Having regard to the declaration of law in Tirumala Tirupathi Devasthanams, delivered by a Bench of two Learned Judges but on the basis of and reliance on the judgments of Larger Benches of three and four Learned Judges respectively, in Srinivas Krishnarao Kango and Sital Das and of the rulings of the Privy Council, this Court is compelled to infer and hold that the broad observation in Radha Krishna Singh (a Bench of three Learned Judges) that: a judgment which is not inter partes is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit - is an observation in the context of the factual circumstances in that case, where an issue/dispute pertaining to genealogy fell for consideration.

31. Section 13 of the Evidence Act occurs in Chapter - II dealing with relevancy of facts and reads:

S. 13. Facts relevant when rights or custom is in question.- Where the question is as to the existence of any right or custom, the following facts are relevant: --

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from..

32. It is clear from the provisions of Section 13 (and as pointed out in Tirumala Tirupathi Devasthanams as well) that since in the judgment of the Reference Court the question as to whether the properties (acquired for expansion of the Begumpet Aerodrome) were owned by claimants before the Reference Court or the Secunderabad Cantonment was in issue; was determined and was recognized and held to inhere in the claimants; and for the several reasons recorded therein, the recognition in the said judgment and the circumstances in which such right of ownership was competently asserted, claimed and eventually recognised in favour of the claimants is a relevant fact and is admissible in evidence. It also requires to be noticed that Section 43 of the Evidence Act itself enjoins that judgments, orders or decrees, other than those mentioned in Sections 40, 41 & 42, are irrelevant, unless the acceptance of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of the Evidence Act. Such other provision of the Evidence Act is Section 13. This is the clear implication of the judgment and ratio in Tirumala Tirupathi Devasthanams, which relied on weighty authority for its conclusion and the analysis of Sections 13 and 40 to 44 of the Evidence Act. Accordingly, the conclusion is compelling that the judgment of the Reference Court dated 01-11-1961 in O.P. No. 19 of 1952 and batch; is a relevant piece of evidence for resolution of the dispute as to the ownership of the scheduled property in this case; and if presented for consideration, ought to be considered in determining the dispute.

33. In Mayor, Aldermen and Citizens of the City of Wakefield v. Cooke and Ors. (1904) AC 31 the issue was whether in proceedings taken by an Urban authority u/s 6 to 8 of the Private Street Works Act, 1892, to compel owners of premises to do private street works in a street, the determination by a Court of summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment in rem and conclusive as to the status of the street, and the question whether it is so repairable is res judicata in any future proceedings under these sections. The House of Lords [leading opinion by the Earl of Halsbury; LC with concurrence recorded by the other Law Lords] approved the definition set out in Smith's Leading Cases: A judgment in rem I conceive to be an adjudication pronounced [as indeed its name denotes] upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such

an adjudication, being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication. The House of Lords further held that that the earlier decision of the court of summary jurisdiction sitting u/s 31 of the Wakefield Corporation Act, 1887, to hear and determine the very same question and holding that Sludge Lane was a highway reparable by the inhabitants of the city of Wakefield was an adjudication upon the status of the street and it is not therefore, necessary to show that it was a judgment between the same parties. It was also held that since the earlier judgment is one as to the status of the street made by the Justices who are called upon by the provisions of the Statute to exercise that jurisdiction and have exercised the said jurisdiction within their power, such earlier adjudication is conclusive as to the status and constitutes a judgment in rem.

34. In *Armstrong v. Whitfield* 1973 (2) ALL.ER 546 Lord Widgery CJ for the Queens Bench Division pronounced judgment on an appeal against the judgment of the Justices for the County of Cumberland. Earlier by an order dated 14-4-1971 the General Quarter Session for the County of Cumberland rejected an application by the Appellant Armstrong and another seeking a declaration that there was No. public right of way over Green Lane. Later the Appellant was charged by the Respondent Whitfield, the Clerk of Cumberland with having willfully obstructed the free passage along Green Lane. The Magistrate's Court by the order dated 1-8-1972 referred to the Queens Bench Division the issue whether the earlier determination dated 14-4-1971 rejecting the Appellant's application for a declaration that there was No. public right of way over Green Lane, constitutes res judicata. Chief Justice Lord Widgery followed the decision of the House of Lords in *Mayor* to hold that the earlier decision of the quarter session was a decision in rem, which bound the world so far as the issue was concerned and therefore was a decision which prevents the later court from going into the matter again.

35. Though pronouncements of the House of Lords in *Mayor* and the Queens Bench Division in *Armstrong* have proceeded on the premise that the earlier judgments; as to the extent of public obligations to repair a street, in the earlier case; and the existence of a public right of way, in the latter case are in the nature of judgments in rem (under English Law), these (earlier) judgments (falling for consideration in *Mayor* and *Armstrong*) would not constitute judgment in rem u/s 41 of the Evidence Act but may be relevant judgments as they relate to matters of a public nature u/s 42, in view of the law declared in *Radha Krishna Singh*.

36. In *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*. 17 W.R 104 [an 1871 decision], the facts were that a Raja of an impatible Raj died leaving children by several wives and concubines. A suit for possession of the Raj was brought by one of the widows on behalf of an infant, to set aside a summary award made

under Act XIX of 1841 giving possession, and for possession of the Raj. This suit involved issues of legitimacy and the validity of a particular form of marriage of one of the Members of the family. The Sudder Diwani Adalat decreed in favour of the Plaintiff. Another suit was brought later by another member of the family (not a party to the former suit) against the party in possession. The latter suit raised substantially the same issue of legitimacy and also a question of priority to succeed by reason of the superior nature of the marriage, of which the Plaintiff in the latter suit was the issue. The Defendant pleaded that the decree of the Sudder Court operated, as in the case of an Estoppel, as a bar to the suit. The Judicial Committee of the Privy Council (per the Right Hon. Sir James Colville) held that the earlier judgment of the Sudder Court was not a judgment in rem and could not bind any but the parties to that suit and that the earlier suit was in the nature of a mere suit for possession by a party claiming to have a preferable right to the party in possession. The Judicial Committee categorically held that the earlier judgment pleaded in this case cannot be treated as of that nature upon any principles, whether derived from English Law or from Law and Practice in India, which can be applied to it and that the appeal must therefore be dismissed.

37. In *v. Ramados and Ors. v. K. Hanumantha Rao* 36 Madras 364 and in *Khaja Hassanulla Khan, Sajjada-i-Nishin of Royal Mosque, Rajahmundry v. Royal Mosque Trust Board by its President, Khan Bahadur Abdul Aziz Sahib* AIR 1948 SC (35) , Chief Justice Sir Arnold White in the former case and Chief Justice Gentle in the latter (concurring with the earlier judgment) held that the scheme framed u/s 539 of the Code of Civil Procedure, 1882 or a scheme framed under the corresponding provision, being Section 92 of the Code of Civil Procedure, 1908 are binding on all whether worshippers or not, including even a person who might have claimed a hereditary trusteeship and have brought a suit to enforce Madras 134 such relief before the settlement of the scheme and that a decree framing a scheme is a bar to a suit by such a person, even where his application to make a party to the scheme suit was rejected.

38. Similarly in *Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh C. (Dead), M.N. Singh and Others*, it was held that the categorical findings by the Supreme Court in a suit u/s 92 Code of Civil Procedure, are findings recorded in a representative suit and as such bind not only the parties named in the suit-title but all those who share common interest and are interested in the trust; and that factual findings relating to the nature and character of the institutions, specifically found on an elaborate review of the governing principles as well, which have reached finality, cannot be reagitated on the principle of "issue estoppel" as well.

39. In the above decisions, judgments pertaining to decrees formulating/settling schemes for the administration of public charities were treated to be in the nature of judgment in rem. This principle however would have No. application to the facts of the present case and the judgment of the Reference Court declaring

the lands acquired in the Secunderabad Cantonment area to be private properties of the claimants therein, in the circumstances cannot be considered judgment in rem to bind the Respondents herein who are not parties to that judgment.

40. Before concluding the analysis on this aspect of Issue No. 1 a reference is apposite to the judgment in *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, In a concurring opinion Hidayatullah, J. [as his Lordship then was] explained the underlying principles and contours of judgment in rem and judgment in personam, referring to several judgments of foreign courts (English and American judgments) and treatment of the doctrine in authoritative treatises. For the purposes of the present case the following exposition of the law in the judgment, is relevant and conclusive:

In India, the law as to conclusiveness of judgments is contained in Sections 40-44 of the India Evidence Act and Sections 11-14 of the Code of Civil Procedure. Section 41 of the former makes certain special kinds of judgments conclusive, while Section 11 makes judgments in India and Section 13 makes foreign judgments conclusive under certain conditions. I shall first analyse the sections in the Indian Evidence Act. Section 40. makes the existence of a judgment etc. which by law prevents any Court from taking cognisance of a suit or holding a trial, a relevant fact when the question is whether such Court ought to take cognisance of such suit or hold such trial. This enables a judgment, order or decree, whether of a Court in India or a foreign Court, to be propounded for the particular purpose mentioned. Section 42 next mentions that judgments etc. other than those mentioned in Section 41, are relevant if they relate a matters of public nature relevant to the enquiry, but such judgments, etc., are not conclusive proof of what they state. The illustration shows what is meant by matters of a public nature. Section 43 then lays down that judgments etc., other than those mentioned in Sections 40, 41 and 42, are irrelevant unless the existence of such judgments etc., is a fact in issue or is relevant under some other provision of the Evidence Act. Section 44 says lastly that any party to a suit or other proceeding may show that any judgment etc., which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. Section 41 which I left out, provides for relevancy of certain kinds of judgment and for their conclusiveness. It reads:

A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant. Such judgment, order or decree is conclusive proof -

that any legal character which it confers, accrued at the time when such

judgment, order or decree came into operation:

that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person:

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

The judgments mentioned in this section are called judgments in rem. As far back as *Yarakalamma v. Ankala* (1) 2 M.H.C.R. 276 distinction was made between judgments which bound only the parties to it and judgments which bound also strangers. The terms of Roman Law which divided law into *quod ad res pertinet* and *quod ad personas pertinet* furnished the root, and this classic distinction has been taken as the foundation. In *Kanhya Lal v. Radha Charan* (1867) 7 W.R. 338 Peacock, C.J., gave a list of judgements in rem, and that list has been followed in framing Section 41. The list of such judgments is much longer in Taylor on evidence, and the present day Private International Law includes all question of status within it. Sir James Stephen is reported to have said that he included only those judgments to which conclusiveness could be given from the point of view of the law of evidence and the conclusiveness attaches as to a given matter of fact relevant to the issue, which may be proved from the judgment. That there may be other provisions, of some other law which may also attach conclusiveness to judgment etc., of some other kinds goes without saying. Section 41 does not prohibit the making of other laws. The provisions of Section 11 of the Code of Civil Procedure, for example, go much farther than Section 40 or Section 41 of the Indian Evidence Act. Section 40 touches only the fringe of the law of *res judicata*; but provision for that has been made more exhaustively in Section 11 of the Code of Civil Procedure. The difference between provisions in the law of evidence and the law of procedure is that one deals with the question of proof and the other, with a bar of suit. A fact which can be proved from a judgment made conclusive for that purpose need not be proved afresh. The proof of the judgment is enough. But a second suit can only be barred on the principle of *res judicata* if the law says so; and this bar is regarding the adjudication of a controversy decided before. It is not possible to add to the list of subjects mentioned in Section 41 of the Indian Evidence Act, except by legislation. Conclusiveness there attaches only to the subjects mentioned therein, and a fact established by a judgment of a competent Court on any of the subjects is taken to be proved, and established in all subsequent proceedings and does not require to be proved again. The Judicial Committee in AIR 1941 85 (Privy Council) did not extend the principle of Section 41 to a case of adoption and a former judgment on the question of adoption was considered u/

s 11 of the code and not u/s 41 of the Indian Evidence Act. The former judgment was not accepted u/s 11 of the Code as it did not come within its terms, and the fact was allowed to be proved de novo. The reason given for the non-applicability of Section 41 was said to be that the decisions on adoption were excluded by Sir Barne Peacock in *Kanhya Lal v. Radha Charan* (1867) 7 W.R. 338 and also in Section 41.

