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Orissa High Court, wanted to argue that the two other businesses, viz. the running of ginning factory and the share business really formed part of the money-lending business and, therefore, all the three businesses should obtain the relief under s. 25 (*4*). What the Orissa High Court held was that if the new business has arisen from the old business, then it may be stated that the new business and the old business constituted only one business and the two businesses were not distinct and separate, and, therefore, both the businesses as one business may be entitled to the relief under s. 25 (*4*). But before us we have a clear and categorical finding that the three businesses of the assessee were distinct businesses and, therefore, it cannot be stated that the relief which was intended for the money-lending business which was carried on by the assessee and which was subjected to tax under the Act of 1918 should be extended to the business of running the ginning factory and the share business which was not in existence and which was not subjected to tax under the Act of 1918. The answer, therefore, to the question put to us will be that the assessee is entitled to the benefit mentioned in s. 25 (*4*) only in respect of his money-lending business. The assessee to pay the costs of the reference.

Attorneys for applicants: *Zaiwalla & Co.*

Attorney for respondent: *N. K. Petigara.*

Answer accordingly.

A. J. P.

ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

ABDUL MAJID HAJI MAHOMED AND ANOTHER APPELLANTS (ORIGINAL PETITIONERS) *v.* P. R. NAYAK, RESPONDENT.*

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Administration of Evacuee Property Ordinance (XXVII of 1949) ss. 2 (d), 7 (1), 10 (2), 26 (1), 28, 43 and 58—Administration of Evacuee Property Act (XXXI of 1950)—Government of India Act, 1935, Seventh Schedule, Concurrent List, Entry 31 (B)—Constitution of India, 1950, arts. 19 (1), (f), 31, 226—Effect of vesting of property in the Custodian—Jurisdiction of the High Court to issue writs and directions—Orders of the custodian in excess of jurisdiction—Validity of the Ordinance.

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* Appeal No. 85 of 1950 Misc. Petition No. 149 of 1950.

The object and purpose of the Legislature in enacting the Adminis-
nagement and administration of evacuee property and to vest the same
tration of Evacuee Property Ordinance is to deal with the custody, ma-
in the Custodian with powers and rights to deal with the same for the purposes of the Ordinance. The legislation is analogous to the legislation enacted in different countries during the war for the management of enemy property. The evacuee is prevented from exercising any rights as an owner in respect of his property. The Ordinance, however, had not provided for the ultimate destination of the property which is taken away from the evacuee and vested in the Custodian. The ultimate destination is left to be determined by any treaties that might be signed by the countries concerned.

Notwithstanding the prohibition contained in ss. 28 and 43 (c) of the Ordinance it is open to a party to challenge the validity of the orders of the Custodian if they either contravene any of the fundamental rights guaranteed to the subject under the Constitution or if they are in excess of the jurisdiction conferred upon him.

The jurisdiction of the High Court to consider any orders passed by the Custodian or any action taken by him would not be barred either under s. 28 or under s. 43 of the Ordinance if the orders passed or action taken are without jurisdiction. Any order passed or any action taken in excess of jurisdiction or in the improper exercise of jurisdiction would not be an order or action contemplated by these two sections.

Further, the orders passed by the Custodian are quasi-judicial orders. Therefore, if those orders are in excess of jurisdiction or are passed in violation of the fundamental principles of justice, then those orders can be corrected by the High Court by the issue of a writ of *certiorari*.

Art. 226 of the Constitution has not only conferred wider powers upon the High Courts than what they possessed before, but has also declared the powers already enjoyed by the High Courts and in so declaring the powers of the High Court and making those powers a part of the Constitution, art. 226 has placed those powers beyond the challenge of the Legislature. It would only be by means of the amendment of the Constitution that these powers of the High Court could be in any way touched. Therefore, to the extent that any legislation seeks to take away the power of the High Court to issue any writ, direction or order contemplated by art. 226, such legislation would be *ultra vires* of art. 226 and if ss. 28 and 43 of the Ordinance are construed to bar the jurisdiction of the High Court to challenge any order or action of the Custodian, however, illegal or without jurisdiction it may be then to the extent that these sections seek to oust the jurisdiction of the High Court to issue the appropriate writs under art. 226, the sections must be considered to be *ultra vires* the Constitution. Therefore, the power of the Court to correct any order made by any executive officer cannot be assailed or challenged by any legislation in view of art. 226 and this power would be exercised by the High Court to correct the orders of the Custodian by a writ of *certiorari* if the orders are found to be in excess of his jurisdiction notwithstanding any provision in the Ordinance or in the Administration of Evacuee Property Act of 1950 seeking to oust the jurisdiction of the High Courts.

