

(1977) 02 DEL CK 0002

In the Delhi High Court

Case No : Regular First Appeal No. 36D of 1964

Zumard-ul-Nisa

APPELLANT

Vs

Custodian of Evacuee Property etc.

RESPONDENT

Date of Decision : 09-02-1977

Acts Referred:

Citation : AIR 1977 Delhi 251 : (1977) ILR Delhi 312

Hon'ble Judges : Prithvi Raj, J;Prakash Narain, J

Bench : Division Bench

Advocate : B.S.C. Singh, A.B. Saharia, V.B. Saharya, K.B. Soni and Meenakshi Aggarwal, for the Appellant;

Judgement

Prakash Narain, J.

(1) This appeal is directed against the decree of a Sub-Judge 1st Class, Delhi, dismissing the appellant's suit.

(2) According to the appellant she is the owner in possession of House No. X/1348 (Old), 2045 (New) in Gali Kalyan Pura. Delhi. She avers that she went for performing "Haj" in July, 1947 and was thus abroad when the partition of India took place in the middle of August, 1947. On her return from pilgrimage she had to land in Karachi, by then in Pakistan, in November, 1947. She came back to Delhi in December, 1947 to her own house, namely, the house "in suit, and has been living there in ever since. She admits that a part of the house is in the physical occupation of the tenant under her- Accordingly to the appellant one Nand Lal made a complaint to the Department of the Custodian of Evacuee Property early in 1949 to the effect that the appellant was an evacuee. This led to certain enquiries being made which showed that the appellant had never become an avacuee. All the same, her aforesaid property was wrongfully and without jurisdiction notified as evacuee property by a notification dated January 7, 1950. It is claimed that a declaration may be granted in favor of the appellant to the effect that she is the owner in possession of the aforesaid property.

Alternatively, it has been pleaded that even if it be held that originally the appellant had become an evacuee she is covered by an exemption notification dated May 19, 1954 and so on, in the eye of law she is neither an avacuee nor is her property evacuee property and it be declared as such. It is further prayed that if either of the two declarations is granted to her, it could not be held that in consequence her possession is not liable to be disturbed by the Custodian of Evacuee Property or either of the other two defendants in the case. It may be mentioned here that the Custodian of Evacuee Property was the first defendant, one Chhajju Singh was the second defendant and one Mangat Rai was the third defendant in the suit and they are respectively the three respondents in the present appeal.

(3) The three defendants/respondents contested the suit and filed written statements. The main contest was put forth by the Custodian of Evacuee Property, hereinafter referred to as the Custodian. It was first pleaded that the civil courts had no jurisdiction to try the suit. It was also pleaded that the impugned order of the Custodian notifying the property in suit as an evacuee property was legal and intra virus the powers of the Custodian. On facts it was urged that the plaintiff/appellant was an evacuee within the meaning of the various evacuee laws enacted/promulgated from time to time. The Custodian also averred that the plaintiff/appellant had applied for restoration of the property to her but the said claim was dismissed by a Competent Authority and the appeals and revisions there from were also dismissed. It is not necessary to set out the defense of the other two defendants because apart from filing written statements they did not take any further active interest in the suit nor have they now out in appearance.

(4) After the plaintiff had filed replications reiterating her original stand the trial Court first framed an issue regarding the jurisdiction of the civil court to entertain and try the suit that had been filed. By an order dated April 7, 1962 a Sub-Judge 1st Class, Delhi, held that the civil court had a jurisdiction to determine as to whether the impugned notification declaring the appellant's property as evacuee property, which was issued by the Custodian, was valid or not though the civil Court had no jurisdiction to determine the validity of the order of the Custodian rejecting the claim of the plaintiff/appellant for restoration of the property in suit to her. A revision against that order preferred to the Punjab High Court in its Circuit Bench at Delhi was dismissed on May 20, 1963, inter alia, with the following observations :-

"....IT is not a fit case in which this Court should interfere with an interlocutory impugned order at this stage. The impugned order can be challenged in appeal from the decree to be passed by the trial Court, if deemed necessary."

THEREAFTER the trial Court framed the following two issues and the parties went to trial :-

"1. Whether the order of the Custodian notifying the property in para No. 3 of the

plaint as evacuee property is illegal and without jurisdiction for the reason stated in para No. 3?

