

PETITIONER:
DR. RAJENDRA PRAKASH SHARMA

Vs.

RESPONDENT:
GYAN CHANDRA & ORS.

DATE OF JUDGMENT 27/03/1980

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
PATHAK, R.S.

CITATION:
1980 AIR 1206 1980 SCR (3) 207
1980 SCC (4) 364
CITATOR INFO :
D 1983 SC 259 (21)

ACT:

Administration of Evacuee Property Act 1950 (31 of 1950). Sections 2(d), 7, 7A 8, 28 and 46 & Displaced Persons (Compensation and Rehabilitation) Act 1954 (44 of 1954) Sections 2(c), 22, 23, 24 and 27 Property acquired under section 12 and auctioned under section 20 of 1954 Act-Property nor declared by Custodian as evacuee property under section 7 of 1950 Act-Jurisdiction of Civil Court to determine question whether property declared evacuee property-Section 46 of 1950 Act whether a bar-Section 27 of 1954 Act-Whether applicable.

HEADNOTE:

The appellant filed a suit in the civil court alleging that the house in dispute was owned by one Abdul Rashid and that he had let out the house to his father who was paying rent to him, that Abdul Rashid had migrated to Pakistan and the house was declared evacuee property. Later, the house was put to auction on January 29, 1969 under section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, was purchased by him and that the sale certificate was also issued. He further pleaded that the respondents-defendants had also filed suit No. 67 of 1970 for ejected and arrears of rent against his father, that the suit was decreed on May 10, 1971, and that in pursuance of that decree they tried to dispossess him, and as he was not impleaded in the ejected suit, he was not bound by that decree. The appellant claimed a declaration of his title to the property and prayed for perpetual injunction restraining the defendants-respondents from dispossessing him in execution of the ejected decree.

The respondents resisted the suit, denied that the property in dispute was ever declared evacuee property or that it was ever acquired under the provisions of the Act of 1954, and asserted that the appropriate authorities never passed any order under section 7 of the Administration of Evacuee Property Act, 1950 declaring the property to be evacuee property. The 1st defendant further pleaded that Abdul Rashid had only 1/6th share in the house in question which was purchased by his father and therefore the

respondents are exclusive owners of the House. The said Abdul Rashid had migrated to Pakistan in the year 1967 long after he had transferred his interest and share in the house in question and that the father of the appellant had in collusion with the Custodian Department prepared fictitious proceedings relating to the sale of the house in question, that the Custodian Department had no jurisdiction to declare the property was evacuee property, much less could they sell it under the Act of 1954, and that the auction if any held, was nullity having been brought about by misrepresentation and fraud.

The trial court held that Abdul Rashid was not the owner of the house in question, that the entire proceedings taken by the Custodian Department were illegal and without jurisdiction and the plaintiff did not acquire any title by virtue of the sale held by the Authorities under the Displaced Persons (Compensation and Rehabilitation) Act of 1954, and accordingly dismissed the suit.

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On appeal, the Additional District Judge, affirmed the findings of the trial court and held that the jurisdiction of the Civil Court was not barred by section 46 of the Administration of Evacuee Property Act, 1950 and that it could go into the question whether or not the matter had been adjudicated upon by the authorities under that Act. It found that no inquiry, as contemplated under section 7 of the 1950 Act was held and no Notification was issued by the Authorities under that Act, declaring the suit property to be evacuee property. It further held that Abdul Rashid had no title or interest, whatever, in the house in question after July 31, 1953, when, in accordance with the decree of the Civil Court in partition Suit No. 289 of 1953, Phool Chand had deposited the value of 1/6th share of Abdul Rashid in this property.

The High Court dismissed the Second Appeal preferred by the appellant affirming the concurrent findings of the court below. It also held that Abdul Rashid was in India much after the repeal of UP ordinance No. 1 of 1949 and consequently there was no question of the property vesting automatically in the Custodian under the aforesaid ordinance.