From the above, it follows that conclusiveness, from the point of view of the law of evidence, will attach to a judgment, order or decree, only if it falls within the categories mentioned in Section 41. Once a judgment etc. falls within it, the law dispenses with the proof of the fact and the conclusion of the former judgment etc., about the legal character which it confers or declares, together with the declarations of property arising from that legal character, is final. In my opinion, the conclusiveness u/s 41 of the Indian Evidence Act cannot be claimed in this case for the Mysore judgment in view of the enumeration of certain jurisdictions in the section, because the status of being joint or separate in relation to a Hindu coparcenary property is not one of the legal characters mentioned in it.

42. Since the judgment of the Reference Court dated 01-11-1961 (in O.P. Nos. 19 of 1952 & batch) does not fall within the judgments specified to be relevant or admissible to prove the facts or conclusions recorded therein under Sections 40 to 42 of the Evidence Act and since the said judgment is per -se neither a fact in issue nor a relevant fact under any other provision of the Evidence Act in the lis before us, is therefore outside the scope of Section 43, the contention that the judgment of the Reference Court constitutes a judgment in rem; is otherwise admissible and relevant; or constitutes conclusive proof as to the findings recorded therein, does not commend acceptance by this Court. The judgment of the Reference Court (in O.P. No. 19 of 1952 and batch) and the findings and conclusions recorded therein are however relevant and admissible in evidence, in proceedings requiring adjudication of an issue whether title in the schedule property inheres in the Petitioners herein or the Respondents.

ISSUE ESTOPPEL:

43. Unlike the doctrine of res judicata which is a rule of procedure, doctrine of estoppel is based on a rule of evidence. Among the several kinds of estoppel covered by the provisions of Section 115 of the Evidence Act is issue estoppel. Diplock, LJ, in *Fidelitas Shipping Co v. V/O Exportchleb* (1965) 2 ALL ER explained the contours of issue estoppel:

An issue, in the sense relevant to issue estoppel, is a decision as to the legal consequences of particular facts, constituting a necessary step in determining what are the legal rights and duties of parties resulting from the totality of facts

"Issue estoppel represents an extension of the doctrine of res judicata to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings, but also to every point which properly belonged to the subject of litigation, and which the parties,

exercising reasonable diligence might have brought forward at that time.

44. Dixon, J. in *R v. Wilkes* 77 CLR 511, explained that issue estoppel is concerned with the judicial establishment of a proposition of law or of fact between the parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation.

45. For issue estoppel to arise there must have been distinctly and inevitably decided the same issue in the earlier proceedings between the same parties. As pointed out in *Piara Singh Vs. The State of Punjab*, an issue as between the State and one of the accused persons in the same litigation cannot operate as binding upon the State with regard to the other accused. Earlier in *Mohar Rai and Bharath Rai Vs. The State of Bihar*, the Supreme Court declared that the rule has No. application where the parties are not the same as in the previous case.

46. Since the Respondents in the present lis are not parties to the judgment dated 01-11-1961 in O.P. No. 19 of 1952 and batch, the contention on behalf of the Petitioners that the conclusion or determination of the Reference Court therein as to the status of lands in Thokatta Village, falls within the doctrine of issue estoppel and bars the claim title to the property by the Respondents, is misconceived and does not commend acceptance by this Court.

47. On behalf of the Petitioners reliance is placed on the judgment of the Court of Appeal in *House of Spring Gardens Ltd and Ors. v. Waite and Ors.* (1990) 2 ALL.ER A passage in the judgment by Stuart-Smith L.J. quoting a passage from the judgment of the Privy Council in *Nana Ofori Atta II v. Nana Abu Bonsra* (1958) AC 95 328 (of Lord Denning) is relied on to contend that since the DEO figured as a witness (R.W.1) before the Reference Court, the findings in that judgment estop the Respondents from reasserting title to the schedule property. The passage of Lord Denning which was cited in *House of Spring Gardens Ltd* (supra) reads:

Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by LORD PENZANCE in *Wytcherley v. Andrews* ((1871) LR 2 P & D 327 at. The full passage is in these words: ".....there is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that

everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened." Counsel for Akim Abuakwa and Muronam argued before their Lordships that the principle stated by LORD PENZANCE was confined to wills and representative actions and has never been extended further. No. decision, however, was cited to their Lordships which confines the principle to wills and representative actions. There attention was, indeed, drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see *Farquharson v. Seton* ((1828) 5 Russ 45, 38 ER 944). But assuming without deciding that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as LORD PENZANCE said, is founded on justice and common sense.

48. The Court of Appeal judgment in *House of Spring Gardens Ltd.* was referred by our Supreme Court in *Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others*, The facts before the Supreme Court were: In a previous appeal (before the Supreme Court) by another company (TISCO), the present Appellant (Facor) as a party Respondent supported the decision of the Central Government to accept the expert committee's assessment of its needs and some other claimants/Respondents for an important mineral, Chromite in Sukinda Valley in Orissa. Facor never raised any dispute inter se with the other Respondents on this aspect. Though Facor filed a writ petition in the Orissa High Court challenging the decision of the Central Government, it neither sought to have it transferred to the Supreme Court for decision nor moved the Supreme Court for orders of the High Court. Ultimately Facor successfully got the decision of the Central Government confirmed by the Supreme Court (in the earlier litigation). In the circumstances, the Supreme Court held that Facor by its own conduct had deliberately waived its dispute regarding the correct assessment of its need by the experts committee as accepted by the Central Government; and acquiesced in the said assessment. On account of the non-contentious attitude of Facor in the previous proceedings, culminating in the order of the Supreme Court, not only the other claimant/Respondents in that appeal but also the Central Government and State Governments changed their position and acted upon the representation flowing from the said non-contentious attitude. Therefore, the Appellant Facor would be bound by the assessment of its need made by the expert committee, accepted by the Central Government and ordered by the Supreme Court; and would be estopped from contending in the subsequent proceedings (the present appeal) that its need of the mineral required upward assessment. While on analysis of the issue whether the doctrine of estoppel applies, the Supreme Court did refer to the judgment (of the Court of Appeal) in *House of Spring Gardens Limited*. However, the Court observed (para 43) that even though the technical bar of *res judicata* and constructive *res judicata* may not apply on the facts to non-suit the Appellant, at least on the grounds of estoppel and acquiescence as well as waiver the Appellant can be said to have

given up its challenge regarding upward revision of the assessment of its need. The Supreme Court clearly observed (para 42) that while the observations of the Court of Appeal do apply to the present case (before it) the case of the Appellant (Facor) stands on a weaker footing. While in the Court of Appeal case the Defendant Macleod was not a party before the Irish Court in the second action but his interest was represented by the other co-Plaintiffs, in the case before the Supreme Court, the Appellant was a party Respondent in the earlier appeal of TISCO, where it took a calculated chance of getting a favourable decision of the Supreme Court along with Respondent Nos. 3 to 7 and got the order of the Central Government dated 17-08-1985 confirmed against TISCO but in the process the entire order favouring Facor and Respondent Nos. 3 to 7 was upheld by the Supreme Court.

49. On a careful consideration of the contentions on this aspect and the several decisions cited in support thereof, we are of the considered view that the Respondents are not estopped from laying a claim of title to the schedule property on account of the fact that the DEO was a witness [R.W.1] before the Reference Court [of the learned Chief Judge, City Civil Court, Secunderabad] in O.P. No. 19 of 1952 and batch. As pointed out by the Supreme Court in Piara, Mohan and Ferro Alloys Corporation Limited, the DEO was a mere witness but not a party to the proceedings in O.P. No. 19 of 1952 and batch. Further, it must not be lost sight of that the claim of title to the schedule property is not for the DEO to assert or disclaim, as an individual officer, but is required to be by or on behalf of the Secunderabad Cantonment; which was not a party to the proceedings in O.P. No. 19 of 1952 and batch. It would be unjust, inequitable and contrary to all notions of fair play and to public interest as well, if a juristic personality, in this case a statutory body, or in an appropriate case the State or an instrumentality, to be saddled with the liability of conclusions in proceedings to which it is not a party, as an issue estoppel, merely on account of the fact that an employee of the State or an instrumentality was a witness, in earlier proceedings.

50. The several aspects falling within issue No. 1 are accordingly answered against the Petitioners.

ISSUE No. 2

Whether proceedings under the 1971 Act are precluded; in view of the bona fide and serious claim by the Petitioners, of title to the schedule property and the summary procedure provided for determination, under the 1971 Act?

ANALYSIS of RELEVANT PROVISIONS of THE 1971 ACT:

(a) This is an Act to provide for eviction of unauthorized occupants from public premises and for incidental matters;

(b) "Premises" means any land, building, part of a building and

includes garden, grounds and out-houses, if any, appurtenant to such building or part of a building; and any fittings affixed to such building or part of a building

for the more beneficial enjoyment thereof. [Section 2(c)]

(c) Public premises is defined [Section 2(e)] as:

[1] any premises belonging to, or taken on lease or requisitioned by, or on behalf of, the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either Houses of Parliament for providing residential accommodation to any member of the staff of that Secretariat;

[2] any premises belonging to, or taken on lease by, or on behalf of, -(clauses (i) to (vii) are not necessary or relevant).

(viii) any Cantonment Board constituted under the Cantonments Act, 1924; and];

(d) Section 2(g) defines "unauthorized occupation":

(g)"unauthorized occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever.

(e) Section-4 which sets out the procedure for eviction of unauthorized occupants of public premises, reads:

4. Issue of notice to show cause against order of eviction. -

(1) If the estate officer is of opinion that any persons are in unauthorized occupation of any public premises and that they should be evicted, the estate officer shall issue in the

manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall, ---

(a) specify the grounds on which the order of eviction is proposed to be made; and

[(b) require all persons concerned, that is to say, all persons who are, or may be, in occupation of, or claim interest, in the public premises, --

(i) to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than seven days from the date of issue thereof, and

(ii) to appear before the estate officer on the date specified in the notice along

with the evidence which they intend to produce in support of the cause shown, and also for personal hearing, if such hearing is desired.]

(3) The estate officer shall cause the notice to be served by having it affixed on the outer door or some other conspicuous part of the public premises, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

While Section-5 confers power on the Estate Officer, after following the prescribed process, to make an order of eviction of persons in unauthorized occupation of public premises, Section 5-A authorizes removal of unauthorized constructions, etc.; and Section 5-B, demolition of unauthorized constructions, in public premises. Suffice it to notice that the power to remove or demolish unauthorized occupation or constructions, is in respect of public premises only.

(f) Section-7 confers power on the Estate Officer to require payment of rent or damages in respect of public premises; where any person, is or has at any time been, in unauthorized occupation of any public premises and occasions damages to the public premises on account of the use and occupation of such premises.

(g) Section-9 provides for an appeal from every order of the Estate Officer made under Section-5, Section 5-B, Section 5-C or Section-7 to the Appellate Officer, namely, the District Judge of the District in which the public premises are situate or any authorized designate of the District Judge having the qualifications prescribed in the said provision.

(h) Section-10 enacts that except as otherwise expressly provided in the Act, every order made by an Estate Officer or Appellate Officer under the Act shall be final and shall not be called in question in any original suit, application or execution proceeding and No. injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

(i) Section 15 enacts a Bar on the jurisdiction of Courts to entertain any suit or proceeding in respect of the matters specified in Clauses (a) to (e) thereof, including eviction of unauthorized occupant of a public premises; (a) removal or demolition of unauthorized constructions in a public

premises; (b) or proceedings for recovery of damages occasioned by unauthorized use or occupation of public premises u/s 7(2) (clause d) and Section 18 enumerates the power of the Central Government to make rules for carrying out the purposes of the Act.

51. The procedure to be followed for eviction of unauthorized occupants (in exercise of the powers under Section-5), is spelt out in Section-4.

52. Sub-Section 2 of Section 5-A provides a similar, summary procedure for removal of unauthorized constructions in public premises. Accordingly, the Estate Officer should serve upon a person erecting a building or other structure or

fixture, a notice requiring him either to remove or to show-cause why he shall not remove such building or other structure or fixture from the public premises within such period, not being not less than seven days, as may be prescribed in the notice. On failure, omission or refusal to show-cause or remove such building, structure or fixture from the public premises, or where the cause shown is not sufficient, the Estate Officer may order removal of the building, structure, or fixture from the public premises and recover the cost of such removal from the person concerned as an arrear of land revenue.