2. Relief."

(5) On the first issue afore-mentioned, the trial Court came to the conclusion that the impugned actions of the Custodian were legal and, in any case, the plaintiff could not challenge the impugned notification declaring her property to be evacuee property in view of the provisions of Section 8(SA) of the Administration of Evacuee Property Act. As such, the notification could not be held to be invalid. In consequence of the finding given on the first issue the decision of the trial Court on the second issue was that the plaintiff's suit fails and the same is dismissed. The parties were left to bear their own costs.

(6) Before we proceed to examine the two issues that arise for consideration in the present appeal, namely, (a) as to the jurisdiction of the civil courts and (b) whether the impugned notification is illegal, invalid or ultra vires, it will be appropriate to notice the various Ordinances and Acts which are relevant to the facts and circumstances of this case.

(7) On account of communal disturbances or fear of communal disturbances resulting from the setting up of the two dominions of India and Pakistan, a large number of people migrated from the territory forming part of one dominion to the territory forming part of the other. Properties were left in both the dominions by owners and occupants. "These could not be managed by the evacuees who had left them on account of migration. Some steps had to be taken to look after these properties and meet the situation. In consequence the Governments of India and of the various provinces in India took legislative steps for the administration of evacuee properties and management thereof. Accordingly, the Governor of then then province of East Punjab promulgated the East Punjab Evacuee (Administration of Property) Ordinance, Iv of 1947. This Ordinance was replaced by the East Punjab Evacuee (Administration of Property) Act, Xiv of 1947. The Act was amended by Ordinance Ii of 1948, followed by East Punjab Act Xxvi of 1948, East Punjab Ordinance Xvi of 1948, East Punjab Ordinance xviii of 1948, East Punjab Act Xlix of 1948. The amended East Punjab Evacuees (Administration of Property) Act, 1947 was repealed by the East Punjab Evacuee Property (Administration) Ordinance IX of 1947 which was subsequently repealed by the Administration of Evacuee Property Ordinance Xxvii of 1949. The last mentioned ordinance repeated all Acts and Ordinances till then made relating to evacuee property and was an ordinance issued by the Central Government Ordinance Xxvii of 1949 was repealed and replaced by the Administration of Evacuee Property Act, Xxxi of 1950 and came into force on April 17, 1950. The Central A.ct I of 1960 amended Act Xxxi of 1950 by introducing in it a section known as Section 8(2A) which has retrospective effect.

(8) The East Punjab Act Xiv of 1947, with certain modifications was extended to the then province of Delhi. On June 13, 1949 the Administration of Evacuee

Property (Chief Commissioner's Provinces) Ordinance Xii of 1949 was promulgated. This also, however, was repealed by the Central Ordinance Xxvii of 1949, later replaced by Act Xxxi of 1950.

(9) There is only one other notification which is relevant and may be noticed at this very stage. Section 52 of Act Xxxi of 1950 empowers the Central Government, by notification in the Official Gazette, to exempt any person or class of persons or any property or class of property from the operation of all or of any of the provisions of the Act. In exercise of the powers conferred by this section and in supersession of an earlier notification dated May 10, 1950 the Central Government issued a notification dated May 19, 1954. This notification exempted, amongst others, any person who on or after the first day of March, 1947 migrated from India to Pakistan but had returned to India before the 1st day of July, 1948 and settled in India, provided such person had not subsequently visited Pakistan except on a temporary visit taking with himself a certificate of no objection to return to India, from the operation of sub-clause (i) of Clause (d) of Section 2 of Act Xxxi of 1950.

(10) The notification by which the property in suit was declared to be evacuee property is Exhibit D-7. A copy of the order on the basis of which this notification was issued is on the survey report which is Exhibit P.I 1. On this survey report, made prior to October 18, 1949, there is an order in the following words :-

"Gazette and issue. sd/- Illegible. 19-19. D.N. (Demand Notice)."

THERE is another endorsement on Exhibit P.I which is, "Enter in the gazette list". The letters "D.N." in the first endorsement noticed by us have been explained by Kasturi Lal, Public Witness 3 (who was the Field Inspector who carried out the survey of this property while working in the Custodian Department and who actually prepared the survey report, Exhibit P.I) means "Demand Notice" The survey report prepared by Kasturi Lal is dated October 17, 1949. According to the notification, Exhibit D.7, the property in suit was declared as evacuee property under clause 6(1) of Ordinance Xii of 1949. It may be mentioned that the notification is dated December- 14, 1949 but was published in the gazette on January 7, 1950.