In the appeal to this court it was contended on behalf of the appellants: (1) in view of the decision in Custodian of Evacuee Property, Punjab & Ors v. Jatran [1967] 3 SCR 736 and section 46 of the 1950 Act, the Civil Court had no jurisdiction to adjudicate upon the question whether the suit property or any right or interest therein is or is not evacuee property, (2) the sale of the suit property had been effected in favour of the appellant under section 20 of the 1954, Act, after it had been acquired by the Central Government under section 12 of that Act, free from all encumbrance and formed part of the compensation pool, (3) the order of its acquisition passed under section 12, and its sale under section 20 of the 1954 Act had become final and conclusive, the respondents could not be allowed to go behind those orders and question their finality on the ground that the property has never been evacuee property vesting in the Custodian, because section 27 of the 1954 Act bars the jurisdiction of the Civil Court to go into this question

Dismissing the appeal,

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HELD: 1 (i) Section 46 will not bar the jurisdiction of the Civil Court where the Custodian has never declared the property as evacuee property after taking proceedings under

section 7 of the 1950 Act. [219 C]

Custodian of Evacuee Property, Punjab & ors. v. Jafran Begum [1967] 3 S.C.R. 736 referred to and explained.

(ii) Form a conjoint reading of section 7 & 8 of the 1950 Act it is clear that the making of a declaration after inquiry under section 7 that the property is 'evacuee property' is a sine qua non for giving the Custodian dominion over the property. If no proceeding is taken under section 7, there can be no vesting of the property in the Custodian. [216 C]

Fazalbhoy v. Official, Trustee of Maharashtra [1979] 2 S.C.R. 699 at p. 712 referred to.

In the instant case Abdul Rashid was throughout residing in India and personally managing the suit property and collecting its rent till 1963. He migrated or went away from India for good some time in 1963 or thereafter. Therefore, if the Custodian had not taken any proceedings under section 7

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of the 1950 Act to declare the suit property as evacuee property before the 7th day of May, 1954, and no such proceedings were pending on May 7, 1954, the property of Abdul Rashid could not be declared evacuee property under the Act, the power of the Custodian to do so having been terminated by section 7A. [217 B-C]

(iii) It was for the plaintiff-appellant to show by producing relevant notifications or other documentary evidence that the Custodian had taken proceedings and declared the suit property to be evacuee property in accordance with the provisions of section 7 or that such proceedings had been initiated earlier and were pending on the 7th day of May, 1954. Despite ample opportunity granted to the plaintiff he did not produce any such documentary evidence in the courts below. All that he showed was that Rehabilitation Authorities had purported to act under the 1954 Act sold the suit property to him and issued the sale certificate in his favour on April 1st, 1969. [217 D]

(iv) Clauses (a), (c) and (d) of section 46 postulate that at the time when the question whether or not a property is evacuee property comes for adjudication the power of the Custodian-General or the Custodian under this Act of 1950 to determine the question is subsisting. That is to say, if at the point of time when the question arises, the power of the authorities constituted under this Act to adjudicate that question stands terminated or extinguished by the operation of section 7A of the 1954 Act, none of the clauses (a), (c) and (d) of section 46 will bar the jurisdiction of the Civil Court to determine that question, which had not been decided by the Custodian during the period he had the power to determine it. [219 P-G]

(v) Section 28 has no application to the facts of the instant case because no order made by any of the authorities mentioned in that section is being called in question. Section 46, also, does not come in the way because no proceedings under section 7 of the 1950 Act to declare the suit house as evacuee property can be taken by the Custodian against Abdul Rashid. [219 H220 A]

(vi) No notification under Sub-section (3) of section 7 published in the official Gazette has been placed on the record nor was it shown that any proceedings initiated under section 7 of the Act to declare it evacuee property were pending on MAY 7, 1954, and the question of saving those proceedings under the proviso to section 7A does not arise. [220 B]

In the instant case Qazi Abdul Rashid was throughout

resident of India till 1963 and was personally managing the suit house and collecting rent of it from the tenant. After May 7, 1954, therefore, the Custodian had no jurisdiction under the 1950 Act to declare the suit house as evacuee property. The jurisdiction of the Courts below to go into this question was thus not barred by anything in sections 28 and 46 of the 1950 Act. [220 C]

2(i) Section 20 of the 1954 Act confers powers on the managing officer to transfer any property out of the compensation pool by sale or in any other manner indicated in clauses (b) to (e) of that Section. The necessary prerequisite for sale is that the property must have been declared under section 7 of the 1950 Act to be evacuee property by the Custodian or it must be evacuee property under the deeming provisions of any law which may be applicable to the case of the evacuee. In other words, only that property could be acquired

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under section 12 and form part of the compensation pool which satisfies the definition of "evacuee property" even in section 2(c) of the 1954 Act. If the property was never evacuee property, as defined in section 2(c), it does not legally form part of the compensation pool and, therefore, cannot be disposed of under section 20 or the Rules framed under this statute. [220 C, 221 H-222 B]