53. On a true and fair construction of the provisions of the 1971 Act it is clear that not only is the procedure prescribed for eviction of unauthorized occupants or removal of unauthorized constructions; of or in public premises, summary, the power vouchsafed to the Estate Officer, either by the express phraseology of the relevant provisions or the compelling inference from the legislative context, does not include the power to determine, in a case where a serious and bona fide dispute is presented, the jurisdictional fact whether a specific property or premises is private property or a public premises; particularly where such decision involves determination as to a disputed question of title which cannot competently and fairly be decided by a summary process.

54. In the context of the claim of the Respondent - Cantonment Board of title to the scheduled property, the claim must fall u/s 2(e)(2) of the 1971 Act, viz., it must be a premises belonging to, or taken on lease by or on behalf of a Cantonment Board constituted under the Cantonments Act, 1924. It is not the case of the Respondent that the premises was taken on lease either by or on its behalf. Its claim is that the premises belongs to it since it is located in the Cantonment area. The claim of the Petitioners per contra is that the scheduled property is within their exclusive ownership having been purchased by B.D. Chenoy under a registered sale deed, dated 18-08-1905, from the earlier owner Mirza Parvarish Ali. In support of this assertion they refer to declarations filed before the competent authorities under the Urban Land (Ceiling and Regulation) Act, 1976; the findings recorded by the Reference Court in its common judgment, dated 01-11-1961, in O.P. Nos. 19 of 1952 and batch (declaring eleven villages including Thokatta as belonging to private individuals and neither to the Central Government nor to the Cantonment); other judgments including of a learned Division Bench of this Court in Union of India v. Vasavi Co-operative Housing Society Limited and Ors. and several other documents including the memorandum on tenure of land in administered areas prepared by the Government of India; the resolution passed by the Nizam Government and the Ferman-e-Mubarrak issued on 28-08-1906; and the marked distinction between lands located within Cantonments in British administered territory and Cantonments in Native or Part "B" States.

55. For resolution of this issue a brief re-visit of the chronology of events leading to passing of the impugned order dated 30-05-2002 by the 3rd Respondent, is apposite.

56. The 3rd Respondent on the basis of entries in the GLR (describing the schedule property as an old grant) issued notices vide proceedings, dated 17-07-1997 to the Petitioners alleging unauthorized possession of public premises and required them to vacate. Aggrieved, they filed an appeal C.M.A. No. 172/97 u/s 10 of the 1971 Act. The Chief Judge, City Civil Court, Hyderabad, by the Order dated 31-01-2002 remitted the matter to the 3rd Respondent. The appellate Court observed in its order (a) that the 3rd Respondent could adjudicate the issues presented since there is a report that the Petitioners are under unauthorized occupation of public premises; (b) that before concluding that the schedule property belongs to the Central Government the 3rd Respondent must record a finding whether the Petitioners (herein) are in occupation of the premises under the registered sale deed as owners or with mere occupancy rights; (c) the 3rd Respondent must decide this point after detailed enquiry; (d) the 3rd Respondent must also verify whether it is a fact that the report of Capt. James and Mr. Barton discloses that the schedule premises is not land owned by the Government of India; (e) that since the Petitioners dispute the entries in the GLR pertaining to the schedule property in 1956 without any earlier basis for such entry, these claims must also be decided by the Estate Officer after a detailed enquiry and on considering documents of both sides and after examining the relevant records and witnesses, if any, produced by either side; and (f) that since the Petitioners are questioning the title, it is for them to approach the City Civil Court to obtain an appropriate relief, as the 3rd Respondent had earlier observed that he cannot decide the title.

57. After the remand by the appellate Court, the 3rd Respondent by the impugned order concluded:

(a) that the schedule property, i.e., land in GLR Sy. No. 528, admeasuring 2.80 acres in Secunderabad Cantonment is a public premises and the constructions carried out therein as detailed in the schedule to the notice dated 29-12-1995 are unauthorized and must thus be demolished;

(b) that if the Petitioners herein desire to question title they must file a suit in the Court having jurisdiction to decide the same;

(c) that in exercise of powers u/s 5-B(1) of the 1971 Act the writ Petitioners are directed to demolish the works erected/completed/commenced in the public premises specified in the schedule, which are not authorized by the competent authority; and

(d) that on refusal or failure to comply with the order, the constructions would be demolished by the 3rd Respondent or an officer authorized by him, by use of adequate force and the expenses of such demolition would be recovered from the Petitioners.

58. For recording the above conclusions the 3rd Respondent observed (a) that the schedule property belongs to the Defence Department/Union of India and is under the management of the 3rd Respondent; (b) that the property is

enumerated as B(3) land in the land records of the DEO and is governed under GGO No. 179, dated 12-09-1836 as amended vide GGO No. 700, dated 03-07-1855, and GGO No. 1001, dated 08-12-1864; (c) that under Rule 3(1) of the Cantonment Land Administration Rules, 1937 (for short "the CLA Rules"), framed u/s 280 of the Cantonment Act, 1924, the DEO is required to maintain GLR for all lands in the Cantonment; (d) that as per Rule 3 read with Rule 10 of the CLA, Rules the DEO was maintaining GLR's in respect of all lands, other than lands in bazaars, the management of which has been entrusted to, or vests in the Cantonment Board and registers and all mutations thereof; (e) that under Rule 3(2) of these rules No. addition or alteration shall be made in the General Land Registers except with the previous sanction of the Central Government or such other authority, the Government may appoint for this purpose or in accordance with the provisions of Rule 10 and 45; (f) that the Supreme Court in Chief Executive Officer Vs. Surendra Kumar Vakil and Others, observed -that GLR's maintained in the normal course of the concerned authorities, under provisions of the CLA Rules is prima facie evidence of title of the Government in respect of B(3), Old Grant properties and that the concerned authorities are required to maintain records inter alia as to nature of the grant in respect of Cantonment lands and the person in whose favour such grant is made; these are old Registers which bear the endorsement of the officer who maintain them in the regular course and any specific changes must also be recorded in the Register by following the procedure laid down under the CLA Rules; (g) according to entries in the GLR, in respect of Secunderabad Cantonment, Bungalow No. 176, situated in GLR Sy. No. 528 in an extent of 2.80 acres, is owned by the Government of India, is classified as B (3) and placed under the management of the DEO, Secunderabad; (h) that in Column No. 5 of this entry, the holding is described is Bungalow No. 176 and the Occupancy Rights over the land is recorded as held by (1) Smt. Avabai Chenoy, (2) Smt. Roshan Minoo Patel, (3) Shri Feroze Behram Chenoy, and (4) Shri. Jehangir Behram Chenoy; (i) the land was allotted to the grantee under a condition that No. right to property in the ground was conferred and the ground continued to be property of the State and was resumable at the pleasure of the Government after giving a months" notice and paying the value of the structures which are authorized to be erected; and (j) it is imperative that the Petitioners should take prior permission of the Government before entering into any transaction for sale or purchase of any Old Grant site, failing which the transfer will not be recognized by the Government. Thus, it is a public premises as defined in Section 2(e) of the 1971 Act.

59. After adverting to the contents of GGO Nos. 179, 700 and 1001, dated 12-09-1836, 03-07-1855 and 18-12-1864 respectively, the DEO observed that since GLR's are prepared under the CLA Rules framed u/s 280 of the Cantonment Act, 1924; and referring to the judgment of the Supreme Court in Surendra Kumar Vakil (supra) and the judgment in C.M.A. No. 172 of 1977, dated 31-01-2002, and declined to consider the report of Capt. James and Mr. Barton on the ground that these do not have any statutory force and are not

binding on the Government and the entries in the GLR which are required to be and are maintained under the CLA Rules, constitute evidence of the title of the Government of India in respect of B(3) Old Grant properties.

60. The 3rd Respondent rejected without any analysis the contention of the Petitioners that since the Bungalow No. 176 is situated in Thokatta Village it does not form part of Cantonment properties established by the British regime; since Thokatta village was not among the (13) thirteen villages covered by Notification No. 41, dated 28-08-1906, issued by the Nizam's Government and since the said notification was superseded by a subsequent notification dated 12-12-1956 (S.R.O. 451) dated 12-12-1956, published in the Gazette of India dated 22-12-1956 and that this Court after a scrutiny of the notification dated 12-12-1956 (in another case) - P.V. Jaya Rao Vs. Cantonment Board, Secunderabad (Dn.), had dismissed the writ petition of PV Jaya Rao.

61. The impugned order also held that after coming into force of the Constitution (on 26-01-1950) all Part "B" States, including Hyderabad, had lost their existence and with the accession and completion of territorial and financial integration, Part "B" States formed part of the Indian Union and the lands and buildings in the use or occupation of the former Indian Native States "have been extinguished" and have vested in the Government of India and became its property.

62. From the relevant provisions of the 1971 Act: -

the definition of "public premises" in Section 2(e); definition of "unauthorized occupation" in 2(g); the procedure stipulated for eviction of unauthorized occupants of public premises in Section-4; conferment of power on the Estate Officer to pass an order of eviction, of persons in unauthorized occupation of public premises in Section-5; for removal of unauthorized constructions or demolition of unauthorized constructions in public premises in Sections 5(A) & 5(B); conferment of power on the Estate Officer to require payment of rent or damages in respect of public premises where a person in unauthorized occupation occasions damages to the public premises on account of use and occupation of such premises in Section-7, it is clear that the power conferred on the Estate Officer, a quasi-judicial authority, is subject to a clear and correct finding on the collateral, jurisdictional fact whether the premises in respect of which proceedings are initiated under this Act, is public premises.

"Public premises", we have already noticed, means inter alia premises belonging to or taken on lease by, or on behalf of any Cantonment Board constituted under the Cantonments Act, 1924 [Section 2(e)(2)(viii)]. It requires to be noticed that premises belonging to, or taken on lease by, or on behalf of any Cantonment Board constituted under the Cantonments Act, 1924, was incorporated into the definition of "public premises" by Act 7 of 1994.

63. The expression "belonging to" is of broad significance and came to be considered in Raja Mohammad Amir Ahmad Khan Vs. Municipal Board of Sitapur

and Another, The Supreme Court observed:

Though the word "belonging to" No. doubt is capable of denoting the absolute title, is nevertheless not confined to connoting that sense. Even possession of an interest less than that of full ownership could be signified by that word. In Webster, "belonging to" is explained as meaning inter alia "to be owned by the possession of.

64. The Supreme Court in this case explained that where a person has an absolute right of user, i.e., even against the owner it can be said that the property belongs to him.

65. In *S.R.B. Gaikwad Vs. The Union of India and Others*, it was held that even where the lease in favour of the Central Government is determined and the Central Government becomes a statutory tenant under the Bombay Rent Act, 1947, the premises do not cease to be public premises within the meaning of Section 2(e) (of the 1971 Act).

66. The Bombay High Court explained that the 1971 Act is not so much concerned with the title as with the possessory rights vested with the Central Government and Section 2(e) only indicates the sources by which such right to possession can be acquired, one such being, the taking of premises on lease from its owner. It was further held that the definition is descriptive of the source or origin of possessory rights acquired by the Central Government and that it is a continuance of the vesting of this possessory title in the Government and not so much the origin thereof that makes any premises a public premises under the Act.

67. Even from the definition of "unauthorized occupation" in Section 2(g) it is clear that unauthorized occupation means the occupation by any person of public premises without authority for such occupation and includes continuance in occupation by any person of the public premises after the authority [whether by way of grant or any other mode of transfer] under which he was allowed to occupy the premises, had expired or had been determined for any reason whatsoever.

68. From the forgoing analyses it is clear that the premises in question must be public premises for exercise of jurisdiction under the 1971 Act. This is essentially a jurisdictional fact and must be affirmatively determined as a condition precedent to exercise of the substantive jurisdiction to proceed for eviction against unauthorized occupation; or for demolition or recovery of damages against unauthorized construction or unauthorized use and occupation, as the case may be.

