

(1988) 06 CAL CK 0004
In the Calcutta High Court
Case No : C. O. No. 6818 (W) of 1984

Tanwir Eqbal and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-06-1988

Acts Referred:

Enemy Property Act, 1968 — Section 11, 12, 5, 6
Foreigners Act, 1946 — Section 9

Citation : AIR 1989 Cal 139 : (1989) 1 CALLT 129

Hon'ble Judges : K. M. Yusuf, J

Bench : Single Bench

Advocate : J. Islam, Mr. P. K. Chattapadhyay, Mr. Ekramul Bari and Mr. Panchanan Khatua, for the Appellant; Bhabani Sankar Bagchi, Arunava Ghosh, Mihir Kumar Das and Mr. Pankaj Kumar Mukherjee, For Respondents Nos 1 to 5, Mr. Jamini Kumar Banerjee and Mr. Subrate Dutta, For Added Respondents, for the Respondent

Judgement

K. M. Yusuf, J.—The writ petitioners are having the second round in the Hon'ble High Court. A writ petition with identical facts was moved in 1970 and thereafter the Trial Court's decision was challenged before the Division Bench in 1982. The Division Bench made certain direction and on the basis of that direction an order was passed on 14th February, 1984 which is under challenge in the instant writ application.

2. The facts of the writ application, in short, are as under: The predecessor-in-interest of the present petitioners, i.e., Shaikh Gulam Rasul Qais, purchased from one Mussammat Khadija Bi the premises No. 6, Harinbari 1st Lane, Calcutta, by a registered Deed of Sale, dated 1st September, 1969 for valuable consideration mentioned therein. After purchasing the said premises Qais mutated his name in the Corporation of Calcutta and paid taxes and was in peaceful possession and enjoyed the usufructs thereof. The said Qais died on 17th January, 1977 leaving behind the petitioners as his sole legal heirs and representatives and. the estate left by him devolved upon his legal heirs and representatives according to the

Mohammedan Law. Since the demise of Qais the petitioners were in peaceful possession and enjoyment of the premises in dispute. It is stated in the writ application that some of the tenants of the premises were inimical to the petitioners and at their instigation the Assistant Custodian of Enemy Property sent a notice, dated 21st April, 1979 to the petitioner No. 1 alleging that it has been ascertained that the immovable property at 6, Harinbari 1st Lane, Calcutta-78, is owned by Mussammat Khadija Khatoon, the wife of Abdur Rashid, a Pakistani National and is therefore, "Enemy Property" and had vested in the Custodian of the Enemy Property for Government of India, Ministry of Commerce, Notification No. 12/2/65 E. Pty., dated 10th September, 1965 (copy enclosed) and continues to so vests in the said Custodian under the provisions of the Enemy Property Act, 1968; (It is an admitted fact that Khadija Bi or Khadija Khatoon is one and the same person). The said notice further stated that this property was transferred to the late Gu1am Rasul Qais under a registered Deed of Conveyance and that the rents and profits are realised by the legal heirs of the deceased Qais. The notice called upon the petitioner No. 1 to Show Cause within 10 days from the receipt of the notice why the rents and profits of the property should not be collected by the Custodian, etc. But strangely enough much before the expiry of 10 days time given for the show cause notice, i.e., on 23rd April, 1979 the Assistant Custodian of the: Enemy Property issued letters to the tenants of the said promises asking them to pay rents not to the petitioners but at his office. The petitioner No. 1 replied to the show cause notice on 25th April, 1979 stating, inter alia, that the said Khadija Khatoon has never been a Pakistani National as alleged and the premises No. 6, Harinbari 1st Lane does not come under the purview of the Enemy Property Act. In view of the facts that the emergency expired on 10th July, 1968 the purported Order, dated 21st April, 1979 declaring that the said property as vested in the Custodian is without jurisdiction and contrary to the provision of Section 5 of the Enemy Property Act. It was further contended that Section 5 of the said Act states that notwithstanding the expiration of the Defence of India Act and Rules, 1962 all enemy properties vested before such expiration in the Custodian of Enemy Property will continue to vest in him immediately under 053 the Enemy Property Act, 1968. In order to attract the operation of the said Section 5 it is necessary to establish that the enemy properties had vested in the Custodian of Enemy Property under the Act and continue to vest in him before the commencement of the Enemy Property Act in 1968. Rut in the instant case there was no such Order by which the property vested in the Custodian. The further case of the petitioners is that the property was purchased after the expiry of the emergency and this makes the alleged notice illegal, unwarranted and without jurisdiction. The petitioners moved the Hon''ble High Court under writ jurisdiction on 3rd May, 1979 and A. K. Mookerji, J. was pleased to issue a Rule and interim order of injunction in C.R. No. 3679 (W) of which was ultimately heard by P. C. Bozooah, J, on 18th June, 1982 when the Rule was discharged. An Appeal was preferred being F.M.A.T. No. 1855 of 1982 and on 22nd December, 1985 M. M. Dutt and C. N. Ray, JJ. allowed the Appeal in part by modifying the Order of the Trial Court.