(ii) The necessary prerequisite for acquiring property under section 12 is that it must be 'evacuee property' as defined in section 2(c) of the 1954 Act. In the absence of this essential prerequisite the Central Government is not competent to acquire that property under this section for throwing it into the compensation pool. This prerequisite or condition precedent, was lacking in the instant case. No notification published in the official Gazette either under sub-section (1) or sub-section (3) of section 12 appears to have been brought on the record of this case, nor attention drawn to any such notifications. [221 F-G]

3. Section 27 of the 1954 Act is not 'attracted' because the plaintiff, who filed the original suit and is now appellant in this appeal, is not questioning the finality of the order of the sale alleged to have been made by the managing officer. It is the defendant-respondents who are resisting the plaintiff's claim on the ground that the sale is a nullity. It could not be made under this Act of 1954 for the reason that it was never declared evacuee property under section 7 of the Act and thus never formed part of the compensation pool. The words "under this Act" occurring in section 27 are significant. They show that those orders which are not made by any officer or authority in accordance with the provisions of this Act, but outside the provisions of this Act in excess of jurisdiction, can be called in question in the civil court. The language of section 27 is not as wide as that of section 46 of the 1950 Act. [222 G-223 A]

4. As Qazi Abdul Rashid remained in India continuously upto 1963, no question of automatic vesting under the U.P. Ordinance No. 1 of 1949 could arise. That ordinance was not applicable to him at all. [214 H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 424 of 1979

Appeal by Special Leave from the Judgment and order dated 23-8-1978 of the Allahabad High Court in Second Appeal

No. 34/78. D. R. Gupta and B.V. Desai for the Appellant. B. R. Agarwala for the Respondents. The Judgment of the Court was delivered by SARKARIA, J.-This appeal by special leave is directed against a judgment, dated August 23, 1978, whereby a learned Single Judge of the Allahabad High Court dismissed the appeal of the appellant herein. It arises out of these circumstances. The plaintiff, Dr. Rajendra Prakash Sharma, is the appellant before us. He filed a suit in the court of the Civil Judge, Bulandshahar, alleging that the house in dispute was owned by one Qazi Abdul Rashid, son of Qazi Abdul Razak. Qazi Abdul Rashid had let out this house to Dr. Bhu Deo Sharma, father of the appel-

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lant, who was paying rent for the same to Qazi Abdul Rashid. He further alleged that the said Abdul Rashid had migrated to Pakistan and the house in dispute was declared evacuee property under the then existing law. Later on, it was put to auction on January 29, 1969 under Section 20 of the Displaced Persons (Compensation & Rehabilitation) Act, 1954, and was purchased by the plaintiff for a consideration of Rs. 1,000/-, and the appellant was declared purchaser of this property with effect from April, 1, 1969. Sale Certificate, dated March 19, 1969, was also issued in his favour.

He further pleaded that the defendants-respondents had also filed Suit No. 67 of 1970 for ejectment and arrears of rent against the appellant's father, Bhu Deo Sharma. The suit was decreed on May 10, 1971, and that in pursuance of that decree they were trying to dispossess the plaintiff-appellant. He further stated that since he was not impleaded in the ejectment suit, he was not bound by that decree. On these facts, the plaintiff-appellant claimed a declaration of his title to the property in question and further prayed for a perpetual injunction restraining the defendants from dispossessing him in execution of the said decree obtained by the defendants in Suit No. 67 of 1970.

The defendants resisted the suit. They denied that the property in dispute was ever declared evacuee property or that it was ever acquired under the provisions of the Act of 1954. They asserted that the appropriate authorities never passed any order under Section 7 of the Administration of Evacuee Property Act declaring this property to be evacuee property. The contesting defendant, Gyan Chandra, further pleaded that Qazi Abdul Rashid had only 1/16th share in the house in question which was purchased by the defendants father (since deceased) and, therefore, the defendants are exclusive owners of the house. Gyan Chandra further alleged that Qazi Abdul Rashid had migrated to Pakistan in the year 1967, long after he had transferred his interest and share in the house in question; that Dr. Bhu Deo Sharma, father of the appellant had in collusion with the Custodian Department, prepared fictitious proceedings relating to the sale of the house in question; that the Custodian Department had no jurisdiction to declare the property in suit as evacuee property, much less could they sell it under the Act of 1954. According to the defendant, the auction if any held, was a nullity having been brought about by misrepresentation and fraud.