(11) Exhibit P. 11, the survey report, clearly sets out that the appellant who was the owner of the property in suit is reported to be non- evacuee and was living personally with her husband in part of the house while some other parts were in occupation of Bashiran, Ata Hussain and Bundu. The plaintiff . also produced or got produced several other documents which all show that she was a non- evacuee. These are Exhibits P.I to P.4 Exhibits P.6 to P.10 are office notings on the file pertaining to the house in suit. Exhibit P.6 is the report of the Field Inspector dated May 28, 1949 reporting, presumably on the complaint made by Nand Lal on January 3, 1949 (Exhibit P.5), that the house in suit was owned by a lady who went for pilgrimage for Mecca and in the meantime disturbances broke out and it was presumed that since the house "was locked, she had gone to

Pakistan. She, however, had returned and was in occupation of it. Exhibit P. 7 dated May 30, 1949, is a query raised by some superior officer asking for the survey report. By Exhibit P.9; the Field Inspector was asked to report or to put up the survey report. By Exhibit P.8 an endorsement is found that there was no survey report on the file in respect of this house. By Exhibit P.10 the survey report is said to be attached to the file. Exhibit P.10 is dated July 8, 1949 and must, Therefore, refer to the survey report other than Exhibit P. 11". According to the record before us these can only be Exhibits P.1 to P.4. Strangely enough there then comes in the survey report Exhibit P.11, dated October 17, 1949. As noticed earlier, this survey report is also in favor of the appellant but for undisclosed reasons the property is nonetheless ordered to be notified as evacuee property without any reason forthcoming as to how and why or in what circumstances it was so notified. It is in this background that one has to construe the legal provisions relied upon by the appellant claiming that the impugned notification, Exhibit D.7, is illegal, invalid and ultra vires and the contention on behalf of respondent No. 1 that the said notification is valid in law and, in any case, the civil courts have no jurisdiction to entertain and try the present suit.

(12) We shall first take up the question as to jurisdiction of the civil courts to try the present suit. It is not necessary to refer to the provisions of the various Ordinances and Acts, noticed earlier, while tracing the history of the legislations regarding evacuee property. It would suffice to notice the relevant provisions in the Central Ordinance XXVII of 1949 and Act XXXI of 1950.

CLAUSE 43 of Ordinance 27 of 1949 reads as under :-- "43. Jurisdiction of Civil Court barred in certain matters.--

(1) Save as otherwise expressly provided in this Ordinance, no civil Court shall have jurisdiction--

(A) to entertain or adjudicate upon any question whether any property is or is not evacuee property or whether an evacuee has or has not any right or interest in any evacuee property; or

(B) to entertain or adjudicate upon any question whether any person is or is not an intending evacuee; or

(C) to question the legality of any action taken by the Custodian General or the Custodian under this Ordinance; or

(D) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Ordinance to determine."

Section 46 of Act XXXI of 1950 reads as under :-

"46. Jurisdiction of civil courts barred in certain matters.- Save as otherwise expressly provided in this Act, no civil or revenue court shall have jurisdiction-

(A) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or

(B)to entertain or adjudicate upon any question whether any person is or is not an intending evacuee; or

(C)to question the legality of any action taken by the Custodian-General or the Custodian under this Act ; or

(D)in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

(13) It will be appropriate to notice that Section 38(3) of the Act Xxxi of 1950 saves anything done or any action taken in the exercise of any power conferred by or under Ordinance Xxvii of 1949 and provides that it shall be deemed that such action could have been done or taken in exercise of the powers by or under the various provisions of the Act.

(14) Clause 55 of Ordinance Xxvii of 1949 provided that notwithstanding the repeal by that Ordinance of Ordinance Xii of 1949, or any corresponding law anything done or any action taken in the exercise of any power conferred by the Ordinance or any other law shall be deemed to have been done or taken in the exercise of powers conferred by Ordinance Xxvii of 1949.

(15) One other provision that may be noticed here is Section 8(2-A) which was enacted in Act Xxxi of 1950 by amending Act 1 of 1960. This section reads as .under :-

"S. 8(2-A) Without prejudice to the generality of the provisions contained in sub-section (2), all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in, or the invalidity of, such law or any judgment, decree or order of any court, be deemed for all purposes to have validity vested in that person, as if the provisions of such law had been enacted by Parliament and such property shall, on the commencement of this Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly, any order made or other action taken by the Custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken."