Pursuant to the Court of Appeal's Order, the Assistant Custodian of Enemy Property disposed of the representation of the petitioners (which was answer to the Show Cause Notice) by Memo, dated 14th February, 1984 rejecting the contentions of the petitioners and the said Memo is now under challenge in this writ application.

3. The decision as contained in the aforesaid Memo has been challenged on several counts including that according to the direction of the Division Bench the Assistant Custodian of Enemy Property ought to have deeded the matter on evidence or materials that might be made available to him whether the property was an enemy property or not. The further case of the petitioners is that in spite of the above direction the respondent No. 8 who is the Assistant Custodian and who was directed to hear the matter, a board of three persons including the Assistant Custodian heard the matter jointly and the petitioner's learned Advocate had to answer a number of questions from all of them thus defying the specific Order of the Appeal Court. It is the further case of the petitioners that the finding of the respondent No. 8 that Khadija Khatoon/Khadija Bi, the wife of Abdur Rashid and the owner of 6, Harinbari 1st Lane, left Calcutta for good in 1949 and became Pakistani National and never came back to India is not based upon any evidence at all as not a single chit of paper was produced before the petitioners to enable them to rebut the same because the reports and other papers already in the possession of the Assistant Custodian and the report of the local enquiry which were referred to in the impugned Memo were never disclosed to the petitioners or the petitioners' learned Advocate. The learned Advocate for the petitioners produced two registered Deeds of Conveyance in support of the contention of the petitioners and the same find no place in the decision of the Assistant Custodian which is not a reasoned one. It is further contended that the Assistant Custodian is holding Khadija Bi as a Pakistani National and, as such, it is for him to prove that Khadija Bi is not an Indian citizen and this onus cannot be shifted by the respondents upon the petitioners and unless the same is proved, the property in question cannot be declared as an enemy property because the petitioners are its legitimate owners in their own right by virtue of the said Sale Deed.

4. The Assistant Custodian of the Enemy Property, the respondent No. 5, contested the writ application by filing the Affidavit-in-Opposition on behalf of the respondents Nos. 1 to 5. Three main points in the said Affidavit are as under: (1) One Md. Suleman of Karachi wrote a letter, dated 16th December, 1978 to the Director of Enforcement, New Delhi, a copy of which was forwarded to the Prime Minister of India and the Custodian of Enemy Property. This Suleman prior to partition was residing at 15, Phears Lane, Calcutta. In the letter he stated that Khadija Khatoon and her husband Abdur Rashid migrated to Pakistan and permanently settled there by becoming Pakistani Nationals. Gulam Rasul Qais was an employee of Md. Safi and Md. Yakub, tenants of 6, Harinbari 1st Lane, who used to carry on business under the name and style of Md. Ismail & Co. Qais fraudulently obtained a Deed of Sale, dated 1st September, 1969 from a woman

other than Khadija Khatoon by impersonating her as Khadija Khatocin in the Registration notice and with the view of concealing the identity of this lady the name of the husband of Khadija Bi was not disclosed in the Sale Deed. Qais simply used to collect rents from the tenants of the premises in question. A copy of the aforesaid letter was forwarded by the Prime Minister's Secretariat and the said Ministry sent the same to the Custodian of Enemy Property for India in Bombay for necessary investigation and action. (2) One Md. Ismail of Karachi addressed a letter, dated 17th February, 1979 to the Ambassador of India in Pakistan at Islamabad which was forwarded to the Assistant Custodian in Calcutta by one Mohinder Singh of the Office of the Custodian of the Enemy Property at Bombay having received the same from the Ministry of Commerce. There Md. Ismail wrote that he was the younger brother of Abdur Rashid, the husband of Khadija Bi, and all of them together left India for good after partition leaving behind in India their Firm M/s. Sirajul Arfin & Co. at 1, Ezra Street, Calcutta, and a building at 6, Harinbari 1st Lane, Calcutta, under the management of Md. Safi and Md. Yakub of 6, Harinbari 1st Lane, who were carrying on business under the name and style of Md. Ismail & Co. Gulam Rasul Qais an employee forged a Deed of Sale in respect of 6, Harinbari 1st Lane, in his favour by putting up a false lady who executed the Deed and got it registered. (3) It transpires from the records of the Office of the Deputy Commissioner of Police, Special Branch, Calcutta, that the owner of 6, Harinbari 1st Lane, Khadija Khatoon migrated to West Pakistan in 1949 when Passport and Visa were not enforced. It is denied in the said Affidavit that Khadija Khatoon was a citizen of India after 1949, and that since migration to Pakistan in 1949 she did never come back to India. It is further stated that under the law whenever a question arises whether a person is or is not a foreigner, the onus of proof that he or she is not a foreigner lies upon him or her who raises a contention that he or she is not a foreigner. In the Affidavit-in-Reply filed by the petitioners all the allegations made in the Affidavit-in-Opposition are denied.