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It is also well settled that even if the jurisdiction is excluded, the Civil Courts have the right to examine into the cases where the provisions of the Act have not been complied with or the statutory tribunal has failed to act in conformity with the fundamental principles of judicial procedure.

Shaikh Ahmed v. *Collector of Bombay,*[1] distinguished.

Dewarkhand Cement Co., Ltd. v. *Secretary of State*[2]; *Secretary of State* v. *Mask and Co.*[3] and *Province of Bombay* v. *Hormusji Manekji,*[4] referred to.

It is well settled that in construing the various entries in the seventh schedule a large and liberal interpretation must be placed upon them. Further in order that the power conferred upon the Legislature should be effective, the Courts must assume that all ancillary and subsidiary powers necessary for the purpose of legislating upon the main topic referred to in the entries, have also been conferred upon the Legislature by the Constitution.

The legislative competence of the Legislature to pass the Ordinance must be in the first instance decided with reference to the newly added entry 31 (*B*) in the Concurrent List which runs thus: "Custody, management and disposal of property including agricultural land declared by law to be evacuee property." This entry must be read as containing all ancillary and incidental powers necessary for the purpose of legislating upon this particular subject. It would be impossible for the Legislature to legislate with regard to the custody, management and disposal of evacuee property unless it has also the power to decide and determine what property is to be evacuee property. Therefore, if by the Ordinance, the Legislature has declared what property is evacuee property, it has acted within its legislative competence although entry 31 (*B*) in terms refers to "custody, management and disposal of evacuee property", only.

The Indian Constitution has conferred upon Parliament the residuary legislative powers which were not conferred upon the Central Legislature under the Government of India Act, 1935. Under entry 97 of List I power is now given to Parliament to legislate upon any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. Therefore, unless a subject-matter falls exclusively within the competence of the State Legislature, there can be no doubt as to the legislative competence of Parliament with regard to a subject which falls in the Concurrent List or if not specifically enumerated in List I, then it would fall under the residuary entry 97 in List I.

As the Administration of Evacuee Property Act, 1950, was passed after the Constitution, there can be no doubt about its validity in view of entry 97 in List I. The validity of s. 58 of the Evacuee Act, 1950, which has repealed the Ordinance and has provided for the validation of all acts done under the Ordinance, cannot also be doubted or challenged.

(1) (1949) 51 Bom. L. R. 589.
(2) (1938) 41 Bom. L. R. 297.
(3) (1940) 42 Bom. L. R. 767.
(4) (1947) 50 Bom. L. R. 524, P.C.

The language used in s. 58 of the Evacuee Property Act, is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act but it provides that the orders passed under the Ordinance shall be deemed to be orders passed under this Act as if this Act was in force on the day on which certain things were done or action was taken. Therefore, the object of this section is, as it were, to antedate this Act as if it was in force on the day on which the particular order which is being challenged, was passed. Therefore, even though an order passed under the Ordinance be invalid or illegal or *ultra vires,* such an order would be a valid order when judged by the Act. Therefore, even though the Legislature, may not have the legislative competence to enact the Ordinance, the Evacuee Act being a valid Act, in view of s. 58 of the Act, any order passed under the Ordinance would be a valid order.

Emperor v. *Dantes,*[1] distinguished.

Sir Currimbhoy Ebrahim v. *M. R. Meher,*[2] dissented from.