(16) Bawa Shiv Charan Singh, learned counsel for the appellant, has urged that the impugned notification Exhibit D-7, purports to have been issued under Ordinance Xii of 1949, according to the provisions of which there was automatic vesting of every evacuee property in the Custodian without holding any enquiry, as contemplated by Section 7 of Act Xxxi of 1950 or Clause (7) of Ordinance Xxvii of 1949, but on December 14, 1949 or on January 7, 1950 when the notification was signed or published respectively, the said Ordinance Xii of 1949 was not in existence. Therefore, there was no valid notification. Ordinance Xii of 1949 was in force from June 13, 1949 to October 17, 1949. This was replaced by Ordinance Xxv of 1949 with effect from October 18, 1949. It is urged that before there could be any automatic vesting under Ordinance Xii of 1949 it has to be

shown that the property was in fact evacuee property. In other words, what is urged is that automatic vesting was of evacuee property and not of non-evacuee property and since the sine qua non of automatic vesting was absent in view of the survey reports, particularly Exhibit P-11, there was no vesting of the plaintiff's property in the custodian. It is also urged that the officers concerned, who made the endorsements on Exhibit P-11 to gazette the property as evacuee property, had no jurisdiction to do so on October 19, 1949 because by that time Ordinance Xxvii of 1949 had come into force and compliance with the requirements of clause (7) thereof was nscssary. It may be noticed that under clause (7) of Ordinance Xxvii of 1949 a notice has to be first issued by the Custodian to the persons interested and after holding an enquiry, he had to decide whether to pass an order declaring a property to be evacuee property. On behalf of respondent No. 1 it has been urged that mentioning of Ordinance Xii of 1949 in the impugned notification, Exhibit D-7, is not very material, for if there was power in the person issuing the notification to issue it on the date that it was issued, then citation of a wrong provision of law or a wrong law is immaterial. Indeed, this argument found favor with the trial Court which held that the mere fact that a wrong Ordinance has been mentioned in the notification is not sufficient to hold that the property in dispute has not been declared evacuee property validly or that the impugned notification is illegal or without jurisdiction. Be that as it may, and we shall refer to this question later-the point at issue at the moment is whether the civil courts had jurisdiction to try the present suit.

(17) Bawa Shiv Charan Singh has relied on three decisions to urge that an illegal act cannot become legal and the civil courts do have jurisdiction to entertain and try the present suit. The decisions that he relies upon are Dr. Zafar Ali Shah and Others Vs. The Assistant Custodian of Evacuee Property, Jhansi and Others, , Custodian of Evacuee Property Punjab and Others Vs. Jafran Begum, and Union of India and Another Vs. Allahawal and Others, .

(18) In the case of Dr. Zafar Ali Shah, the petitioners had filed a petition in the Supreme Court under Article 32 of the Constitution invoking the fundamental right, guaranteed by Article 19(1)(f) of the Constitution. It was urged that inasmuch as the petitioners were sought to be deprived of their property without complying with the provisions of Section 7 of Act Xxxi of 1950, it amounted to a violation of Article 19(1)(f) of the Constitution and the petitioners were in consequence entitled to a writ quashing the impugned orders of the various authorities under Act Xxxi of 1950, the effect of which orders was that the petitioners were being deprived of their property without due process of law. In our view this decision is not relevant as Section 46 of Act Xxxi of 1950 has no application to the constitutional remedies provided by Articles 32 & 226.

(19) Jafran Begum's case really goes against the appellant and we shall presently advert to it after we have dealt with the decision of a learned Single Judge of this Court which has been relied upon by Bawa Shiv Charan Singh, viz., the one Union of India and Another Vs. Allahawal and Others, .