5. Five tenants of the premises in question were subsequently added party-respondents to the writ application and they support the case of the Custodian of Enemy Property in two and it appears from their Affidavit-in-Opposition that, in fact, the tenants supplied the materials to the Asstt. Custodian to make out the case against the petitioners.

6. When the first writ petition being C. R. No. 8679 (W) of 1979 was moved against the notice dated 21st April, 1979 issued by the Assistant Custodian of Enemy Property, two pertinent questions were raised first, whether by virtue of Notification, dated 10th September, 1965 issued by the Ministry of Commerce, Government of India, this property is an enemy property and it vested in the Custodian, and second, whether Khadija Bi migrated Pakistan and became a Pakistani National and the Deed of Conveyance, dated 1st September, 1969 is forged one. This Rule was discharged on 18th June, 1982 by P. C. Borooah, J. holding that the Notification as valid and that all enemy properties automatically vested in the Government of India from the date of the said Notification and also

holding that whether Khadija Bi was an Indian citizen on the date of the alleged transfer of the property in question and whether she migrated to West Pakistan or remained in India were disputed questions of facts to be decided on evidence and the Writ Court could not go into it. Leave was granted to the petitioners for agitating the question of facts in appropriate Civil Forum. The petitioners preferred an appeal against the aforesaid order of P. C. Borooah, J. being F.M.A.T. No. 1855 of 1982 and the Division Bench consisting of M. M. Dutt and G. N. Ray, JJ. modified the Order of the Trial Judge and allowed the Appeal in part. On the question of Notification, dated 10th September, 1965 issued under Rule 133 - V of the Defence of India Rules 1962 the Court of Appeal held that the Notification appears to be very clear and all enemy property vested in the Custodian of Enemy Property with immediate effect and the contention of the appellants that the property in question was not specified was overruled. But the Court observed "in our opinion, it is not necessary to specify a particular property as enemy property in the Notification for the purpose of vesting. Accordingly if the premises in question is an enemy property it has vested in the Assistant Custodian by virtue". The Court was further of the view that unless a property is an enemy property it cannot vest in the Custodian under the Notification and in this particular case nobody has, however, decided whether the premises in question is an enemy property and this is the specific case of the appellants. The Appeal Court endorsed the submission of the appellants that without making any decision on the Show Cause. Notice the Assistant Custodian cannot proceed on the assumption that the premises in question is an Enemy Property. The Court of Appeal finally observed as under: "In our opinion, before any steps for taking possession of the premises in question are taken by the Assistant Custodian of Enemy Property it must be decided by him whether the property is an Enemy Property or not, and such decision shall be made after giving the appellants a reasonable opportunity of being heard. The Assistant Custodian of Enemy Property cannot proceed on the basis of a preconceived notion or assumption, but he has to decide on evidence or materials that will be made available to him. In the circumstances, therefore, we are of the view that the Assistant Custodian of Enemy Property cannot take possession of the premises in question without deciding the plea of the appellants that their vendor was not a Pakistani National and, consequently, the property was not and is not an Enemy Property". And thus the Appeal Court directed the Assistant Custodian to dispose of the representation of the appellants in answer to the Show Cause Notice according to the direction hereinbefore.

7. In accordance with the direction of the Court of Appeal the Assistant Custodian of Enemy Property gave a hearing on 50th January, 1984 and passed the impugned Order, dated 14th February, 1984. Mr. Islam, the learned Counsel appearing for the appellants, submitted that during the course of hearing not a single paper was produced before the learned Advocate of the petitioners by the Assistant Custodian in support of the contention of the Respondents Nos. 1 to 5 which are now relied upon at the time of the hearing of the instant writ

application. And the impugned Order which is not at all a speaking order was passed on the basis of the reports and papers in the record of the Assistant Custodian and also the reports of the local enquiry made by him at the back of the petitioners. There is much substance in the contention of Mr. Islam because Mr. Bagchi, the learned Counsel for the respondents Nos. 1 to 5, placed a bunch of xerox copies for use of this Court and also handed over a set of copies thereof to Mr. Islam for the first time. Though the substance of the two letters find place in the A/O but the letters are not annexed with it nor the report of the D.C., S.B. ; only mention of the report is there. It is strange that when the hearing took place on 30th January, 1984 why these papers were not handed over or shown to the petitioners" learned Advocate whereas the petitioners through their Advocate submitted two title deeds to the Assistant Custodian in support of their contentions. One fails to understand this hide and seek policy of the Assistant Custodian in suppressing the evidence and materials at his disposal from the petitioners in spite of the specific direction of the Court of Appeal and passing a Cryptic Order without giving reasons on the basis of those very papers which were kept secret from the petitioners and which the petitioners could not rebut. This is not becoming of a high Government Official holding a responsible position.