The trial court held that Qazi Abdul Rashid was not the owner of the house in question; that the entire proceedings taken by the Custodian Department were illegal and without jurisdiction and the plaintiff did not acquire any title by virtue of the sale held by the Authorities

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under the Displaced Persons Compensation and Rehabilitation)

Act (No. 44 of 1954) (for short, called the 1954 Act). In the result, the trial court dismissed the plaintiff's suit.

On appeal, the Additional District Judge, Bulandshahar affirmed the findings of the trial court. He held that the jurisdiction of the civil court was not barred by section 46 of the Administration of Evacuee Property Act (No. 31 of 1950) (hereinafter called the 1950 Act) to go into the question whether or not the matter had been adjudicated upon by the Authorities under that Act. It found that no inquiry, as contemplated under Section 7 of Act 31 of 1950 was held and no Notification was issued by the Authorities under that Act, declaring the suit property to be evacuee property. It held that Abdul Rashid had no title or interest, whatever, in the house in question after July 31, 1953, when, in accordance with the decree of the Civil Court in the partition Suit No. 289 of 1953, Phoolchand had deposited Rs. 343/ regarding the value of 1/6th share of Abdul Rashid in this property. On the deposit of that amount, Phool Chand and his sons had become sole owners of the property in question and the plaintiff's father became their tenant of the suit property. It was in that capacity that a decree for ejectment was passed against him and in favour of the respondents. In the result, it was held that since the property had never been declared evacuee property after following the prescribed procedure under the Act and the Rules framed thereunder, the rights of the defendants respondents remained unaffected by the auction held by the Custodian Department and the consequent issue of the sale certificate in favour of the plaintiff-appellant.

The High Court affirmed the concurrent findings of the two courts below and dismissed the Second Appeal preferred by the plaintiff. It agreed with the lower appellate court that the auction in favour of the plaintiff-appellant was a nullity and wholly without jurisdiction and did not confer any rights on him because the suit property had never been declared as evacuee property in accordance with law. It also held that Abdul Rashid was in India much after the repeal of the U.P. Ordinance 1 of 1949 and consequently there was no question of the property vesting automatically in the Custodian under the aforesaid ordinance. The High Court, however, granted six months' time to the plaintiff-appellant to deliver vacant possession of the suit house to the defendants-respondents without the intervention of the court.

After obtaining special leave under Article 136 of the Constitution, the aggrieved plaintiff has now come in appeal before this Court.

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The main contention of the learned counsel for the appellant is two-fold: (a) In view of Section 46 of the 1950 Act, the Civil Court had no jurisdiction to adjudicate upon the question whether; the suit property or any right or interest therein is or is not evacuee property. (Reliance for this contention has been placed on the decision of this Court in Custodian of Evacuee Property, Punjab and ors. v. Jafran Begum.

(b) The sale of the suit property has been effected in favour of the appellant under Section 20 of the 1954 Act, after it had been acquired by the Central Government under Section 12 of that Act, free from all encumbrances, and formed part of the compensation pool. It will therefore, be presumed that prior to its acquisition under Section 12 of the 1954 Act, it was evacuee property vesting in the custodian. The orders of its acquisition passed under Section 12 and its sale under Section 20 of the 1954 Act had

become final and conclusive. The respondent could not be allowed to go behind those orders and question their finality on the ground that the property has never been evacuee property vesting in the custodian, because Section 27 of 1954 Act bars the jurisdiction of the Civil Court to go into this question. The only remedy of the defendants-respondents is to claim compensation under the 1954 Act. Reference in this connection' has been made to N. S. Gujral v. Custodian of Evacuee Property and Anr.

Before dealing with these contentions, some basic facts concurrently found by all the courts below may be noticed.

Qazi Abdul Rashid obtained a money decree in suit No. 523 of 1935 against one Ami Chand S/o Phool Chand and brother of present respondents (original defendants 1 to 4). In execution of that decree, he purchased with the permission of the court, the share of Ami Chand in 1937. At that time, apparition suit No. 3 of 1931 amongst the family members of the said Ami Chand was pending in the Court of the Civil Judge, Bulandshahr. Qazi Abdul Rashid did not join as a party in the said partition suit. However, he instituted Suit No. 452 of 1949 against the said Phool Chand and others in the court of the Munsif, Khurja for partition and separate possession of his share. The suit was contested. The Munsif decreed the suit holding that Qazi Abdul Rashid had 1/16th share in the house in question and one other shop. Applying the provisions of Section 4 of the Partition Act, the Munsif evaluated Qazi Abdul Rashid's 1/16th share in the suit house at Rs. 343/- and directed the sale of that share.