69. From the provisions of the 1971 Act it is clear that the Parliament conferred on the Estate Officer a limited jurisdiction, to determine whether an occupation is authorized or otherwise; whether construction is authorized or not so; and if the occupation or construction is unauthorized then to order eviction of the

unauthorized occupation; to order demolition of unauthorized construction or levy of damages for unauthorized use or occupation. Before exercise of the above jurisdiction, however, the jurisdictional or precedent fact; whether the premises in respect of which proceedings are initiated is a public premises, must correctly be determined by the Estate Officer.

70. A classic statement of principle on this aspect is enunciated in *Bunbury v. Fuller* (1853) 9 Ex. 111 Coleridge, J stated the principle thus:

Now it is a general rule, that No. Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court.

71. In *The Queen v. The Commissioner for Special Purposes of the Income Tax* (1888) 21 QBD 313 Lord Esher formulated the principles regarding the contours of jurisdiction of tribunals:

When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends, and if they were given jurisdiction so to decide, without any appeal being given, there is No. appeal from such exercise of their jurisdiction.

72. This passage was approved by the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* 1969 2 AC 147.

73. Wade and Forsyth 40 point out that the distinction between jurisdictional (or collateral) and any other questions, is the lynch-pin of the fundamental policy of the law, that No. inferior tribunal or authority can conclusively determine the limits of its own jurisdiction. If it could so determine them, it would be uncontrollable and the system of jurisdictions would become incoherent. In *R v. Shoreditch Assessment Committee ex p. Morgan* (1910) 2 KB 859, Farwell L.J. explained the basis of this principle and the distinction between jurisdictional and other questions in a classic statement:

No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess... or to refuse to exercise a jurisdiction which it has... Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact...

74. The above formulation of Farwell L.J. was approved by the House of Lords in *Anismic Limited* (supra).

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75. In *R. v. Fulham etc. Rent Tribunal ex p. Zerek* (1951) 2 KB 1, Lord Goddard CJ, reiterated the principle:

If a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this Court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide.

76. The principle formulated by Lord Esher was quoted with approval by Rajagopala Ayyangar, J in *Addanki Tiruvenkata Thata Desika Charyulu* (Since deceased) and after him his legal representatives Vs. State of Andhra Pradesh and Another,

77. In view of the well entrenched principle reiterated in *Desika Charyulu* (supra) it would normally follow that the jurisdiction of the Estate Officer includes the jurisdiction to record a finding on the jurisdictional, collateral or precedent fact whether the premises in question is "public premises" before proceeding to exercise the jurisdiction substantively conferred under the provisions of the 1971 Act.

78. In the facts and circumstances of the present case however the process of adjudication and determination of the precedent and jurisdictional fact, (whether the scheduled property is public premises), involves consideration and analysis of a complex matrix of several disputed facts; analysis of several documents and instruments, some from antiquity, going back to the origins of the Secunderabad Cantonment; the nature of the grant in favour of the Cantonment by the then native State of Hyderabad under the rule of the Nizam, a sovereign; whether Thokatta village (among the 13 Moghlai villages) was granted to the Secunderabad Cantonment for all purposes or restrictively for administration of civil and criminal jurisdiction; whether there was a grant in favour of the Petitioners' predecessors-in-title of this property, and if so by whom, when and by what instrument; whether the entries in the GLR made in 1956 were based on any anterior record wherein the property is established to belong to the Secunderabad Cantonment; whether the findings to the contrary recorded by the Reference Court in O.P. No. 19 of 1952 and batch, which is a relevant piece of evidence having regard to the nature of the title to this property necessarily being a fact in issue in such determination, is overborne by any other evidence to the contrary; whether the Petitioners, on the basis of the registered sale deed, dated 18-08-1905, [executed by Mir Parvarish Ali in favour of B.D. Chenoy] having been in long and uninterrupted possession of the schedule property have also openly asserted title to the said property, expressly or by implication and whether such long uninterrupted possession coupled with assertion of title confers title to the schedule property in the Petitioners; the evidentiary value of the "memorandum of tenure" prepared by the Government of India, wherein reference is made to much historical material which points to the position that No. land was assigned to the Government of India by the Nizam's Government for military purposes of Secunderabad Cantonment, in respect of the 13 Mogalal villages, including Pedda Thokatta and Chinna Thokatta; the inferences that should legitimately be drawn from entries in the GLR prepared in accordance with CLA Rules, in 1933 where the schedule property is described as Class "B", the name of the landlord is unfilled and there is No. mention of "Old Grant", while in 1956 the GLR records the property as Class "B3" and the name of the landlord is enumerated as "Central Government"; the factual basis or record for such alteration in the GLR of 1956; the effect of the resolution dated 17-10-1904 of the Government of the Nizam and the Notification dated 28-08-1906 issued by the Government of Nizamul Kul Asifjar whereby the 13 Mugalai villages including Thokatta were handed over to the British Government by the Nizam only for civil administration without any rights in land; the legal consequence of the accession and territorial and financial integration of Part "B" States including Hyderabad into the Indian Union; and several other such variegated and competing issues of law and fact.

79. It does not persuade this Court that the methodology or source of recruitment, qualifications, experience or training of the Estate Officer qualify this authority to adjudicate and determine with any reasonable degree of certitude,

the jurisdictional fact as to whether the schedule property is public premises, in the light of the bewildering complexity of factual and legal issues involved in such endeavour; particularly having regard to the fact that proceedings under the 1971 Act are clearly summary in nature.

For the above view this Court is fortified by the decision in *Government of Andhra Pradesh Vs. Thummala Krishna Rao and Another*,

80. The A.P. Land Encroachment Act, 1905 confers power on the Government to summarily evict persons in unauthorized occupation of Government land. Section-7 provides for a notice to the person in unauthorized occupation of Government property calling upon him to show cause why he be not proceeded against under Sections 5 or 6 which authorise summary eviction for such unauthorized occupation. The Supreme Court held that bona fide disputes regarding the title of the Government, of any property cannot be determined by recourse to the summary remedy provided by Section-6, for evicting a person who is in possession of the property with a bona fide claim of title. It is appropriate to extract the relevant portions of this judgment:

7. It seems to us clear from these provisions that the summary remedy for eviction which is provided for by Section 6 of the Act can be resorted to by the Government only against persons who are in unauthorized occupation of any land which is "the property of Government". In regard to property described in Sub-sections (1) and (2) of Section 2, there can be No. doubt, difficulty or dispute as to the title of the Government and, therefore, in respect of such property, the Government would be free to take recourse to the summary remedy of eviction provided for in Section 6. A person who occupies a part of a public road, street, bridge, the bed of the sea and the like, is in unauthorized occupation of property which is declared by Section 2 to be the property of the Government and, therefore, it is in public interest to evict him expeditiously, which can only be done by resorting to the summary remedy provided by the Act. But Section 6(1) which confers the power of summary eviction on the Government limits that power to cases in which a person is in unauthorized occupation of a land "for which he is liable to pay assessment u/s 3." Section 3, in turn, refers to unauthorized occupation of any land "which is the property of Government". If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title. In the instant case, there is unquestionably a genuine dispute between the State Government and the Respondents as to whether the three plots of land were the subject-matter of acquisition proceedings taken by the then Government of Hyderabad and whether the Osmania University, for whose benefit the plots are alleged to have been acquired, had lost title to the property by operation of the law of limitation. The suit filed by the University was dismissed on the ground of

limitation, inter alia, since Nawab Habibuddin was found to have encroached on the property more than twelve years before the date of the suit and the University was not in possession of the property at any time within that period. Having failed in the suit, the University activated the Government to evict the Nawab and his transferees summarily, which seems to us impermissible. The Respondents have a bona fide claim to litigate and they cannot be evicted save by the due process of law. The summary remedy prescribed by Section 6 is not the kind of legal process which is suited to an adjudication of complicated questions of title. That procedure is, therefore, not the due process of law for evicting the Respondents.

8. The view of the Division Bench that the summary remedy provided for by Section 6 cannot be resorted to unless the alleged encroachment is of "a very recent origin", cannot be stretched too far. That was also the view taken by the learned single Judge himself in another case which is reported in *Mehrunnissa Begum v. State of A.P.* (1970) 1 Andh LT 88 which was affirmed by a Division Bench (1971) 1 Andh LT 292: (AIR 1972 AP 382). It is not the duration, short or long, of encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person. What is relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. Facts which raise a bona fide dispute of title between the Government and the occupant must be adjudicated upon by the ordinary courts of law. The Government cannot decide such questions unilaterally in its own favour and evict any person summarily on the basis of such decision. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can be taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

9. The conspectus of facts in the instant case justifies the view that the question as to the title to the three plots cannot appropriately be decided in a summary inquiry contemplated by Sections 6 and 7 of the Act. The long possession of the Respondents and their predecessor-in-title of these plots raises a genuine dispute between them and the Government on the question of title, remembering especially that the property, admittedly, belonged originally to the family of Nawab Habibuddin from whom the Respondents claim to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession must be decided in a properly constituted suit. May be, that the Government may succeed in establishing its title to the property but, until that is done, the Respondents cannot be evicted summarily..

81. In *The Special Dy. Collector, Land Eviction, Hyderabad and Ors. v. Konda Laxman Bapuji* 1984 1 AN.W.R. 404 and following the judgment in *Thummala*

Krishna Rao (supra) a learned Division Bench held that No. proceedings under the A.P. Land Encroachment Act, 1905 could be taken against persons in occupation of property, openly and for appreciable length of time, there being a prima facie and bona fide claim to the property, requiring an impartial adjudication according to the established procedure of law, for determination of any dispute as to title of such persons including by/or on behalf of the Government; and that such disputes must be adjudicated by the ordinary Courts of Law.

82. Shivalingappa v. State of A.P., rep. by the Secretary to Government, Revenue Department and Ors. 1988 (1) ALT 716, after referring to the decisions in Thummala Krishna Rao and Konda Laxman Bapuji, ruled that provisions of the A.P. Land Encroachment Act, 1905 and the summary proceedings therein (for eviction of encroachers of Government land) cannot be put into operation against persons in occupation bona fide. It can be put into operation only on the basis that the land that has been encroached upon unauthorisedly is Government land. Occupation can become unauthorized if it is not traced to its origin to the legal owner or is not perfected by adverse possession. Every kind of occupation claimed by an encroacher as not unauthorized cannot be presumed to be bona fide. Bona fide requires more solid foundations to rest on than mere claims. However, the Court held, if there is a bona fide dispute between the parties, about the nature of the occupation then such a dispute takes the matter beyond the provisions of the Land Encroachment Act and the summary proceedings provided by the Act, being wholly inadequate to decide the title of the parties, should not be allowed to be put into operation.

83. In Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, the issue inter alia, whether the summary procedure, for eviction of unauthorized occupation under the provisions of the 1971 Act could be taken, fell for consideration. The facts in brief were, the Express Buildings was constructed by Express Newspapers Private Limited with the sanction of the Lessor, the Union of India, Ministry of Works and Housing on plot Nos. 9 & 10, Bahadurshah Zafar Marg, and were demised on perpetual lease by registered lease-deed dated March 17, 1958 to the Express Newspapers Private Limited. The Supreme Court held that that being the position there was No. question of the Lessor applying for eviction u/s 5(1) of the 1971 Act nor has the Estate Officer any authority or jurisdiction to direct their eviction under Sub-Section 2 of Section 5 by summary process. The Court observed: Due process of law in a case like the present necessarily implies the filing of suit by the lessor i.e., the Union of India, Ministry of Works & Housing for the enforcement of the alleged right of re-entry, if any, upon forfeiture of lease due to breach of the terms of the lease.

84. In State of Rajasthan Vs. Padmavati Devi (Smt) (Dead) by Lrs. and Others, the Supreme Court reiterated the principle that summary procedure for eviction of unauthorized occupants of Government land, u/s 91 of the Rajasthan Land Revenue Act, 1956 cannot be employed where a person in occupation raises a

bona fide dispute involving complicated questions of title and as to his right to remain in possession of the land. The Apex Court pointed out that Section 91 of the Act prescribes a summary procedure for eviction of a person who is found to be in unauthorized occupation of Government land and these provisions cannot be invoked where the person in occupation raises a bona fide dispute about his right to remain in occupation. Quoting with approval and following the earlier decision in Thummala Krishna Rao, the Court held that the summary remedy available u/s 91 of the Rajasthan Land Revenue Act is not a legal process suited for adjudication of complicated questions of title, where the person sought to be evicted as an unauthorized occupant makes a bona fide claim regarding his right to be in possession. In such a case, the proper course is to have matter adjudicated by the ordinary Courts of Law.