8. Mr. Islam made submissions in support of his contention on several points. He submitted that Khadija Bi was an Indian National, she sold the property in dispute to Gulam Rasul Qais by the registered Deed of Conveyance, dated 1st September, 1969 for valuable consideration. Since the property was transferred to Qais by Khadiji Bi the purchaser was fully in possession thereof and enjoyed the usufructs thereof. After his death his legal heirs, i.e., the petitioners stepped into the shoes of their predecessor-in-interest and enjoyed the property and its usufructs peacefully. He submitted that the two letters referred to by the respondents which had been received from Md. Suleman and Md. Ismail both of Pakistan containing wild and false allegations have no legs to stand on. The very authenticity of those letters are much in doubt. Any person can send any letter from Pakistan to the Government of India and on the basis of such letters nobody's property can be grabbed. Though these two letters find extra-ordinary position in the Affidavit-in-Opposition of the respondents Nos. 1 to 5 without annexing the copies thereof with the A/O nothing has been placed before the Court to establish their authenticity. No envelope has been produced containing the postal seal nor there is any endorsement by the Government of India when such a letter was received by them. He further submitted that for the first time he is being shown these two letters in the Court during the, hearing of the writ application along with a report of the Deputy Commissioner of Police, Special Branch, Calcutta, and a few statements made by the tenants of the premises to the Assistant Custodian containing allegations which are suitable to and amiable from the Assistant Custodian's point of view. So far the tenants are concerned they are quite inimical to the petitioners because these tenants very comfortably and liberally enjoy the tenanted premises and take undue advantage of areas in excess of their tenancies on meager rents and naturally do not want that the

petitioners be given the charge of the property as they apprehend interference in their comfort and enjoyment. He submitted that the hastily action of the Assistant Custodian in taking over the property without waiting 10 days as per his own notice is mala fide and vindictive in nature.

9. The learned Counsel for the petitioners further submitted that the learned Court of Appeal did not say that the property in dispute is an enemy property but referred to matter to the Assistant Custodian to hear and decide on evidence and materials whether the property is an enemy property or not and if it is proved on evidence and materials then only it can be declared as an enemy property. It is further con-tended by Mr. Islam that Section 5 of the Enemy Property Act, 1968 is not at all applicable to the property in dispute unless it is proved that it is an enemy property and in consequence the question of Section 6 of the Act coming into operation in this respect does not at all arise. He further submitted that it is the Custodian who has thrown a challenge that Khadija Bi was a Pakistani National and that the Sale Deed was forged one and it is for the Assistant Custodian to prove in a Court of Law that the Deed of Sale is a forged one done at the back of Khadija Bi who left for Pakistan much before the date of its execution and registration. This onus cannot be shifted upon the petitioners who are in rightful possession of the property by virtue of the title conferred upon them by the conveyance executed and registered by Khadija Bi.

10. Mr. Islam has referred to the following decision in support of his contentions: (i) Asadulla Chowdhury & Ors. v. State of West Bengal & Ors; reported in 79 C.W.N. 159; (ii) Md. Nazrul Islam v. Union of India & Ors. reported in 1979 (2) C.L.J. 97; (iii) Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, ; (iv) Ramana Dayararn Shelly v International Airport Authority of India & Ors. reported in AIR. 1979 S.C. 1928; (v) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; (vi) Sm. Marchhia Sahun & Anr. v. State of West Bengal & Ors. reported in AIR 1979 Gal. 94: and lastly (vii) N. N. Singh & Ors. v. General Manager, Chittaranjan Locomotive Works & Ors. reported in 77 C.W.N. 354. I shall deal with these decisions later on.

11. Mr. Bagchi, the learned Advocate appearing for the main respondents i.e., the respondents Nos. 1 to 5 have very emphatically submitted that on the basis of the two letters received from Pakistan by Md. Suleman and Md. Ismail the Assistant Custodian of Enemy Property in Calcutta made extensive enquiries and came to the conclusion that Khadija Bi left India much earlier (i.e., in 1947) than the execution and registration of the Deed of Sale. He further submitted that the tenants too corroborated this fact as contained in his Affidavit-in-Opposition. He further submitted that the report of the Deputy Commissioner of Police, Special Branch, Calcutta, also confirmed that the land-lady was not in Calcutta when the execution and the registration of the Deed of Sale took place. On the basis of the two letters Mr. Bagchi submitted that Khadija Khatoon and her husband Abdur Rashid migrated to Pakistan permanently leaving their Firm M/s. Sirajul Arfin Co.

and premises No. 6, Harinbari 1st Lane. Gulam Rasul Qais who was an employee of Md. Safi and Md. Yakub, tenants of 6, Harinbari 1st Lane, somehow managed to impersonate falsely a woman other than Khadija Khatoon as Khadija Bi and got the Deed of Sale executed and registered. He submitted with force that strangely the name of the husband of Khadija Bi is not disclosed in the said Deed of Sale, and the registration of the documents was done on the basis of a Citizenship Certificate issued by a Councillor of the Corporation of Calcutta which has no value in the eye of law because the Citizenship Certificate can only be issued by the Central Government.