(20) A certain property was notified as evacuee property on February 23, 1951. This property belonged to one Fatma Bi who died at Delhi on October 23, 1954. The legal representatives of Fatma Bi instituted a suit challenging the legality and validity of the notification dated February 23, 1951. The suit was contested by the Union, of India and the Custodian of Evacuee Property on various grounds including the plea that the civil courts had no jurisdiction to try the suit. B. C. Misra, J. held that the notification in question was issued without jurisdiction and was not sustainable. It was observed that the said notification had been issued u/s 7 of Act Xxxi of 1950 but Without complying with the prerequisites of any notice to the persons interested, without any enquiry or without any determination and so, was illegal and ineffective in view of the law enunciated by the Supreme Court in Ebrahim Aboobaker and Another Vs. Tek Chand Dolwani and Others, and Dr. Zafar Ali Shah and Others Vs. The Assistant Custodian of Evacuee Property, Jhansi and Others, . It was observed that according to the definition of an evacuee in the various Acts Constituting evacuee legislation, an evacuee is a person who on account of disturbances leaves or has after March 1, 1947 left any place in India. Inasmuch as it had not been established as a fact that Fatma Bi had left India or settled in Pakistan, she could not be treated as an evacuee and the properties owned or held by her would be deemed to be evacuee properties under the law. The learned Judge has said in his judgment that had the Custodian ever recorded a finding that she was or had become an evacuee, the jurisdiction of the Civil Court to reappraise the evidence or determine the correctness or otherwise of the finding of the Custodian, whether in fact or law, would be barred. Inasmuch as the Custodian had not done so, the plea of bar could not be accepted. The learned Judge has relied on I the report of the Field Inspector of the Custodian which report had stated that Fatma Bi had lived, died and was buried in Delhi and she never had any notice of the proceedings leading to the impugned notification. Accordingly, the learned Judge negatived the claim on behalf of the defendants that jurisdiction of the civil courts was barred. In our view, and we say this with great respect, the learned Judge has not correctly applied the law. It seems that the decision of the Supreme Court in Jafran Begum's case was not brought to his notice. It further seems that the provisions of Section 8(2A) were also not brought to his notice. The view expressed by the learned Single Judge does not appear to be correct in law. The law on the scope and effect of Section 46 of Act Xxxi of 1950 has been settled by the Supreme Court in Jafran Begum's case to which we shall presently advert. The learned Single Judge has based his decision on the rule enunciated in two reported cases of the Supreme Court, namely, the cases of Ebrahim Aboobaker and Dr. Zafar Ali Shah. We have already noticed the case of Dr. Zafar Ali Shah. That was a petition under Article 32 of the Constitution in which a constitutional remedy was invoked. Section 46 of Act Xxxi of 1950 or the corresponding provisions in the earlier Ordinance could not and did not create a bar against Constitutional remedies postulated either by Article 32 or Article 226 of the Constitution. Therefore, reliance on Dr. Zafar Ali Shah's case was misplaced. As far as Ebrahim Aboobaker's case is concerned, that was also a

matter in which a petition for the issue of a writ of prohibition was filed in the Punjab High Court by the petitioners therein. "The contention raised in the petition was that reading Sections 7 and 8 of Act Xxi of 1950 together the Custodian could get dominion over the property only after a declaration is made. The declaration follows upon an enquiry made u/s 7 but until the proceedings are taken u/s 7 there can be no vesting of the property and consequently no right accrued to the Custodian to take possession of it. In this case the "intending evacuee", Aboobaker, died during the course of the pendency of the appeal filed by the informant and pending before the Custodian-General. The son, Ebrahim Aboobaker and daughter, Hawabai Aboobaker, were brought on record and the challenge before the Punjab High Court was the competency of the Custodian-General to hear the appeal. That court dismissed the said petition but granted leave to appeal to the Supreme Court. The said son and daughter then filed a petition under Article 226 of the Constitution in the Bombay High Court challenging the order of the Custodian-General. They prayed for issue of a writ of certiorari. The petition was dismissed by that High Court holding that it had no jurisdiction against the Custodian-General. An appeal from that order came up before the Supreme Court but was allowed to stand over with a view to await the decision of that court in the appeal against the order of the Punjab High Court. The Supreme Court dismissed the appeal from the order of the Punjab High Court but decided only the preliminary point that the informant, Tek Chand "Dolwani. was entitled to prefer an appeal to the Custodian-General; it left the question about the jurisdiction of the Custodian-General but declared the properties of Aboobaker as evacuee properties after his death open as that question was not raised before it. An independent petition was then preferred by Ebrahim Aboobaker and his sister challenging the order of the Custodian-General and an application for grant of special leave to appeal from the decision of the Bombay High Court was also moved. That is how the matter came up before the Supreme Court in the reported decision relied upon by the learned Single Judge. It was held that the proceedings u/s 7 being the sine qua non, orders made without complying with that provision of law amounted to a violation of Article 19(1)(f) of the Constitution. Therefore, this case also is no authority to understand the scope and effect of Section 46 of Act Xxi of 1950 or the corresponding provisions in the earlier ordinances. In our opinion, the decision of a learned Single Judge of this Court in Union of India and Another Vs. Allahawal and Others, is, Therefore, not correct nor has it applied the correct law.