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Feeling aggrieved by the said decree, Qazi Abdul Rashid preferred Civil Appeal No. 289 of 1953. The First Appellate Court by its judgment, dated December 20, 1954 (Ex. A-2), partly allowed the appeal and modified the decree of the trial court in so far as it related to the shop. But it upheld the decree of the trial court in so far as it related to the house now in question, whereby Phool Chand defendant was required to deposit Rs. 343/- as the value of Qazi Abdul Rashid's share. In accordance with the decree affirmed by the First Appellate Court, Phool Chand on July 31, 1953 deposited Rs. 343/- (vide Ex. A-1) to the credit of Qazi Abdul Rashid, the then plaintiff in the Court. Qazi Abdul Rashid being aggrieved by the decree of the First Appellate Court, preferred Second Appeal No. 235 of 1955 in the High Court. The High Court dismissed this appeal as abated by an order, dated February 25, 1959 (Ex. A-1), due to the failure of Qazi Abdul Rashid to take proper steps for substitution of the legal representatives of the then respondents 7 and 11, who had died during the pendency of the appeal.

During the pendency of the said litigation, Phool Chand and his two sons, Gyan Chand and Raghbur Sharan, instituted Suit No. 323 of 1953 in the court of the Munsif, Khurja for the recovery of the damages for use and occupation of the house in dispute against Qazi Abdul Rashid. By a judgment dated September 30, 1959 (Ex. A-4) the trial court decreed that suit against Qazi Abdul Rashid. Aggrieved by that judgment and decree, Qazi Abdul Rashid preferred Civil Appeal No. 461 of 1959 which was partly allowed by the First Appellate Court on December 21, 1960.

The trial court further found-and this finding has been upheld by the First Appellate Court and the High Court that Abdul Rashid definitely remained in India at least till 1963, if not till 1965. Upto 1963, he was directly receiving rent from his tenant, the father of the present plaintiff-appellant, in respect of the suit house. This was held

primarily on the basis of documentary evidence (Ex. A-14/A).

In view of the fact that Qazi Abdul Rashid remained in India I continuously upto 1963, no question of automatic vesting under the I U.P. Ordinance No. 1 of 1949, could arise. That ordinance was not applicable to him at all. For our purpose, only the 1950 Act and the 1954 Act are relevant. It will, therefore, be worthwhile to notice, very briefly, the material provisions of these statutes.

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Clause (d) of Section 2 of the 1950 Act defines "evacuee;" this A definition so far as material, reads: "Evacuee means any persons-

- (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, or
- (ii) who is a resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any part of the territories to which this Act extends, or whose property in any part of the said territories has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorised person, or.. "

(iii) to (iv) are not relevant for this case.

Clause (h) defines "evacuee property" to mean "any property of an 1 evacuee (whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity) and includes any property which has been obtained by any person from an evacuee after the 14th day of August 1947, by any mode of transfer which is not effective by reason of the provisions contained in Section 40 :) but does not include " Sub-section (1) of Section 7 requires that where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property. Sub-section (3) of the Section peremptorily requires the Custodian to notify from time to time by publication in the official Gazette or in such other manner as may be prescribed all p properties declared by him to be evacuee properties under Sub-section (1).

Rule 6 of the Rules framed under the 1950 Act requires that the notice to be served under Section 7(1) on persons interested in the property proposed to be declared evacuee property shall be in Form I.

Section 8 provides, "Any property declared to be evacuee property under Section 7 shall be deem-d to have vested in the Custodian for the State-

- (a) in the case of the property of an evacuee as defined in sub clause (i) of clause (d) of Section 2, from the date on which

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he leaves or left any place in a State for any place outside the territories now forming part of India;

- (b) in the case of the property of an evacuee as defined in sub-clause (ii) of clause (d) of Section 2, from the 15th day of August, 1947; and

(c) in the case of any other property, from the date of the notice given under sub-section (I) of Section 7 in respect thereof. (The rest is not material)."