12. Mr. Bagchi submitted that the onus lies upon the petitioners to prove that Khadija Bi did not migrate to Pakistan and renounced Indian citizenship and she was not a Pakistani National. He submitted that the Custodian is ready to hand over the property in dispute to Khadija Bi if she comes back to Calcutta, otherwise to whom the property would be handed over? The writ petitioners are just nobody, they are strangers. He did not cite any decision in favour of his contention but mainly submitted his arguments on the basis of the facts based on the A/O and the xerox copies of the papers supplied to the Court and the learned Advocate of the petitioners during the hearing of this writ application.

13. Mr. Banerjee, the learned Counsel appearing for the five added-respondents who are tenants, supporting the case of the Asstt. Custodian submitted that the point for decision before the Court is limited. The Court of Appeal directed the Asstt. Custodian of Enemy Property to dispose of the representation made by the appellants in answer to the Show Cause Notice after giving the appellants reasonable opportunity of hearing on evidence and materials. Now it is to be seen whether the Assistant Custodian did comply with the Order of the Appeal Court or not. If in the view of the Court the Assistant Custodian did not act in conformity with the Order of the Court of Appeal the Court will accordingly take a decision and refer the matter back for rehearing on that particular issue.

14. I have given my considerate thought to the facts and circumstances of the case and carefully examined the submissions of the respective parties. I wonder how the Assistant Custodian of Enemy Property came to the conclusion that Khadija Bi became a Pakistani National for good in 1949 and never returned back to India while keeping in tact in his possession all the reports and papers without disclosing the same to the petitioners at the time of hearing on 80th January, 1984. Of course some of the materials namely, the two letters from Pakistan and the report of Dy. Commissioner of Police, Special Branch, were mentioned in the Affidavit-in-Opposition by the respondents Nos. 1 to 5 in the instant writ application but those letters and the report were not made annexures thereto only some contents were narrated in the said Affidavit. This of course puts the petitioners in a wrong and as they were not in a position to fully defend themselves and adequately make submissions when the hearing took place before the Asstt. Custodian on 30th January, 1984.

15. The letter of Md. Suleman, dated 16th December, 1978 permanently of

Karachi and temporarily of 15, Phears Lane, Calcutta, marked as "Registered AD", xerox copy of which was supplied to the Court, does not bear any departmental stamp of its being received in the Office of the Director, Enforcement Directorate, Delhi. A copy of this letter was sent to the then Prime Minister of India, Mr. Morarji Desai, the Director of C.B.I., Delhi, Shri N. Sarkar, Dy. Director, Foreign Exchange Directorate, Calcutta, and Shri Chandra Shekhar, President, Janata Party, Delhi. It does not indicate on the face of it whether this letter was posted from Karachi or Calcutta. It is the Office of the Janata Party at 7, Jantar Mantar Road, New Delhi, which acknowledged it under Serial No. 1827, dated 2nd January, 1979 and with the compliments of Shri Chandra Shekhar, President, it was forwarded to one Shri H. M. Patel of 2, Akbar Road, New Delhi, and bears Finance Minister's Office No. being Dy. 14 F.M./79 V.IMP. (R), dated 15th January, 1979. A further endorsement mentions that Md. Suleman's letter, dated 16th December, 1978 has not been acknowledged. The said endorsement is signed by the Permanent Secretary (perhaps of the Janata Party Office). The Office of the Custodian of Enemy Property for India at Bombay forwarded this letter to the Assistant Custodian of Enemy Property in Calcutta by covering letter, dated 15th February, 1979 which was received in the Calcutta Office on 21st February, 1979 and on the very next date, i.e., on 22nd February, 1979 an enquiry was ordered. Md. Suleman writes that Khadija Khatoon is his cousin and wife of Abdur Rashid who was a partner of M/s. Sirajul Arfin & Co, and migrated to Pakistan in 1947 (not in 1949 as is the case of the Custodian) and through the help of his Mistress Sahida Qais get the Sale Deed registered on 1st September, 1969, the said Sahida signing as Khadija Bi. The Sale Deed did not disclose the husband's name of Khadija Bi but her father's Mr. Moslem. The letter also reveals that Gulam Rasul Qais and after his death his sons were in fraudulent game by bribing the Police Personnel both of the C.B.I., Calcutta and the Calcutta Police, Government Officers and other persons concerned and further Md. Suleman states in his letter that because of, "financial distress, I was a party to the evil game of Gulam Rasul Qais". The second letter of Md. Ismail written from Karachi on 17th February, 1975 addressed to the Ambassador of India in Pakistan at Islamabad, copies of which were forwarded to the then Prime Minister of India, Mr. Morarji Desai, Chief Minister of West Bengal, Mr. Jyoti Basu, the Director of Foreign Exchange Directorate, New Delhi, the Director of C.B.I., New Delhi, and Shri Mohan Dharia, Minister, New Delhi, bears the seal of the Govt. of India's Ministry of Commerce, dated 23rd March, 1979. In the said letter Md. Ismail describes himself as a member of joint family of Khadija Bibi and Abdur Rashid and the premises at 6, Harinbari 1st Lane, as a joint family house of his sister-in-law Khadija Khatoon. It may be pointed out that the concept of joint family is alien to Mohammedan Law. He, inter alia, states that Khadija Khatoon with his husband migrated to Pakistan and permanently settled there leaving behind in Calcutta estate worth Rs. 90,00,000 under the management of Mr. Safi and Md. Yakub with the help of a clerk Gulam Rasul Qais. The latter further states that Ismail has "learnt" that Qais forged the Deed of Sale in respect of 6, Harinbari 1st Lane and got it executed and registered by