(21) This brings us to the decision in Jafran Begum's case. The Supreme Court was concerned in the appeal by special leave before it with only one question and that is the interpretation of Section 46 of Act Xxi of 1950. A house situate in Malerkotla belonged to one Muradbux who died some time in 1922. In 1947, the house was in possession of Muradbux's son, Mohd. Rafiq and Muradbux's widow, Jafran Begum. Sometime after the partition of the country in 1947 Mohd. Rafiq migrated to Pakistan. Thereafter notice was issued u/s 7 of Act Xxi of 1950 to Dildar son of Mohd. Rafiq to show cause why the house be not declared as

evacuee property. No notice was, however, issued to the respondent Jafran Begum. Dildar appeared before the Deputy Custodian and admitted that his father had migrated to Pakistan. Thereupon the house was declared as evacuee property. Jafran Begum in March, 1954 filed an application before the Custodian claiming that by virtue of a will made in her favor by Muradbux in 1918 he had bequeathed the house to her and Therefore, she was owner of the entire property. This application was dismissed by the Custodian on a construction of the "will and the right of a Mohammedan to bequeath his entire property by a will. A review application was dismissed by the Custodian on the ground that it was belated. A revision to the Deputy Custodian-General was also dismissed. The Deputy Custodian-General however, suo moto reviewed his order and held that Jafran Begum as the widow of Muradbux was entitled to 1/8th share under Mohammedan law and, Therefore, only 7/8th share of the house became evacuee property and 1/8 share of Jafran Begum was not evacuee property. In the meanwhile, and prior to the Order of the Custodian-General in suo moto review, Jafran Begum had filed a suit on March 3, 1958 against the Custodian of Evacuee Property, Punjab and others. In her suit she had claimed on the basis of the will of Muradbux that the property belonged to her and was non-evacuee. It was prayed that a permanent injunction be issued against the Custodian of Evacuee Property, Punjab and other restraining them from evicting her from the house in question. This suit was dismissed by the trial Court holding that the civil Courts had no jurisdiction to decide the matter in view of Section 46 of Act Xxi of 1950. The trial Court had decided other issues also but the Supreme Court did not concern itself with the same. An appeal preferred by Jafran Begam was dismissed by an Additional District Judge. She then went in second appeal to the Punjab High Court. The learned Single Judge of that court referred the matter to a larger bench and so, the appeal came up for hearing before a Division Bench. That Bench in its turn referred the case to a still larger bench and ultimately, the appeal was heard and disposed of by a Full Bench of the Punjab High Court. The Full Bench was of the view that when a question arose whether any property was or was not an evacuee property, two matters had to be decided, namely, (i) whether the particular person had or had not become an evacuee and (ii) whether the property in dispute belonged to him. On the first question the Full Bench was of the view that the matter could only be determined by the Custodian. On the second question it was held that civil court's jurisdiction depended on whether in a particular case a question of title did or did not arise but if it arose and was a complicated question, civil court's jurisdiction was not ousted. In that particular appeal that the Full Bench heard it was held that a complicated question of law arose, and, Therefore, the suit was competent and the civil court had jurisdiction to entertain it. The Custodian of Evacuee Property and others thereupon appealed by special leave and that is how the matter came up before the Supreme Court. After considering the scheme of the Act and noticing Sections 4 and 28 of the said Act the Supreme Court observed as follows.