From a conjoint reading of Sections 7 and 8, it is clear that the making of a declaration after inquiry under Section 7, that the property is 'evacuee property' is a sine qua non for giving the Custodian dominion over the property. If no proceeding is taken under Section 7, there can be no vesting of the property in the Custodian. (See observations in *Fazalbhoy v. Official Trustee of Maharashtra*).

The other point to be noted is that in the case of an 'evacuee' falling under sub-clause(i) of the definition of 'evacuee' that is one, who on account of the things mentioned in that sub-clause, leaves India or has left India on or after August 14, 1947, the vesting will date from the date he leaves India for any outside destination. In the instant case, Qazi Abdul Rashid left India to settle in Pakistan long after August 14, 1947 (in 1963).

Section 9 gives power to the Custodian to take possession of evacuee property which vests in him under Section 8.

Then, there is Section 7A which was inserted by the Administration of Evacuee property (Amendment) Act, 1954 (42 of 1954) with effect from May 7, 1954.

"Notwithstanding anything contained in this Act, no property shall be declared to be evacuee property on or after the 7th day of May 1954:" This is made subject to two Provisions. Clause (a) of the First Proviso saves from the application of this Section any property in respect of which proceeding are pending on the 7th day of May, 1954 for declaring such property to be evacuee property. Clause (b) of the Proviso saves from the bar of this Section property of any person who became an evacuee on or after the 1st day of March, 1947, and who on the 7th day of May, 1954 was resident in Pakistan. The second Proviso lays down that no notice under Section 7 for declaring any property to be evacuee property with reference to Clause (b) of the preceding Proviso shall be issued after the expiry of six months from the commencement of the Administration of Evacuee

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Property (Amendment Act, 1954). Then, there are three Explanations, which are not material for our purpose.

It is clear from the facts concurrently found in the instant case that Qazi Abdul Rashid was throughout residing in India and personally managing the suit property and collecting its rent till 1963. He migrated or went away from India for good sometime in 1963 or thereafter. Therefore, if the Custodian had not taken any proceedings under Section 7 of the 1950 Act to declare the suit property as evacuee property before the 7th day of May 1954, and no such proceedings were pending on May 7, 1954, the property of Qazi Abdul Rashid could not be declared evacuee property under the Act, the power of the Custodian to do so having been terminated by Section 7A.

It was for the plaintiff-appellant to show by producing relevant notifications or other documentary evidence that the Custodian had taken proceedings and declared the suit property to be evacuee property in accordance with the provisions of Section 7 or that such proceedings had been initiated earlier and were pending on the 7th day of May, 1954. Despite ample opportunity granted to the plaintiff, he did not produce any such documentary evidence in the courts below. All that he showed was that the Rehabilitation

Authorities had, purporting to act under the 1954 Act, sold the suit property to him and issued the sale certificate in his favour on April 1, 1969.

Section 24 gives a person aggrieved of an order made under Section 7 by the Custodian a right of appeal. Section 27 confers power of revision on the Custodian-General to revise suo motu or on the application made to him, any order passed by the Custodian if it is not found to be legal or proper.

Sections 28 and 46 bar the jurisdiction of courts. Section 28 reads thus:

"Save as otherwise expressly provided in this Chapter, every order made by the Custodian-General, Custodian, Additional Custodian, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian shall be final and shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding."

Section 46 of the 1950 Act provides:

"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
- (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."

218 The scope of Sections 28 and 46 of the 1950 Act came up for consideration before this Court in Jafran Begum's case (ibid). The facts of that case were that a person who was in possession of a house in India, migrated to Pakistan. Notice was issued to his son under s.7 of the Administration of Evacuee Property Act, 1950, and after hearing him the Deputy Custodian declared the house to be evacuee property. Jafran Begum, who was the mother of the evacuee and on whom the notice under s.7 of the Act was not served, started proceedings before the Custodian, claiming that the owner of the house had executed a will bequeathing the property to her and so the property could not be declared evacuee property. That application was dismissed by the Custodian. When she failed before the authorities constituted under the Act, she filed a suit in the civil court basing her case on the will and prayed for a permanent injunction restraining the authorities from evicting her from the house. On the question of jurisdiction being raised, the High Court held that determination of a complicated question of law relating to title by authorities under the 1950 Act was not final and could be reopened in the civil court, and Section 46 did not bar the civil court's jurisdiction to entertain such a question. After examining the scheme of the 1951 Act, Wanchoo, J., speaking for the Bench constituted by three learned Judges, laid down the law, thus:

"(Where) 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 under S.7 whatever may be the basis of decision, whether issues of factor of law and whether simple or complicated."