a fake woman. The latter further states that when contacted Qais admitted that he had done so. The latter further requests the Ambassador to see that Qais did not leave the country after committing this fraud. One thing which must be noted is that there is no communication to the Indian Authorities either the Custodian or any high official of the Government of India from Khadija Bi or her husband stating that Qais obtained the Deed of Sale by fraudulent means. It is only the relations of Khadija Bi who are writing to the Authorities and on the basis of these two letters the Assistant Custodian of Enemy Property in Calcutta conducted an enquiry and on the basis of these two letters and a police report a decision was taken. Further, from the record produced before the Court I find several statements by the tenants of the premises in dispute which corroborate in full the case of the Assistant Custodian and this but is very natural. The statements of the tenants obviously found weigh with the Assistant Custodian as these appear to have been taken u/s 11 of the Enemy Property Act. The two original Conveyances, dated 15th February, 1945 and 1st September, 1969 were produced before this Court by the petitioners. The property was purchased in 1945 by Khadija Bi consisting of two storied house on Two Cottahs Ten Chittacks and One Kancha of land more or less in consideration of a sum of Rs. 25,500. The second Conveyance of 1969 reveals that Khadija Bi sold this property to Gulam Rasul Qais in consideration of Rs. 20,000 only. Undoubtedly this appears somewhat strange that in the heart of the city of Calcutta over Two and a half cottahs of land with two storied house thereon could be sold for a paltry amount of Rs. 20,000 only.

16. There are a number of discrepancies in the two letters on the police enquiry took place. First, the letter of Md. Suleman appears to have been written not from Karachi but from Calcutta because in the letter the name of the mistress of Qais has been spelt as "Sahida" which is generally a spelling adopted in Bengal for the Arabic Word Shahida. Had this letter been written from Karachi the spelling would have been Shahida. One fails to understand what prevented this gentleman from personally appearing before the Asstt. Custodian and recording the whole matter himself. Further, the letter of Md. Suleman is signed in Urdu as Md. Salman which cast a doubt upon the writer himself. Suleman and Salman are two different names. In the letter of Md. Ismail it is stated that he had learnt that Qais got a forged Deed of Sale in respect of the property in question and got it executed through fraudulent means. How he learnt and what is the source of his knowledge are not disclosed in the letter. The date of migration in the letter of Md. Suleman also differs from the date given by the Assistant Custodian. The other letter does not contain any date of migration of the lady at all.

17. Before proceeding further I like to discuss some of the case laws cited on behalf of the petitioners. In my opinion the decisions in Asadulla Chowdhury & Ors. v. State of West Bengal & Ors. (supra) and Md. Nazral Islam v. Union of India ft Ors. (Supra) do not help the petitioners as the question raised in the two cases have been finally set at rest by the Division Bench presided over by M.M. Dutt, J, while referring this matter to the Assistant Custodian for hearing