85. In the light of the precedential authority cited *supra*, this Court is of the considered view; and in the facts and circumstances of this case, that the Estate Officer - the 3rd Respondent cannot determine the essential and jurisdictional fact whether the schedule property is public premises; in particular since the dispute as to the nature of this property is a bona fide dispute involving determination of complex questions of law and fact and since the nature of the enquiry provided under the provisions of the 1971 Act is clearly summary in nature.

Whether long possession of the Petitioners inheres a presumption of their ownership of the schedule property?

86. Section 110 of the Evidence Act reads: when the question is whether any person is the owner of any thing of which he is shown to be in possession, the burden of proof that he is not the owner is on the person who affirms that he is not the owner.

87. In *Krishna Aiyar v. The Secretary of State for India in Council* represented by the Collector of Tinnevely ILR 1910 MAD 173 where the Plaintiff proved his possession of two items of the schedule property; for 30 years in himself and his vendor in respect of the first item; and for 40 years in himself in respect of the second item, the learned Division Bench of the Madras High Court held, following the earlier decisions in *The Secretary of State for India v. Kota Bapanammagaru* ILR 1896 MAD 165 and in *Haidar Khan v. The Secretary of State for India* ILR 1909 CAL 1 held that since the Plaintiff proved his possession for more than twelve years the Government must prove that it has subsisting title and when it fails to prove such title or possession within 60 years, the Plaintiff is entitled to a declaration of title and not merely to a declaration that he is lawfully in possession of such land.

88. The above decision of the Madras High Court was quoted with approval and followed in the *State of Andhra Pradesh v. Gowra Subbaraya Setti* 1967 (2) An.W.R 433.

In *Thummala Krishna Rao* (*supra*), the Supreme Court observed: that the long

possession of the Respondents and their predecessor-in-title of these plots raises a genuine dispute between them and the Government on the question of title, remembering especially that property, admittedly belonged originally to the family of Nawab Habibuddin from whom the Respondents claim to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property and thereafter perfected his title by adverse possession must be decided in a properly constituted suit.

89. On behalf of the Respondents reliance is placed on several precedents contending that the present writ petition is not maintainable in view of the alternative remedy of an appeal under Section-9 of the 1971 Act. We proceed to consider the precedents cited to resist the writ petition.

90. In *Safari Airways Vs. The Estate Officer and Others*, a notice issued by the Estate Officer to the Petitioner alleging his unauthorized occupation of public premises was questioned on the ground that it does not disclose the material on which the Estate Officer formed the opinion that the noticee was in unauthorized occupation of the premises. It is in this context that the Delhi High court observed that the notice issued u/s 4(1) of the 1971 need not disclose the material on which the opinion as to unauthorized occupation was formed and that the writ petition challenging such notice was not maintainable at that stage and its validity can be questioned in an appeal available under Section-9, against the order of eviction, if passed. This decision does not afford any assistance to the contention of the Respondents that the present writ petition is not maintainable.

91. In the case on hand, the challenge to the order of the Estate Officer, dated 30-05-2002, is on several grounds including:

(a) that the exercise of jurisdiction under the 1971, Act is based on a perverse conclusion as to the jurisdictional fact, of the premises in question being public premises; (b) even on the jurisdictional fact there was No. unequivocal determination that the premises is public premises; and (c) that only a prima facie conclusion is recorded as to the character of the premises. Since the Estate Officer, a quasi-judicial Tribunal it is alleged to have clearly erred in recording a conclusion on the jurisdictional fact, an aspect collateral to the main issue within its jurisdiction under the Act, No. objection as to maintainability can gainfully be urged.

92. Reliance is also placed by the Respondents on the decision in *Chief Executive Officer v. Surendra Kumar Vakil and Ors.* (supra). The relevant facts of this case may be noticed. An extent of 11.37 acres comprising Sy. No. 392 and known as Bungalow No. 39, Sagar Cantonment is described in the GLR maintained under the CLA Rules 1925 as held on "old grant" terms and stands in the name of S.N. Mukherjee. This property is described as "B-3" land and was placed under the management of the DEO, Jabalpur Circle. The factual setting in which this

decision and the finding was summarised by the Supreme Court:

In the present case, however, apart from the requirements of Order No. 179 of Governor General in Council, 1836, the general land register maintained under the Cantonment Land Administration Rules of 1925 has been produced which supports the contention of the Appellants that the land is held on old grant basis. The Appellants have also led evidence to show that the file containing grant in respect of the said property, is not available with them because it has been stolen in the year 1985. The Respondents on the other hand have not produced any document of title pertaining to the said land or showing the nature of the rights of the Respondents over the said land except the sale deeds referred to earlier. The stand of the Respondents relating to their rights over the said land has changed from time to time. In the sale deeds executed by the Vendees in favour of the Respondents, the land is described as lease hold cantonment land. This was later changed by the Respondents in the amendment deeds to old grant land. In the suit, the Respondents have contended that they have become the absolute owners of the said land. These bare assertions do not carry any conviction. Had there been any conveyance or lease in respect of the said lands executed in favour of the Respondents or their predecessor-in-title, such conveyance or lease should have come from their custody. There is, therefore, No. document before the Court which would show that the Respondents were the absolute owners of the said land as now contended by them. The Regulations as well as the general land registers, on the other hand, which are old documents maintained in the regular course and coming from proper custody, clearly indicate that the land is held on old grant basis. This is, therefore, not a case where the Appellants had not produced any evidence in support of their contention that the land in the cantonment area was held on old grant basis by Mukherjee.

93. The shifting stands and claims by the Respondents at various times, with regard to the nature of the property, was adverted to in detail by the Supreme Court and the inconsistent stands noticed are:

(a) S.N. Mukherjee who is the recorded occupancy holder in the GLR died in 1972 leaving behind 11 legal heirs. Bungalow No. 39 (the subject-matter of the lis) was not mutated in the names of the legal heirs. By four registered sale deeds, dated 26-02-1983, Mukherjee's heirs sold the entire property in favour of the Respondents (24 in number). Gopal Das Soni (Mr. Soni) obtained power of attorney from the vendors and vendees for dealing with the said property and pursuing proceedings in connection with it;

(b) In the four sale deeds, the property was described as leasehold land of the Cantonment Board and stipulated that the Petitioners must abide by the terms and conditions on which the land was held in the name of the seller's ancestors;

(c) Subsequently, Mr. Soni, by four amendment (admission) deeds dated 4/5-8-1983, (on behalf of the vendors) stated that due to typographical error in

the sale deeds the land was shown as leasehold whereas it should have been described as "old grant" and therefore by the amendment deeds the description was being changed to "old grant" type;

(d) Mr. Soni addressed a letter dated 26-05-1985 to the MEO Jabalpur Cantonment informing that on the death of Mukherjee on 13-07-1972 his legal heirs sold the property in favour of 24 persons (Respondents) under four sale deeds, dated 26-02-1983, and requested transfer of the Bungalow in the names of the purchasers, in the records of the MEO;

(e) The MEO on 03-10-1983 issued a notice to the vendors and vendees stating that the vendors had divided the entire land into four portions without prior sanction, in contravention of the terms of the grant on which the site was held and that the sale in favour of the purchasers was

also without prior sanction and would invite action for resumption of the site. The vendors and vendees were called upon to show-cause why action for resumption be not taken;

(f) Mr. Soni replied on 15-10-1983 that as per the terms of the "old grant" the sellers had occupancy rights which were transferred to the purchasers and that they were not aware that prior permission of the MEO was required before the sale. He sought pardon for the unintentional lapse and set-out the reasons for executing four sale deeds instead of one;

(g) By a cancellation deed, dated 30-10-1984, the parties cancelled the amendment/admission deeds, dated 4/5-08-1983. Thereafter, deeds dated 18-06-1985 were executed incorporating clauses that purchasers would have the same rights as Mukherjee, over the property;

(h) By the letter dated 28-12-1984, the Cantonment Estate Officer advised Mr. Soni to submit building plans and obtain permission for construction on the property. Soni however commenced construction without awaiting permission. The building plans sent by the CEO to the DEO, Jabalpur, were rejected on 06-03-1985. Despite the rejection, constructions were continued. Eventually a notice dated 15-04-1985 was issued to Mr. Soni advising him to desist from raising unauthorized construction. An appeal filed by Mr. Soni and Ors. u/s 274 of the Cantonment Act 1924 was dismissed by the Appellate Authority on 28-08-1985; and

(i) Thereafter the purchasers/Respondents in the Supreme Court filed a civil suit praying that they be allowed to enjoy the property peacefully and without interruption. The prayer was subsequently amended and declaration of title was sought.

94. The Trial Court decreed the suit and the Cantonment Board's appeal was dismissed by the High court and therefore the Board appealed to the Supreme Court. It is therefore clear that not only was there an entry in the GLR describing the property in question as "old grant" but the heirs of S.N. Mukherjee who were

the vendors of the Respondents and Mr. Soni had consistently (prior to the suit) adopted the position that Mukherjee was either an occupant of the premises under "old grant" terms or a lessee, as the case may be. Never did any of the Respondents or their predecessors-in-title assert clear ownership right over the property. In the circumstances and since the entry in the GLR was the only piece of documentary evidence on record in the lis, with regard to the nature of the property (apart from the frequently modified sale and amendment deeds), the Supreme Court relied on the GLR entries; disbelieved the inconsistent positions adopted by the Respondents from time to time and concluded that since the GLR's were maintained in the regular course they could be relied upon to infer the nature of the property as belonging to the Cantonment.

95. If the GLR entry had been considered by the Surendra Kumar Vakil Supreme Court as conclusive evidence of its contents (describing Bungalow No. 39 as "old grant" and S.N. Mukherjee as only an occupant with No. title to the property), a detailed reference to the inconsistent stands adopted by the Respondents and their predecessors-in-title from time to time or that the Respondents failed to marshal a scintilla of evidence to support their contention that Mukherjee had title to the scheduled land, was wholly uncalled for. In the paragraph of the Supreme Court judgment (extracted above) it is clearly observed that the Regulations as well as the GLR's are old documents maintained in the regular course and coming from property custody and thus clearly indicate that the land is held on "old grant" basis. In fact, from the context and tenor of the Surendra Kumar Vakil judgment, the inference is compelling that entries in the GLR were merely considered as evidence indicative of the nature of the property.

96. Surendra Kumar Vakil is thus not an authority for the principle or proposition that, entries in the GLR though maintained under the CLA Rules (made in exercise of the powers u/s 280 of the Cantonments Act, 1924), are conclusive evidence of title to property, whether of the Cantonment or otherwise. The entire discussion in the judgment clearly discloses that the conclusion by the Supreme Court (that the property belongs to the Cantonment) is based on entries in the GLR, maintained in the normal course juxtaposed with the shifting claims and stands of the Respondents at various stages; and the absence of any evidence marshalled by Respondents in support of the assertion that they are the owners of the property. It also requires to be noticed that in Surendra Kumar Vakil there was No. assertion on behalf of the Respondents therein, as is urged by the Petitioners herein that the GLR entries were altered.

97. In the present case the 1956 GLR entries enumerate the schedule property as belonging to the Central Government and granted on "old grant" terms while there is No. corresponding entry in the GLR of 1933. There is No. response to the Petitioners' categorical assertion that there is No. factual basis or any instrument to substantiate the alteration in the GLR entries of 1956. The Respondents do not state the particulars and date of the grant in favour of the Petitioners or their predecessors-in-title. It also requires to be noticed that the Petitioners rely on

the resolution of the Nizam's Government of 1904 and the Notification dated 28-08-1906; the decision of the Reference Court in O.P. No. 19 of 1952 & batch and several other documents already adverted to (earlier in this judgment) to support their claim that the property does not belong to the Secunderabad Cantonment. That Secunderabad Cantonment was a station in an erstwhile Native State and not in British India is also a distinguishing feature.

98. Since on the analysis above Surendra Kumar Vakil does not support the principle that GLR entries are conclusive evidence of title to property in Cantonment areas, we are required to consider the generic status of entries in the GLR.