(Emphasis supplied)

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"..... 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 Code of Civil Procedure on a combined reading of Ss.4, 28 and 46. (But).. S. 46 or S. 28 cannot bar the jurisdiction of the High Court under Art. 226 of the Constitution."

(Emphasis supplied)

From the crucial words underlined in the above extract, it is clear that even according to the rule of the above decision section 46 will not bar the jurisdiction of the civil court where the Custodian has never declared the property as evacuee property after taking proceedings under Section 7 of the 1950 Act.

A Full Bench of the Allahabad High Court in Khalil Ahmed Khan v. Malka Mehar Nigar Begum(1), held that where the matter as to whether a property is evacuee property or not, has never been adjudicated upon by the Custodian himself but he merely takes action on the basis of the judgment of the court of first instance, without deciding the matter for himself, that judgment being subject to correction by the court of appeal does not become final merely because the Custodian had taken action on the basis thereof. In such a case, the jurisdiction of the civil court of appeal to determine the correctness of an adjudication already made by the civil court is not barred. This decision was noticed by this Court in Jafran Begum (ibid), and it was observed that to some extent, "this case is in line with the view we have taken."

The matter can be looked at from another angle also. Clauses (a), (c) and (d) of section 46 postulate that at the time when the question whether or not a property is evacuee property comes for adjudication the power of the Custodian-General or the Custodian under this Act of 1950 to determine that question is subsisting. That is to say, if at the point of time when the question arises, the power of the authorities constituted under this Act to adjudicate that question stands terminated or extinguished by the operation of Section 7A of 1954, none of the clauses (a), (c) and (d) of section 46 will bar the jurisdiction of the civil court to determine that question which had not been decided by the custodian during the period, he had the power to determine it.

Section 28 has no application to the facts of the instant case because no order made by any of the authorities mentioned in that section is

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being called in question. Section 46, also, does not come in the way because no proceedings under section 7 of the 1950 Act to declare the suit house as evacuee property were taken by the Custodian against Qazi Abdul Rashid. No notification under sub-section (3) of section 7 published in the official Gazette has been placed on the record. Nor was it shown that any proceedings initiated under section 7 of the Act to declare it evacuee property were pending on May 7, 1954, and

the question of saving those proceedings under the proviso to section 7A does not arise.

Qazi Abdul Rashid was throughout a resident of India till 1963 and was personally managing the suit house and collecting rent of it from the tenant. After May 7, 1954, therefore, the Custodian had no jurisdiction under the 1950 Act to declare the suit house as evacuee property. The jurisdiction of the courts below to go into this question was thus not barred by anything in sections 28 and 46 of the 1950 Act.

We, therefore, negative the first contention of the appellant.

Now let us have a look into the relevant provisions of the 1954 Act.

Section 2(c) of the 1954 Act defines "evacuee property" to mean any property which has been declared or is deemed to have been declared as evacuee property under the Administration of Evacuee Property Act, 1950. At this place, it may be recalled that the second part of the definition which contains a deeming provision has no application to the facts of the instant case because Qazi Abdul Rashid was throughout residing in India till his migration to Pakistan in 1963. That is to say, he had not become an evacuee before the repeal of the U.P. Ordinance No. 1 of 1949. This ordinance is not relevant for the purposes of the present case. The first part of the definition, also, is not applicable because the suit house has never been declared as evacuee property under the 1950 Act.

The next provision is to be found in section 12, which reads as follows:

"S. 12. Power to acquire evacuee property for rehabilitation of displaced persons.-

(1) If the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose, being a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation

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to such persons, the Central Government may at any time acquire such evacuee property by publishing in the official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section.

(2) On the publication of a notification under sub section (1), the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.

(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notifications referred to in sub-section (1) in respect of- (a) all evacuee property generally; or (b) any class of evacuee property; or (c) all-evacuee property situated in a specified area; or (d) any particular evacuee property.

(4) All evacuee property acquired under this section shall form part of the compensation pool."

It may be noted that the necessary prerequisite for acquiring property under Section 12 is that it must be 'evacuee property' as defined in section 2(c) of the 1954

Act. In the absence of this essential prerequisite, the Central Government is not competent to acquire that property under this section for throwing it into the compensation pool. This prerequisite or condition precedent, as already noticed, was lacking in the instant case. No notifications published in the official Gazette either under sub-section (I) or sub-section (3) of section 12 appear to have been brought on the record of this case. Our attention was not drawn to any such notifications.