(reported in 1984(1) C.L.J. 359). The Supreme Court's decision in Mahinder Singh Gill's Case (supra) states that "when a statutory functionary makes an Order based on certain grounds, its validity must be judged by the reason so mentioned and cannot be supplemented by fresh reason in the shape of Affidavit or otherwise. Otherwise, an Order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out". This case directly helps the petitioners inasmuch as at the beginning when the hearing took place by the Assistant Custodian at the direction of Division Bench no papers were furnished to the petitioners which were in possession of the Assistant Custodian. But in the affidavit-in-opposition those papers were relied on. This cannot be done in view of the Supreme Court's pronouncements. Whether the contentions in the A/O strengthens are not the case of the respondents is totally a different question and would be judged on merits. In Ramchandra Kesab Adke's case (supra) the Supreme Court specifically states: "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, and other methods of performance are necessarily forbidden". In the instant case the direction of the Division Bench was to decide the matter on evidence and materials that would be available to the Assistant Custodian, but the materials which were available and were in the possession of the Assistant Custodian were not disclosed and the matter was heard and the decision was given on the basis of undisclosed materials which only saw the light of the day during the hearing of this writ application. The decision of Calcutta High Court in Sm. Marchhio Sahun's Case (supra) which is based on the W.B. Estate Acquisition Act does not help the petitioners. The Supreme Court in the case of Ramana Dayaram Shetty v. International Airport Authority (supra) while dealing with a matter relating to tender lays down the principle of equality and justice with the following observation "..... obviously where a Corporation is an instrumentality or agency of Government, it would in the exercise of its power or discretion be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such Corporation is dealing with the public whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet-will, but its action must be in conformity with some principle which meets the test of reason and relevance". The decision of Calcutta High Court in N. N. Singh & Ors. v. General Manager, Chittaranjan Locomotive Works (supra) has been cited to bring home the points that the Court of Law should probe and scrutinize Orders to see if they had been passed for other purposes under colourable exercise of powers or if such Orders are accordingly mala fide. The Administrative Orders, not otherwise justifiable come under Court's scrutiny if there are allegations of mala fide or colourable exercise of powers behind such Orders are liable to be interfered with if the allegations are established or is evident on materials on record in absence of any rebuttable evidence.

18. There is force in the argument of Mr. Islam that the Assistant Custodian heard the reply to the Show Cause Notice and gave the hearing with a closed mind and definitely acted against the principle. Of natural justice and fairplay and no reasonable opportunity was given to the petitioners to fully defend themselves. The aforesaid decisions cited by the learned Counsel for the petitioners provide enough materials in support of his contentions on this point.

19. The whole emphasis of Mr. Bagchi appearing for the respondents nos. 1 to 5 are the facts that Khadija Bi migrated to Pakistan in 1949 and because a Pakistani National and never returned back to India and it is for the petitioners to prove that she was at that material time in India and she is not a Pakistani National. Then and then only the property in question can be exempted from the purview of the Enemy Property Act. He also submitted as mentioned aforesaid that Qais got the documents executed and registered by putting a false woman who personified as Khadija Bi and it is again for the petitioners to prove that this particular lady is Khadija Bi and not any other woman. Then it is submitted that the name of the husband is not put in the Deed of Sale and this Deed of Sale was executed and registered on the basis of Citizenship Certificate procured from a Councilor at Calcutta Corporation. I am afraid I cannot agree with the submissions of Mr. Bagchi. The petitioners produced the original Deed of Sale, dated 1st September, 1969 and supplied the xerox copy thereof to Mr. Bagchi and the name of the husband of Khadija Bi, i.e., Abdur Rashid very much appears in the Deed though written in hand. with ink and initiated by the lady. When the original Sale Deed was produced in the Court and Mr. Bagchi saw the name of the husband mentioned there, he at once took the plea that the name was inserted afterwards and not at the time of the registration. This objection of Mr. Bagchi may very well be decided in appropriate Civil Forum on evidence and not in the Writ Court. So far as the Citizenship Certificate is concerned it is well known that during those days the Authorities at the Registration Offices in West Bengal used to coerce the Muslim vendors to produce Citizenship Certificates from Councillors or M.L.A.s or any such persons and unless such Certificates were produced the registration of Sale Deed of an Indian Muslim citizen "was never done though this was very much against law and without any specific direction of the Government of West Bengal or any other appropriate Authority known to the public. But still this ignominious practice was then. in vogue. Naturally the Vendor of Qais, too, had to take the Citizenship Certificate from a Councillor to have her property registered. Of course this particular Citizenship Certificate of a Councillor does not confer any citizenship right upon anybody but at the same time it is no indicator that that particular lady was a Pakistani and not Indian. National at that material time. Mr. Bagchi submitted that the onus lies on the petitioners to prove that Khadija Bi was not a foreigner. In this connection he did not cite any Statute or Case law. But I think he had in mind the provision of Section 9 of the Foreigners Act, 1946 which relates to the burden of proof. This Section is a departure from the general rule of evidence as to burden of proof. This particular Section, inter alia says that whether any person is or is not

a foreigner the onus of proving that such person is not a foreigner shall notwithstanding anything contained in the Indian Evidence Act lie upon such person. The writ petitioners obviously do not come under the purview of this Section.