"UNDER S. 7 the Custodian has to determine whether certain property is or is not

evacuee property. To determine that he is to find out whether a particular person is or is not an evacuee. Having found that, he is to find whether the property in dispute belongs to that person. If he comes to the conclusion that the property belongs to that person, he declares the property to be evacuee property. Now there is nothing in S. 7 which shows that the Custodian cannot enter into all questions whether of fact or of law in deciding whether certain property belongs to an evacuee. There is no reason to hold that under S. 7 the Custodian cannot decide what are called complicated questions of Law or questions of title. It is difficult to see how the Custodian can avoid deciding a question of title if it is raised before him in proceedings under S. 7. Nor do we find it possible to make a distinction between questions of fact and questions of law that may arise before the Custodian under S. 7. If he has the power to decide questions of fact, which the learned Judges in the order under appeal seem to concede, we do not see why he should not have the power of deciding question of law also. Further if the learned Judges in the order under appeal are correct in saying that if a question of title rests on a simple allegation of fact it can be finally determined, by the Custodian, we cannot see on what reasoning it can be said that where a question of title depends on a question of law it cannot be finally decided under S. 7 by the Custodian. His power under 3. 7 is to decide whether certain property is evacuee property or not and there is nothing in S. 7 which restricts that power to deciding only questions of fact. There can in our opinion be no escape from the conclusion that under S. 7 when deciding whether certain property is evacuee property or not, the Custodian has to decide all questions, whether of fact or law, whether simple or complicated, which arise therein. That power cannot be denied on the ground that the Custodian which term for these purposes includes the Deputy Custodian or the Assistant Custodian may not be experienced judicial officer and, Therefore, may not be in a position to decide questions of title. His decision is not final and is open to appeal under S. 24 and to revision under S. 27. If he makes a mistake the two higher authorities who, we are told, have always been recruited from experienced judicial officers can correct him. It is after the matter has been decided under S. 7 and S. 24 if an appeal is filed and under S. 27 if a revision is filed, that S. 28 gives finality to orders of the authorities mentioned therein and lays down that such orders shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceeding. As we have already said, the legislature was not satisfied by merely conferring finality on such orders; it went further and expressly barred the jurisdiction of civil and revenue courts under S. 46 to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. These words are very wide and clear and bar the courts from entertaining or adjudicating upon any such question. Where Therefore the question whether certain properties are evacuee properties has been decided under S. 7 etc., whether that decision is based on issues of fact or issues of law, jurisdiction of courts is clearly barred under S. 46(a). It is difficult to see how a distinction can be drawn between decisions under S. 7 based on questions of fact and decisions based on questions

of law. The decision is made final whether based on issues of law or of fact by S. 28 and S. 46 bars the jurisdiction of civil and revenue courts in matters which are decided u/s 7 whatever may be the basis of decision, whether issues of fact or of law and whether simple or complicated.

"IT may be added that the only question to be decided under S. 7 is whether the property is evacuee property or not and the jurisdiction of the Custodian to decide this question does not depend upon any finding on a collateral fact. Therefore there is no scope for the application of that line of cases where it has been held that where the jurisdiction of a tribunal of limited jurisdiction depends upon first finding certain state of facts, it cannot give itself jurisdiction on a wrong finding of that state of fact. Here under S. 7 the Custodian has to decide whether certain property is or is not evacuee property and his jurisdiction does not depend upon any collateral fact being decided as a condition precedent to his assuming jurisdiction. In these circumstances, S. 46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under S. 7. This conclusion is reinforced by the provision contained in S. 4(1) of the Act which provides that the Act overrides other laws and would thus override S. 9 of the CPC on a combined reading of Ss. 4, 28 and 46. But as we have said already, S. 46 or S. 28 cannot bar the jurisdiction of the High Court under Article 226 of the Constitution, for that is a power conferred on the High Court under the Constitution."

(22) Jafran Begum's case fortifies the view that we have taken that Section 46 does not bar the jurisdiction of a High Court under Article 226 of the Constitution or the Supreme Court under Article 32 of the Constitution. Indeed, it was in that view of the matter that the decision of the Bombay High Court in Abdul Majid Haji Mahomed Vs. P.R. Nayak, was upheld. The only point which was left open in Jafran Begum's case was the rule enunciated in AIR 1940 105 (Privy Council) as that question did not arise in the appeal before it. The rule enunciated in Mask and Co.'s case and followed by Chagla C.J. in Bombay, decision, was:-

"EVEN if jurisdiction of courts is excluded, civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Wanchoo, C.J

" who delivered the judgment in Jafran Begum's case after observing that the above rule laid down by the Privy Council did not arise for consideration on the facts and circumstances of Jafran Begaum's case, however did observe : "Normally jurisdiction of civil courts to entertain or adjudicate upon such question relating to evacuee property would be barred under S. 46 ; the question whether in some extreme circumstances civil courts may have jurisdiction in spite of S. 46 need not be decided just now. However, we may add that in Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, this Court

observed at p. 763 that the observations in AIR 1940 105 (Privy Council) were in some respects too widely stated". The ultimate conclusion of the learned Chief Justice was :-

"ON careful consideration, Therefore, of the authorities cited before us, we are of opinion that generally speaking the jurisdiction of the civil or revenue court is barred under S. 46 and no such court can entertain any suit or adjudicate upon any question whether a particular property or right to or interest therein is or is not evacuee property....