Status and evidentiary value of GLR entries:

99. Union of India represented by its Union of India (UOI) and Others Vs. Vasavi Cooperative Housing Society Limited and Others, is a judgment of a Division Bench of this Court in a first appeal. The Co-operative Society filed the suit for declaration of its title in respect of the specified portion of the suit land covered by Sy. Nos. 60/1 and 61 of Kakaguda village; for vacant possession from Defendant Nos. 1 to 3 and 7 after removal of the structures therein; and for a perpetual injunction against the Appellants (who are the said Defendants) from interfering with an extent of Ac.0-06 guntas in the same Sy. Nos., comprising plot Nos. 72 and 52 of the lay-out plan. The suit was decreed and this Court dismissed the first appeal.

100. The Plaintiff being a registered Co-operative Society claimed the property to be private property, not belonging to the Union of India or the Secunderabad Cantonment, and was purchased from private individuals, the predecessors-in-title. On behalf of the Defendants the schedule property was claimed to belong to the Cantonment on the basis of GLR entry bearing Sy. No. 581, described the extent of Acs.7-51 cents as Morram pits. In the context of the competing facts the Vasavi judgment referred to the origins of Secunderabad Cantonment; the limited purposes (civic administration) for which the 13 Mughlai villages were handed over to the British Government by the Nizam by the Notification dated 28-10-1906 and without any rights in the land and the evidentiary value of GLR entries as evidence of title. The analysis and conclusions of the Division Bench (relevant for this case) may be summarized:

(a) Kakaguda village where the suit schedule lands are situate was in Hyderabad State ruled by the Nizam till 25-01-1950 and indisputably the village was not in British India;

(b) By a Notification dated 28-08-1906 issued by the Government of Nizamul kul Asifjar, the 13 Mughlai villages including Kakaguda were handed over to the British Government to administer as part of the Cantonment for civic purposes without any rights in land and stipulating that the Government of Hyderabad would utilize all powers of judiciary and civil as usual in these areas; there will not be any change in their nature due to amalgamation of these villages in the

Cantonment; that the Royal Rights as prevalent in other parts of the Cantonment, shall continue as usual; that those villages shall be considered within the boundaries of the Cantonment, subject always to the condition to that powers of Civil (Judicial), Ecclesiastical and Revenue, with all matters concerned thereto and all the rights and powers which were vested on the Government of Hyderabad, Jagirdars, or owners, possessors of the land in the above said villages or any persons who are not mentioned in detail, shall not be affected due to the said amalgamation and are preserved by the Government of Hyderabad, Jagirdars, owners or possessors, as usual.

Thus, the transfer of the 13 villages including Kakaguda did not adversely affect the right, title and interest of the pattedars and owners in the lands;

(c) The then Resident of Hyderabad, Sir William Barton, in his report, dated 10-10-1926, to the Government of India, informed that in the 13 Mughlai villages there is No. ownership of the lands whatsoever held by the British Government and that land was assigned to the Government of India by the Nizam Government for military purposes. The report further observed that an important distinction must be drawn between the status of the Government as regards land within the Cantonment of Secunderabad and land in Cantonments in British India or in Indian States where the land had been definitely assigned for the purposes of Cantonment. In the case of Secunderabad, the report stated, there was No. definite assignment of land or land handed over from time to time free of charge by the Nizam for occupation of military authorities. The report further noted that in Civil areas outside the military areas and excluding the 13 Moghlai villages, the control of buildings rest with the Cantonment Authority to whom they can give permission to build, but merely as a license and not to convey title to the land; that land may be owned by private individuals or by the Nizam's Government, it may be a revenue paying land or waste land used for grazing or otherwise; and if their properties are owned by the Nizam Government, an application for permission to buy or lease should be addressed to that Government through the Residency. However, if an applicant owns the land either by purchase or by hereditary rights there is No. difficulty unless the land pays revenue to the Nizam's Government, in which case, sanction of the Nizam's Government would be necessary. On the basis of this report, the judgment concluded that there was No. ownership of land in the 13 Moghlai villages in the British Government and this land is merely owned by Pattedars, Inamdars, Jagirdars and the Nizam, and Army barracks existed in portions of the areas with the permission of the Nizam;

(d) In view of the decision of the Supreme Court in Ameer-un-Nissa Begum and Others Vs. Mahboob Begum and Others, (where it was recognized that prior to integration of the Hyderabad State the Nizam enjoyed uncontrolled sovereign powers without constitutional limits upon its authority and firmans issued were expressions of sovereign will and would override all other laws in conflict with them so long as the particular firman held the field, that alone would govern or

regulate the rights of the parties concerned; a view reiterated in Director of Endowments, Government of Hyderabad and Others Vs. Akram Ali, and in Union of India Vs. Prince Muffakam Jah and others, the Notification dated 28-08-1906 is conclusive on the issue that there was No. transfer of ownership rights in favour of the British Government;

(e) That the Cantonments Act, 1924 only applied to British India and Hyderabad being a princely State, the provisions of that Act do not apply to the Hyderabad State. Further, in P.V. Jaya Rao Vs. Cantonment Board, Secunderabad (Dn.), another Division Bench of this Court, after scrutiny of the various notifications including the one dated 28-08-1906, had concluded that Civil, Ecclesiastical and Revenue administration remained with the Nizam and the powers relating to construction and remodeling of the constructions within the Cantonment Area were delegated under an agreement of 1893, as exercisable by the Cantonment authorities and these were not curtailed by reason of the notification dated 28-08-1906;

(f) The Cantonment Land Administration Rules, 1925 were applicable only to British India and not to the Nizam State and this is clear from the fact that the then Resident issued the Secunderabad and Aurangabad Cantonment Land Administration Rules, 1930 which alone were applicable to the Secunderabad Cantonment. Rule-3 of these Rules deals with the preparation and maintenance of GLR in Rules 5 & 6. The note appended to Rules-6 of the 1930 Rules, however, states: nothing in these rules shall apply to State, Sarf-i-Khas, Paiga or privately owned land or to land in the thirteen villages referred to in the Residency Orders Notification No. 41, dated 28-08-1906, and the villages of Kowkur and Mahadeopur. Thus, even the 1930 CLA Rules do not apply to the 13 Moghlai villages and No. GLR register could have been prepared in 1933 under those Rules. The GLR entries had thus No. statutory basis, either under the Cantonments Act, 1924, the 1925 CLA rules or the 1930 Secunderabad and Aurangabad Cantonment Land Administration Rules;

(g) That the judgment in Surendra Kumar Vakil has No. application since there is No. presumption of Government's ownership over lands in the 13 Moghlai villages in Secunderabad Cantonment and that the Surendra Kumar Vakil 's judgment would not apply to GLR entries maintained by the DEO of Secunderabad Cantonment and in the circumstances the Cantonment authorities and the Union of India (Defendants in the suit) have to make out a clear case and establish their own title without any presumption;

(h) That since GLR entries are recorded or modified without any requirement of or actual public participation, after a notification inviting objections from interested persons without hearing any person or by notification after publication, the entries in General Land Register by themselves do not constitute title. The entries may be pressed into service as a piece of evidence in respect of the claim of ownership or title by the Defence Estate Officer.

(emphasis is added)

101. There is abundant precedential authority to the effect that Revenue records/ entries or Jamabandi entries are neither documents of title nor have presumptive value as title vide *Corporation of the City of Bangalore Vs. M. Papaiah and Another*, ; *Jattu Ram Vs. Hakam Singh and others*, ; *Smt. Sawarni Vs. Smt. Inder Kaur and Others*, ; *State of Himachal Pradesh Vs. Keshav Ram and others*, and *Suraj Bhan and Others Vs. Financial Commissioner and Others*, On parity of principle GLR entries are merely indicative of assertion by Cantonment authorities in their records as to the character of a property located within a Cantonment area.

102. In conclusion, on the vitality of GLR entries, this Court observed in *Vasavi Co-operative Housing Society Ltd*:

The General Land Register prepared, so far as this case is concerned, under the Secunderabad and Aurangabad Cantonment Land Administration Rules, 1930 cannot be said to be prepared and maintained in respect of the rights in or over land. The same cannot be equated to that of land record relating to survey for revenue purposes and record of rights. The entries made therein cannot have any effect of superseding the entries in the Survey and Settlement Register and the Record of Rights prepared and maintained under the provisions of the Land Revenue Act and the Regulations referred to hereinabove. The General Land Register and the entries made therein are at the most can be construed as a record maintained by the Defence Estate Officer for its own purposes.

103. In *Phiroze Temulji Anklesaria Vs. H.C. Vashistha and Others*, the Bombay High Court was considering a challenge to a notice dated 29-01-1972, issued by the Union of India, Ministry of Defence and the Military Estate Officer, Poona Circle, intimating an intention to resume an extent of 4,100 Sq.mts. of land with the Bungalow therein being No. 17, Right Flank Lines, in Poona Cantonment along with the structure thereon after unilaterally determining the compensation payable for the structure alone. While the Petitioner claimed the land to be a free-hold and not belonging to the Cantonment or the Government; the Respondents (in the notice impugned as well as before the Bombay High Court) asserted that the property belonged to the Cantonment and was granted to the Petitioners' predecessors-in-title on "old grant" terms. The Petitioner per contra claimed the land was of free-hold tenure, purchased by his father on 19-09-1918 from Abdul Kader who owned the property by succession.

104. The learned Division Bench of the Bombay High Court [per Jahagirdar, J], after an elaborate and incisive analysis of the voluminous pleadings and documents placed before the Court in support of the respective contentions, found No. basis for the Respondent's claim that the property in question was given to the predecessor-in-title of the writ Petitioner on "old grant" tenure; there was a right to resume; or any legal authority to take possession of the property from the writ Petitioner or determine compensation for the structures

on the property. In course of its analysis, the contention urged on behalf of the Respondents as regards registers prepared by the Cantonment Authorities was also considered and the Court observed in Phiroze Temulji Anklesaria (supra):

Reliance placed upon the registers of the Government property maintained by the Cantonment Authorities will also be of little assistance to the Respondents because it has not been shown to us that before making entries in the registers, owners of the properties were individually informed of the proposal to make entries in such registers. It has been contended that public notice had been given and it should be regarded as a notice to all the occupiers in the Cantonment area. It has not been contended, let alone shown, that such public notice could be given or was given in pursuance of any provision in any Act or Rules made under any Act. It is an admitted position that No. individual notice was given to the Petitioner or his father before making any entry in the register maintained by the Cantonment Authorities. There is No. presumption in law that the entries made in such register are true until the contrary is proved - the type of presumption which will be found in respect of the entries in the Record of Rights under the Land Revenue Code.

105. The Respondents rely on two Division Bench judgments of this Court to assert that in view of the GLR entries, the title of the Government of India, in the scheduled property is beyond disputation and the Writ Petition is not maintainable.

106. Union of India (UOI) and Others Vs. S.M. Hussain Rasheed and Others, is a judgment in a batch of writ appeals and a writ petition. W.A. No. 936 of 1999 was filed by the Union of India and Ors. against the order dated 26-04-1999 in W.P. No. 9381 of 1994; W.A. Nos. 890 and 1407 of 2001 were against the order dated 19-04-2001 in W.P. No. 12124 of 2000, by the Executive Officer, Secunderabad Cantonment Board and the DEO, A.P. Circle; and W.P. No. 801 of 2003 is a connected writ petition. W.A. No. 936 of 1999 arose out of the writ petition challenging the proceedings dated 18-04-1994 of the Union of India rejecting the representation of the writ Petitioner for change of GLR entries relating to Bungalow No. 219, from "B3" to "B2" category. In allowing W.A. No. 936 of 1999, (supra) the Division Bench held that the writ Petitioner failed to establish any legal entitlement, interest, right or title in the schedule property; that the alleged real owners of the property are not the Petitioners nor the persons from whom the Petitioners obtained a GPA; that title is asserted on the basis of a sale agreement purported to have been executed by the alleged real owners of the property coupled with the GPA and such agreement of sale of 1987 was not filed; and there was No. material or evidence on record in proof of possession of the bungalow in question by the writ Petitioner. In the circumstances the appellate Court held that the writ petition is not maintainable where relief sought is in the nature of a declaration of title to the property and observed that the claim of the Petitioner was frivolous and amounts to speculative litigation.