20. So far the added-respondents are concerned I appreciate the stand taken by Mr. Banerjee on their behalf at the time of hearing. He very fairly submitted as stated above that the matter be sent back once more to the Assistant Custodian for hearing on evidence and materials and he be directed to pass a speaking Order. Mr. Bagchi, too, made similar submission as he is convinced that the impugned Order is cryptic in nature.

21. I am of the view that no useful purpose will be served by referring the matter back to the Asstt. Custodian of the Enemy Property for rehearing. He is already prejudiced and his impugned Order under challenge passed almost ex parte keeping his papers and documents concealed from the petitioners at the time of hearing thus debar-ring them from an opportunity to rebut the same is quite perverse. Such an act of denial of natural justice and reasonable opportunity to the petitioners speak of ill-motive on the part of the respondent No. 5 and clearly demonstrates mala fides, more so in the light of the direction of the Court of Appeal. In this connection I may point out to a Division Bench decision in Collector of Customs, Calcutta & Ors. v. Biswanath Mukherjee reported in 1974 C.I.J. 251 (on page 515) wherein the Division Bench relying on an unreported decision in Appeal No. 76 of 1970 (Addi. Collector of Customs v. Union of India) by A. N. Sen, J. set out eight grounds which may lead to any finding of a Tribunal as perverse and can be challenged in a writ application and if satisfied the Court is entitled to interfere with the finding. One such ground is violation of the principles of natural justice. I am satisfied that the Asstt. Custodian of Enemy Property in Calcutta acted in flagrant disregard of the norms of natural justice in this case.

22. But at the same time I find that there is ample scope of coming to a definite finding on the question involved in this case under the provision of Section 6 of the Enemy Property Act, 1968 which runs as under: "Where any property vested in the Custodian under this Act has been transferred, whether before or after the commencement of this Act, by an enemy or an, enemy subject or an enemy firm and where it appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, then, the Central Government may, after giving a reasonable opportunity to the transferee to be heard in the matter, by Order, declared such transfer to be void and on the making of such Order, the property shall continue to vest or be deemed to vest in the Custodian". In this Section "property vested obviously refers to the properties coming within the purview of the said Act by virtue of Notification, dated 10th September, 1965 of the Ministry of Commerce, Government of India, issued under Sub-rule (1) of Rule 155-V of the Defence of India Rules, 1962. If such a property has been transferred

whether before or after the commencement of the Enemy Property Act by an "enemy" (as defined in the said Act) and such transfer was made to evade or defeat the vesting of the property then the Central Government was authorised under this section to declare such transfer as void; of course, after giving the party a reasonable opportunity of hearing. This section takes away the right of the Civil Court under special circumstances and entrusts that right to the Central Government to declare a particular instrument of transfer as void after proper hearing. The vires of Section 6 of the Enemy Property Act is not under challenge in this writ application. I do not agree with the submission of Mr. Islam that Section 6 of the Act can operate only after Section 5 comes into operation. Section 6 is independent of Section 5 and not co-related in any way and as such the Central Government can hear and decide whether any particular transfer of property was made with the motive to evade vesting of the said property in the Custodian.

23. Let it be made clear that without deciding whether a particular property is an enemy property or not or whether that property vested in the Custodian under the Enemy Property Act has been transferred before or after the commencement of the Act to evade or defeat the vesting of the property, the Custodian of the Enemy Property cannot take over the possession of the property arbitrarily, and the possession of the property if taken over as such shall be unlawful and legal consequences will follow.

24. In that view of the matter the writ application succeeds. I set aside and quash the Memo No. 680, dated 14th February, 1984 along with the Certificate u/s 12 of the Enemy Property Act, 1968 enclosed thereto issued by the respondent No. 3, the Asstt. Custodian of Enemy Property in Calcutta. Let a writ or writs in terms of prayers (a), (b) and (c) be issued. The Respondents Nos. 1 to 5 shall pay 100 G.Ms. as costs to the petitioners.

25. Liberty, however, is given to the Respondent No. 1 only, i.e., the Union of India, Ministry of Commerce, to have the matter heard in accordance with Section 6 of the Enemy Property Act, 1968 by a high-ranking Officer not below the rank of the Joint Secretary or equivalent thereto and sitting or sittings should take place at New Delhi after giving full opportunity of producing evidence and documents to the petitioners and the Assistant Custodian of Enemy Property in Calcutta and hearing the parties on the basis of such evidence and documents in the light of the observations made in this judgment. The Officer concerned shall be free to come to his findings in accordance with law and shall pass a reasoned Order and copies thereof must be forwarded to the petitioners under registered post. If aggrieved the petitioner shall be at liberty to take recourse to the appropriate forum. A clean 14 days notice of hearing date must be given to the parties. The liberty granted must be exercised within three months from date and the proceedings concluded within this time-limit.

26. On the prayer of Mr. Bagchi, learned Advocate appearing for the respondents Nos. 1 to 5, the operation of this Order is stayed for a period of three weeks from

date.