(23) We have made somewhat detailed reference to the observations in Jafrat Begum's case because in the present case, in our opinion, each one of those observations would be pertinent.

(24) The contention on behalf of the appellant that the impugned notification, Exhibit D-7, is liable to be struck down because of the absence of juridical authority cannot be accepted. As Wa'nchoo, C.J. observed in Jafran Begum's case the string of cases about jurisdictional fact are not relevant in view of Section 46 of Act Xxxi of 1950.

Furthermore, 8(2A) which has retrospective effect removes the invalidity, if any, attached to the vesting of the property in suit so far as that Section is concerned. Therefore, he may well say that the declaration contained in Exhibit D-7 cannot be challenged by way of a civil suit. In this view of the matter we need not consider the various cases cited on the question of jurisdiction and rest our findings on the scope and effect of Section 46 of Act Xxxi of 1950 and the corresponding provisions of the earlier Ordinance as stated earlier.

(25) If that was all, we would have had no difficulty in dismissing this appeal. There is, however, one more aspect which requires serious consideration and that is the scope and effect of the exemption notification issued by the Central Government under the provisions of Section 52 of Act Xxxi of 1950. As noticed earlier, this notification exempted, amongst other things, any person who on or after the first day of 1947 migrated from India to Pakistan but returned to India before the first day of July, 1948 and settled in India, from the operation of sub-clause (i) of clause (d) of Section 21 of Act Xxxi of 1950. In other words, though it is not factually correct, since the appellant is being deemed to be an evacuee and her property is being deemed to be an evacuee property by virtue of Section 8(2A) of Act Xxxi of 1950. she on her part can say that she stood exempt from the operation of sub-clause (i) of clause (d) of Section 2 of Act Xxxi of 1950. Section 2(d)(i) reads as under :- "(d) "evacuee" means any person,-

(I)who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March, 1947, left. any place in a State for any place outside the territories now forming part of India, of".

Admittedly, appellant came back to India in December, 1947 and has been living

in her house ever since. The notification, Therefore, places her outside the ambit of the term "evacuee". If she is not* an evacuee, she could not be declared as such either under any of the Ordinance or under any of the Acts of competent legislature. Indeed, the evidence in the case shows that the appellant never became an evacuee. Applying, Therefore, the rule in the case of Mask and Co. we are of the opinion that the provisions of the evacuee legislation are not attracted in the case of the appellant or her property in suit. Mr. Saharaya, learned counsel for the respondents urges that looking at the plaint in the suit it has to be held that the plaintiff is claiming title under the Act. He concedes that though the first prayer can be granted, the second prayer cannot be granted in view of Section 46 of Act Xxxi of 1950 for that would involve determination whether the appellant is or is not an evacuee or whether her property is or is not evacuee property which can only be done by the Custodian. Reliance is again placed on Jafran Begum's case to say so. As we have already observed the appellant may fall under the mischief of evacuee legislation and may be debarred by Section 46 of Act Xxxi of 1950 from filing a civil suit but for the exemption notification which places her out of the ambit of the term "evacuee". Inasmuch as she must be deemed not to be an evacuee, the question of applying evacuee legislation in her case does not arise. Section 46 of Act Xxxi of 1950 would be a bar if the property in suit had been declared evacuee property u/s 7 and if the case was not one of those cases where the rule of Mask & Co., is attracted inasmuch as this is a case of gross injustice and arbitrary action as evidenced by the note on Ext. P. 11 dated 19-10-49 & the appellant clearly is an exempted person. The suit cannot be held to be barred and we hold accordingly.

(26) Inasmuch as civil courts jurisdiction has been held not to be barred in this case by us and it has also been held that the appellant is not an evacuee or that "the definition of the term "evacuee" is not attracted in her case, we must hold that the impugned notification. Exhibit D-7, cannot be sustained.

(27) In this view of the matter, we accept the appeal, set aside the judgment and decree of the trial Court and decree the appellant's suit with costs throughout.