107. W.A. Nos. 890 and 1407 of 2001 arose out of the order in the writ petition directing the Secunderabad Cantonment Board to consider the application of the Petitioner (for construction of a building in bungalow No. 219), whether it is in consonance with building Regulations and without insisting on title and without reference to the claims of the DEO that the property belongs to the Government. In allowing the appeals the Division Bench held that as per Section 181(3) of the Cantonments Act, 1924, the property for which the construction permission was sought is recorded in the GLR, therefore the building plan has necessarily to be referred to the DEO and the Board has No. right to accord permission and therefore, since the DEO has set up a definite objection by way of a claim to title in the Government in respect of the schedule property (bungalow No. 219), the Cantonment Board had No. option except to reject the application of the writ Petitioner. Insofar as W.P. No. 801 of 2003 is concerned the learned Division Bench rejected the writ petition since unauthorized constructions in bungalow No. 219 were demolished by the Cantonment Board after following the due process, under Sections 185 & 256 of the Cantonments Act, 1924.

108. The judgment in S.M. Hussain Rasheed does not postulate any ratio pertaining to the jurisdictional contours or limits under the provisions of the 1971 Act nor does this judgment eschew the analysis and ratio in Vasavi Cooperative Housing Society Limited with regard to the claim of title to or control of the Union of India or the Secunderabad Cantonment Board with respect to lands in the 13 Moghlai villages within the Secunderabad Cantonment area. The reliance placed by the Respondents on this judgment to contend that the Petitioners have No. case or that the writ petition is not maintainable, is thus misconceived.

109. In PV Jaya Rao, the writ challenged an order of the Cantonment Board, dated 25-07-1957, levying a composition fee of Rs. 1,000/- for certain unauthorized constructions by the Petitioner in his premises and in default directing demolition and removal of unauthorized constructions. The question whether the property belonged to the writ Petitioner or to the Union of India or the Cantonment Board was not directly in issue. What was in issue was whether demolition of unauthorized constructions was within the purview of the Cantonment Board under the provisions of the Cantonment Act, 1924. Referring to the series of notifications by the Nizam, delegating powers to control constructions or buildings in villages constituted within the Cantonment area, this Court concluded that the powers relating to construction and re-modelling of constructions within the Cantonment area were delegated by the Nizam under an agreement of 1893; were recognized by the Nizam's Government as exercisable by the Cantonment authorities in these areas without any curtailment, by reason of the notification dated 28-08-1906; and the said notification, conferring only criminal and police jurisdiction was superseded in 1956 and consequently full control passed to the Cantonment Board and the writ petition must therefore fail on the question of the jurisdiction of the Cantonment Board. The writ petition was dismissed.

110. It requires to be noticed that the judgment in PV Jaya Rao was also considered in Vasavi Cooperative Housing Society Limited where on an analysis of all the material considered in PV Jaya Rao and other material, this Court recorded a finding, on the basis of an exhaustive analysis of several aspects that No. title or ownership vested in the Central Government or the Secunderabad Cantonment, with respect to properties in the 13 Moghlai villages.

111. Sri Sitaramiah, learned Senior Counsel also referred to Section 286 of the Government of India Act, 1935 and entry (2) of List 1 of the Seventh Schedule thereto, to contend that there was No. Federal Legislative power vouchsafed with regard to Cantonment Stations established in Native States except for local self-Government in Cantonment areas (not being Cantonment areas of Indian State troops). Section 286 of the Government of India Act, 1935 provided:

1. If His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States requests the assistance of armed forces for the due discharge of those functions, it shall be the duty of the Governor-General in the exercise of the executive authority of the Federation to cause the necessary forces to be employed accordingly, but the net additional expense, if any, incurred in connection with those forces by reason of that employment shall be deemed to be expenses of His Majesty incurred in discharging the said functions of the Crown.

Entry 2 of List 1 -the Federal Legislative list enumerated:

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), [the constitution and powers within such areas of cantonment authorities] the Regulation of house accommodation in such areas, and within [British India], the delimitation of such areas.

112. It also requires to be noticed that the Indian Independence Act, 1947 empowered the Governor-General of India [Section 8(2)] to adapt the Government of India Act, 1935 as the interim Constitution till the enactment of a Constitution by the Constituent Assembly of India. Thus, the Government of India Act, 1935, as adapted, served as the Constitution from 15th August, 1947 to 25th January, 1950; whereafter the Indian Constitution became operative.

113. The provisions of Section 286 and Entry 2 of List 1 of the Government of India Act, 1935, clearly show that the Cantonments Act, 1924 (enacted even prior to the 1935 Act) had No. application to Cantonment Stations outside British India. The contours of the powers of the Cantonment at Secunderabad, at any rate in respect of the 13 Moghlai villages including Thokatta can be traced only to powers granted by the Nizam's Government, vide the Notification dated 28-08-1906.

114. In Indu Bhushan Bose Vs. Rama Sundari Debi and Another, the scope of Entry 3 of List 1 of the Seventh Schedule to the Constitution and on whether

Regulation of house occupation in Cantonment areas is confined to houses acquired, requisitioned or allotted for Military purposes and whether the State Legislature is competent to legislate on relationship between landlord and tenant in Cantonment areas, fell for consideration. Entry 3 of List 1 reads:

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the Regulation of house accommodation (including the control of rents) in such areas.

115. The relevant facts in the above case were that the Respondent before the Supreme Court instituted a suit for eviction of the Appellant who was a tenant in a premises situate within the Cantonment area of Barrackpore. On an application of the A.G. Noorani: A Constitutional History of Jammu and Kashmir, pg.3. Appellant, the Rent Controller had fixed fair rent u/s 10 of the West Bengal Premises Tenancy Act of 1956. The Respondent served a notice on the Appellant to vacate the premises and, there being No. response, filed a suit in the Munsifs Court. The Respondent claimed that Regulation of house accommodation including control of rents being a subject in Entry 3 of List 1, the State Legislature had No. competence to enact the law on the same subject for Cantonment areas and that the Appellant was not entitled to protection under the Tenancy Act of 1956 which was extended to the Cantonment area by the State Government. It was contended that the extension of the State Act to the Cantonment area was ultra vires. The learned Munsif having regard to the Constitutional issue involved, referred the matter to the High Court u/s 133 CPC. The Calcutta High Court declared that the Notification of the State Government extending the provisions of the 1956 Tenancy Act to the Barrackpore Cantonment area was ultra vires and void. In dismissing the appeal; recording a concurrence with the decision of the Calcutta High Court, the Supreme Court held:

The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant in so far as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. The submission made that this interpretation will lead to a conflict between the powers conferred on the various Legislatures in Lists I, II and III has also No. force, because the reservation of power for Parliament for the limited purpose of legislating in respect of cantonment areas only amounts to exclusion of this part of the legislative power from the general powers conferred on State Legislatures in the other two lists. This kind of exclusion is not confined only to legislation in respect of house accommodation in cantonment areas. The same entry gives Parliament jurisdiction to make provision by legislation for Local Self-Government in cantonment areas which is clearly a curtailment of the general power of the State Legislatures to make provision for Local Self-Government in all areas of the State

under Entry 5 of List II. That Entry 5 does not specifically exclude cantonment areas and but for Entry 3 of List I the State Legislature would be competent to make provision for Local Self-Government even in cantonment areas. Similarly, power of the State Legislature to legislate in respect of: (i) education, including universities, under Entry 11 of List II is made subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III; (ii) Regulation of mines and mineral development in Entry 23 of List II is made subject to the provisions of List I with respect to Regulation and development under the control of the Union; (iii) industries in Entry 24 of List II is made subject to the provisions of Entries 7 and 52 of List I; (iv) trade and commerce within the State in Entry 26 of List II, is made subject to the provisions of Entry 33 of List III; (v) production, supply and distribution of goods under Entry 27 of List II, is made subject to the provisions of Entry 33 of List III; and (vi) theatres and dramatic performances; cinemas in Entry 33 of List II is made subject to the provisions of Entry 60 of List I. Thus, the Constitution itself has specifically put down entries in List II in which the power is expressed in general terms but is made subject to the provisions of entries in either List I or List III. In these circumstances, No. anomaly arises in holding that the exclusive power of Parliament for Regulation of house accommodation including control of rents in cantonment areas has the effect of making the legislative powers conferred by Lists II and III subject to this power of Parliament.

116. From the decision in *Indu Bhushan Bose* and the provisions of Entry 3 of List 1 of the Seventh Schedule read with Article 246 of the Constitution, it follows that it is within the Union Legislative field to enact a law for Local Self-Government in Cantonment areas, the Constitution and powers of Cantonment authorities within Cantonment areas and Regulation of house accommodation (including control of rents) in such areas. Many of these areas enumerated in Entry 3 of List 1 would otherwise normally fall within different entries of the State Legislative field, as pointed out in *Indu Bhushan Bose*, but for the specific enumeration in Entry 3 of the Legislative fields therein. Under the scheme of the Constitution therefore the provisions of the Cantonment Act may properly contain provisions for Local Self-Government and Regulation of house accommodation including control of rents as well, in Cantonment areas. But that is not the issue presented in this writ petition. The proceedings against the Petitioners with respect to the alleged unauthorized constructions are not under the Cantonments Act, 1924. The proceedings are under the 1971 Act.

117. The question that falls for consideration in this writ petition is the applicability of the provisions of the 1971 Act to premises whose character as "public premises" is in serious disputation.

118. It is not the case of the Respondents that the provisions of the 1971 Act are applicable to premises other than public premises. Clearly they do not. The entire case of the Respondents rests on the assertion that the schedule property is public premises. The preceding analysis of the relevant facts in this judgment

discloses that the material on record is overwhelmingly weighted against the assumption even prima facie that the schedule property is public premises belonging to, or taken on lease by, or on behalf of the Secunderabad Cantonment or the Central Government. The burden of establishing that the property belongs to the Central Government or the Cantonment is clearly on the Respondents. The singular basis for the Respondents' persistent if vacuous assertion that the schedule property is public premises, is the GLR entry of 1956 pertaining to Sy. No. 528 recording the property enumerated therein as on "old grant" basis. The analysis by this Court supra of the several precedents leads to the compelling inference that entries in the GLR are not conclusive evidence of title; they are at best indicative.

119. On the analyses above, on the several aspects arising out of issue No. 2 and in the light of the discussion (supra); having regard to the long and uninterrupted possession of the Petitioners and their predecessors-in-title of the schedule property, anterior and pursuant to the registered sale deed, dated 18-08-1905; in view of the fact that there is no material on record to justify the GLR entries recorded in 1956 enumerating Sy. No. 528 as being an "old grant" and the property as belonging to the Central Government or the Cantonment Board, as the case may be; in view of the judgment of the Reference Court in O.P. No. 19 of 1952 and batch, dated 01-11-1961; of the Division Bench of this Court in Vasavi Cooperative Housing Society Limited; the judgment of the Supreme Court in Thummala Krishna Rao and Express Newspapers Private Limited; and the decision in Addanki Tiruvankata Thata Desika Charyulu; having regard to the bona fide and serious assertion by the Petitioners of ownership of and title to the schedule property; the complex questions of law and fact involved in determination of such claim; the competing claim of the Union of India and the Secunderabad Cantonment of title to the schedule property; the fact that GLR entries do not constitute conclusive proof of title; and in the light of the fact that provisions of the 1971 Act postulate only a summary procedure for the substantive determinative jurisdiction conferred on the Estate Officer, this Court holds that proceedings under the 1971 Act are inappropriate and precluded for determining the collateral and jurisdictional fact whether Petitioners or the Respondents have title to the property representing bungalow No. 176 with the appurtenant land at Bowenpally, Secunderabad, within the Secunderabad Cantonment area.

Issue No. 2 is answered accordingly.