Then, there is section 20 which confers power on the managing officer to transfer any property out of the compensation pool by sale or in any other manner indicated in clauses (b) to (e) of that section. Again, the necessary prerequisite for sale is that the property must have been declared under section 7 of the 1950 Act to be evacuee property by the Custodian or it must be evacuee property under the

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deeming provisions of any law which may be applicable to the case of the evacuee. In other words, only that property which was evacuee property could be acquired under section 12 and form part of the compensation pool which satisfies the definition of "evacuee property" given in section 2(c) of the 1954 Act. If the property was never evacuee property, as defined in section 2(c), it does not legally form part of the compensation pool and, therefore, cannot be disposed of under Section 20 or the Rules framed under this statute.

Then, there are Sections 22, 23 and 24. Section 22 gives a right of appeal to a person aggrieved by an order of the Settlement officer or a managing officer, to the Settlement Commissioner. Any person aggrieved by the order of the Settlement Commissioner/Additional Settlement Commissioner/Assistant Settlement Commissioner or a managing officer has been given a right to prefer an appeal to the Chief Settlement Commissioner under Section 23. But no appeal is competent from any order passed in appeal under Section 22. Section 24 confers the power of revision on the Chief Settlement Commissioner to revise any order of the authorities mentioned in that Section, including that of the managing officer.

Some argument was made by the learned counsel for the appellant that the only remedy of the respondents was to prefer an appeal or revision under the aforesaid provisions of this Act and that, since 1. they did not avail of the same under Section 27, the sale made by the managing officer in favour of the plaintiff-appellant has become final and cannot be questioned in any court. Section 27 reads thus:

"27. Finality of orders.-Save as otherwise expressly provided in this Act, every order made by any officer or authority under this Act, including a managing corporation, shall be final and shall not be called in question in any court by way of an appeal or revision or in any original suit, application or execution proceeding."

It will be seen that Section 27 is not attracted because the plaintiff, who filed the original suit and is now coming before us by way of appeal, is not questioning the finality of the order of the sale alleged to have been made by the managing officer. It is the defendant respondents who are resisting the plaintiff's claim on the ground that the sale is a nullity. It could not be made under this Act of 1954 for the reason that it was never declared evacuee property under Section 7 of the Act and thus never formed part of the compensation pool. The words "under this Act" occurring in Section 27 are significant

They show that those orders which are not made by any officer or

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authority in accordance with the provisions of this Act, but outside the provisions of this Act in excess of jurisdiction, can be called in question in the civil court. It may be noted that the language of Section 27 is not as wide as that of Section 46 of the 1950 Act.

The facts of N.S. Gujral (ibid) were entirely different. There, an Indian citizen held a money decree against a person who, subsequent to the passing of the decree, turned an evacuee. It was held that at no time, the decree-holder had any right whatsoever in the property which vested in the Central Government on the issue of the notification under Section 12. It was further held that though the decree-holder cannot claim to proceed against the property in suit or its income after the date on which it vested in the Central Government by virtue of the notification under Section 12, he can ask the Custodian to pay him out of the moneys lying with him on the date of such vesting if he can satisfy him in the manner provided in Section 10(2)(n) read with Section 10(1) of the 1950 Act. The ratio of that decision has no application to the facts of the pr

The second contention, also, being meritless, is overruled.

For the foregoing reasons, the appeal fails and is dismissed with costs.

Before parting with this judgment, we may note here that at the conclusion of final arguments in this Court, counsel for the appellant represented that his client was making all efforts to search out and produce the Gazette Notification, whereby the suit property was declared and notified as evacuee property by the Custodian under subsection (3) of Section 7 of the 1950 Act. He wanted some time. We therefore, reserved this judgement to give the plaintiff-appellant a last chance to produce such a notification of which the Court could take judicial notice. But, he has failed to produce any such Gazette Notification. Instead, he has produced, what purports to be, a copy of an order, dated January 5, 1951, of the Assistant Custodian. This is not a copy of any Gazette Notification of which judicial notice, without formal proof, could be taken. We, therefore, do not find any good ground to reopen the case and decline the appellant's request for permitting him to produce additional evidence at this very late stage.

N V K.

Appeal dismissed.

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