120. Before proceeding to an analysis and determination of Issue No. 3 it is considered appropriate to dispose of another contention urged on behalf of the Respondents. Sri T. Venkata Raju Goud contended that since the Petitioners are strenuously asserting title to the schedule property, it is for them to approach the Civil Court and that they cannot seek declaration of title in a proceedings under Article 226 of the Constitution. It is also contended that in the appeal by the Petitioners - C.M.A. No. 172 of 1997 directed against an earlier order of the

Defence Estate Officer, the appellate Court of the Chief Judge, City Civil Court, Hyderabad, had observed:

Since the Appellants are questioning the title, it is for them to approach to the Civil Court to get an appropriate relief as the Estate Officer has rightly observed that he cannot decide the title.

and that this observation in C.M.A. No. 172 of 1997, constitute *res judicata* and bars the relief sought in the writ petition on the basis of a claim to title in the schedule property. As part of this contention the learned Central Government Standing Counsel contends that the Petitioners cannot impeach the finding of the DEO in the impugned order (as to title of the schedule property inhering in the Central Government, either in this writ petition or even in a appeal u/s 9 of the 1971 Act) and they must have recourse to the Civil Court by way of a declarative suit if the Petitioners seek to establish their title to the schedule property.

121. The above contention is stated to be rejected. For the Bar of *res judicata* to apply, the matter directly and substantially in issue between the parties, or between parties under whom they or any of them claim, litigating under the same title must have been heard and finally decided earlier by a Court and the same matter must be presented in a subsequent suit or proceeding and must be directly and substantially in issue. Explanation III to Section 11 CPC clarifies that the matter must in the former suit have been alleged by one party or either denied or admitted expressly or impliedly by the other. In view of the explanation IV to Section 11 the matter directly and substantially in issue may again be so either actually or constructively. A matter is actually in issue when it is alleged by one party and denied or admitted by the other and it is constructively in issue when it might and ought to have been made a ground of attack or defense in the former suit.

122. As explained in *Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others*, a matter directly in issue in the previous suit would not operate as *res judicata* in the subsequent suit unless it was also substantially in issue in such former suit.

123. This Court in *Mangu Ramdas Vs. Madurai Venkataratnam and Others*, explained that the expression "substantially" means "of importance and value and a matter can be said to be substantially in issue if it is of importance and value for the decision of the case". As explained in *Ragho Prasad Gupta Vs. Shri Krishna Poddar*, an unnecessary or irrelevant issue, the decision of which either way will not effect the final outcome of the suit, cannot be of any importance or value for the decision of the suit and cannot, therefore, be said to be "substantially in issue".

124. The following are the relevant principles regarding application of *res judicata* doctrine to the facts of the case on hand:

(a) In order to operate as *res judicata*, a finding of Court must have been necessary for the determination of the suit. If a finding is not necessary, it will

not operate as res judicata. A matter directly and substantially in issue cannot be said to have been "heard and finally decided", unless the finding on such matter or issue is necessary. It cannot be ramified or expanded by logical exclusion vide Pandurang Ramchandra Mandlik (Since Deceased) by his Lrs. and Another Vs. Shantibai Ramchandra Ghatge and Others, ; Ramesh Chandra Vs. Shiv Charan Dass and Others,

(b) A finding on an issue cannot be said to be necessary to the decision of a suit unless the decision was based upon such finding - Smt. Ganga Bai Vs. Vijay Kumar and Others, Patwari v. Hiralal AIR 1950 PC 80;

(c) A decision cannot be said to have been based upon a finding unless an appeal can lie against such finding. The underlying principle is that "everything that should have the authority of res judicata is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of res judicata". It is the right of appeal which indicates whether the finding was necessary or merely incidental - Thakore Sobhag Singh Vs. Thakur Jai Singh and Others,

(d) If the Plaintiff's suit is wholly dismissed, No. issue decided against the Defendant can operate as res judicata against him in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the Plaintiff may operate as res judicata against him in a subsequent suit, for he can appeal from a finding on such issue, the decree being against him - Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai, Ganga Bai (supra); Pandurang (supra);

(e) Similarly, if the Plaintiff's suit is wholly decree, No. issue decided against him can operate as res judicata for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the Defendant is res judicata for he can appeal from a finding on such issue, the decree being against him. Midnapur Zamindari Company Ltd. v. Naresh AIR 1922 PC 241; Corporation of Madras v. Ramchandraiah AIR 1977 SC 25; and

(f) Obiter observations of a Court cannot operate as res judicata in a subsequent suit - Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others,

125. C.M.A. No. 172 of 1997 was filed by the Petitioners herein against an order directing demolition of allegedly unauthorized constructions in bungalow No. 176, on the premise that it is public premises. As is apparent from the order in the CMA, despite the Petitioners' contention that it is private property and not a public premises, the Estate Officer while observing that he cannot decide the question of title nevertheless proceeded to exercise jurisdiction under the provisions of the 1971 Act and directed demolition of the "unauthorized structures". In the appeal the Petitioners impeached the order of the DEO contending that the schedule property is private property and therefore not public premises and the order of demolition is unsustainable. The C.M.A. was

allowed and the matter remitted to the DEO for fresh enquiry on the ground that the Petitioners' claim with regard to the schedule premises not being owned by the Government of India, must be determined after fresh inquiry. It was neither the case of the Petitioners (Appellants in the CMA) nor of the Cantonment authorities (Respondents); nor was there any issue framed as to whether the Petitioners or the Respondents, as the case may be, must approach the Civil Court for the relief of a declaration of title. Who among the litigating parties must, if at all, approach the Civil Court for declaration of title was therefore not a matter directly and substantially in issue or even constructively so. The observation in CMA that since the Appellants (the Petitioners herein) have taken plea that they are owners of the land and the bungalow in question, (having obtained ownership through registered sale deed), it is for them to prove the same in a Civil Court, is an observation recorded in the C.M.A. casually and was not fundamental to the matters directly and substantially in issue, either actually or constructively. In any event since the Petitioners herein had succeeded in the appeal and obtained invalidation of the order of the DEO appealed against and the matter was remanded for de novo consideration by the DEO, it cannot be held that either the issue of ownership of the schedule property or as to who must approach the Civil Court, if at all, for seeking a declaration of title, was heard and finally decided.

126. There is a more fundamental reason why the casual observation in C.M.A. No. 172 of 1997 (that since the Petitioners are questioning title they should approach the Civil Court to get the appropriate relief) would not bind the Petitioners nor constitute a declaration as to which of the competing claimants to ownership of the schedule property, are required to approach the Civil Court of competent jurisdiction, seeking a declaration of title. The jurisdiction exercised in C.M.A. No. 172 of 1997 is an appellate jurisdiction arising out of the primary jurisdiction of the DEO under the provisions of the 1971 Act. The substantive jurisdiction of the primary authority, the DEO under the 1971 Act, pertains to determination of whether public premises is in unauthorized occupation or there are unauthorized constructions therein. Determination of the issue whether the premises is public premises is a jurisdictional and collateral fact. Any determination by the primary authority of such jurisdictional and collateral fact cannot be conclusive, is an established and venerated principle. In the circumstances, an appellate Court or tribunal exercising appellate jurisdiction over a decision of a primary tribunal of limited jurisdiction cannot record a conclusive finding on the jurisdictional and collateral fact, either.

127. Since the issue whether the schedule property is public premises is an aspect constituting a jurisdictional or collateral fact in a determination arising out of or in connection therewith of such jurisdictional collateral fact, even by the appellate tribunal (in C.M.A. No. 172 of 1997) cannot be a matter directly and substantially in issue. It could only be a matter which is collaterally and incidentally in issue and therefore be outside the pale of the application of the doctrine of *res judicata* - vide, *Smt. Gangabai Gilda Vs. Smt. Chhabubai*

Gandhi, ; Life Insurance Corporation of India Vs. M/s. Indian Automobiles and Co. and others, ; and Rameshwar Dayal Vs. Banda (Dead) through his Lrs. and Another,

128. The observations of the Supreme in Gangabai (supra) on this aspect are apposite: In India Automobiles, an application for fixation of fair rent was made under the relevant Rent Act and the Rent Controller was required to record a prima facie finding that the applicant was the landlord. The decision of the Rent Controller on this aspect of the matter however would not operate as res judicata on the question of title to the property which could be decided only by a civil court, held the Supreme Court. The Court observed:

A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata.

There is No. doubt that since an application for this purpose cannot lie except at the instance of a landlord or a tenant, the Rent Controller has to deal with this incidentally but this is not one of the direct issues before the Rent Controller... (H)is decision is not final on the issue that opens up his jurisdiction and cannot preclude an owner from contending, in a civil suit, that he should not be asked to pay rent for his own property to someone else.

129. In Banda, the Supreme Court following Gangabai held that where a Small Cause Court incidentally determined the question of title, the same would not operate as res judicata and observed further:

The contention ignores that to operate as res judicata the first finding must be on an issue which has been directly and substantially in issue in the former suit. If the finding is given incidentally while determining another issue which was directly and substantially in issue, such finding cannot be said to be an issue which was directly and substantially in issue in the former suit.

129. The contention by the Respondents, based on the bar of res judicata, is thus misconceived.

Issue No. 3: Whether in view of the available alternative remedy, of appeal u/s 9 of the 1971 Act against the [impugned order], the Writ Petition is maintainable? and If so, what appropriate relief could be granted ?

130. The preceding analyses; in particular on Issue No. 2, compels the conclusion that existence of an appellate remedy, u/s 9 of the 1971 Act, bars neither the jurisdiction nor operates to exclude the discretion of this Court to entertain and adjudicate upon this writ petition assailing the order of the DEO dated 30-05-2002. The impugned order is patently erroneous and unsustainable for a plurality of reasons:

(a) The impugned order records that the premises is a public premises; (b) this finding is unsustainable since having regard to the complex issues involved in

determination of the fact as to ownership of the schedule property and the summary nature of the process provided under the provisions of the 1971 Act, the title dispute is outside the adjudicatory domain of the DEO under the provisions of the 1971 Act; and (c) since the DEO proceeded to assume without doctrinal foundation that entries in the 1956 GLR constitute conclusive evidence of title to the schedule property vesting in the Central Government, contrary to the established precedents in this area, analysed above. In view of exclusion of jurisdiction with respect to determination of the jurisdictional fact, in view of the bona fide and serious disputes as to ownership and title of property, from the domain of the DEO; the substantive determination by the impugned order, of occupation of the Petitioners as well as the constructions being unauthorized is patently unsustainable. Since the very jurisdiction of the DEO is in issue, the existence of an alternative and appellate remedy is No. bar to the exercise of discretion by this Court to entertain this writ petition to examine the validity of the impugned order, in certiorari.

131. The only aspect that remains to be considered is what is the appropriate relief to be granted?

132. On the analyses supra, and in view of the conclusions on the earlier issues formulated for determination, this Court holds:

(a) The order of the 3rd Respondent dated 30-05-2002, in case No. 21/188/EV/SY. No. 528/B. No. 176, is unsustainable and quashed;

(b) It is declared that since the competing claims of the Petitioners and the Respondents as to ownership and title to bungalow No. 176, situate in the Secunderabad Cantonment area, involves adjudication of a complex variety of facts and complicated questions of law as well; unsuitable in the context of the summary procedure provided under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, adjudication of this jurisdictional and collateral fact is precluded from determination under the provisions of the 1971 Act and the adjudication of title, in the circumstances, is more appropriately pursued before the Civil Court of competent jurisdiction;

(c) It is declared that since the Petitioners are in long, open and uninterrupted possession of the property since and under the registered sale deed, dated 18-08-1905, there is a presumption that they are the owners of the property; consequently and since the Respondent claim to the contrary, they must seek declaration of title before the appropriate Civil Court, of competent jurisdiction;

(d) The impugned proceedings of the 3rd Respondent, dated 30-05-2002 ordering demolition of unauthorized constructions by the Petitioners in the schedule property situate in the Cantonment area is declared incompetent and unsustainable, since it is passed pursuant to provisions of the 1971 Act, which are applicable only to public premises;

(e) There is No. legally sustainable finding that the property is public premises,

in the impugned order;

(f) That nothing in this judgment shall however be construed as inhibiting the Respondents from proceeding in accordance with law, against unauthorized constructions, if any, in the schedule property under any other law authorising the Respondents to so proceed; or even under the provisions of the 1971 Act, if the Respondents establish title or ownership to the property in appropriate proceedings before a Civil Court of competent jurisdiction;

(g) The liberty of the Respondents to proceed against the Petitioners under the provisions of the 1971 Act for unauthorized occupation of the property is also not impaired, subject to the Respondents obtaining a declaration from the appropriate Court as to their ownership of the schedule property.

132. In the facts and circumstances above, the writ petition is allowed in the terms above but in the circumstances without costs.