As far as art. 31 (*1*) of the Constitution is concerned the first important safeguard conferred upon the subject is that he cannot be deprived of his property by any executive act or fiat. It is only by authority of law, that is, by a valid law passed by a Legislature that he can be deprived of his property. Art. 31 (*1*) and (*2*) must be read in conjunction with art. 19 (*1*) (*f*) so that the rights guaranteed by art. 19 (*1*) (*f*) can only be enjoyed provided the citizen is in a position to enjoy those rights and provided those rights can be enjoyed although he has been deprived of his property under art. 31 (*1*) or his property has been acquired or taken possession of under art. 31 (*2*). It would be impossible for a citizen to say that he has a right to hold and dispose of property if that property has been validly taken away from him under art. 31 (*1*) or 31 (*2*). The power given to the State under art. 31 (*1*) is a very drastic power but it is a power which it is necessary to confer upon any State and the State must be armed with such a power to be exercised wisely and under circumstances where its exercise would be absolutely necessary. The Courts must also be careful to see that any deprivation of property by the State is not too easily put in the category of deprivation referred to in art. 31 (*1*) without the very salutary limitations laid down upon its power under art. 31 (*2*). But art. 31 (*2*). does not apply in the case of evacuee property for which there is a specific provision in sub-cl. (5) of art. 31. The effect of this provision is that if the Indian Government takes possession of any property declared by law to be evacuee property, then the conditions laid down in art. 31 (*2*) for the valid taking of such possession would not apply. In other words, the Legislature may pass a law for taking possession of evacuee property without providing for compensation and without such taking possession of being for public purpose. In providing in art. 31 (5) that nothing in art. 31 (*2*) shall affect legislation with regard to evacuee property, it is clear that the Constituent Assembly came to the conclusion that legislation by which evacuees were deprived of their property fell under art. 31 (*2*) and not under art. 31 (*1*). Therefore, when under

(1) (1940) 42 Bom. L. R. 791.

(2) (1950) Mis. No. 122 of 1950, decided by Bhagwati J., on June 30, 1950 (Unrep.).

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art. 31 (*2*) it is permissible for the State to take possession of property without paying compensation, that possession need not be of the same quality and need not possess the same characteristics as when possession is taken by the State and compensation has got to be provided for the same. In the latter case the very idea of compensation carries with it the necessary corollary that the State should have the use and benefit of the property; whereas in the former case when possession is taken without the obligation to pay compensation, the attribute of such possession need not be the beneficial enjoyment of the property by the State or by any other person.

The effect of the Ordinance is not to transfer the title vested in the evacuee as the owner of the property, to the State or any other person. The title of the evacuee remains in statutory suspense. The title is neither destroyed nor extinguished. The title remains in existence but there is only a prohibition against the owner from exercising his rights of ownership until such time as Parliament in its wisdom decides what is ultimately to happen to the evacuee property.

Therefore, the mere fact that under the Ordinance no one has the beneficial use of the property of the evacuee and the property merely remains vested in the Custodian for the purposes of the Act, should not deter the Court from holding that the property is taken possession of under art. 31 (*2*) and that by reason of cl. (*5*) of art. 31 no obligation attaches to the State to pay compensation for taking possession of such property.

The power of disposal given by the Ordinance to the Custodian to transfer in any manner whatever any evacuee property is a reasonable restriction upon the rights of a subject guaranteed under art. 19 (*1*) (*f*) to acquire, hold and dispose of property.

It is always for the Legislature to determine the purpose and object of a particular legislation and if the purpose and object of the legislation are constitutional and not opposed to the fundamental rights conferred by the Constitution, then it is not for the Court to question the policy underlying that legislation or to sit in judgment upon the Legislature as to the desirability of passing a particular legislation.

The function of the Court is to look at the purpose and object of the legislation and then to consider whether the restrictions imposed by it upon the citizen's rights are reasonable or not. If there is a reasonable relation between the purpose of the legislation and the provisions enacted in the legislation, then any restrictions imposed by the provisions must be considered to be reasonable restrictions.

The restrictions imposed by the Ordinance are really necessary and ancillary to the main purpose and object of the Ordinance which is to provide for the administration of evacuee property. The restrictions found in the Ordinance are to protect the possession of the Custodian and to prevent the evacuee from dealing with that property so that that property might be secured and safeguarded until its ultimate destination is determined by Parliament. S. 13 of the Ordinance refers to the property which is vested in the Custodian. There is no bar under this section against an evacuee doing any business or carrying on any profession which entitles him to earn money and acquire property and

the Ordinance does not prevent the evacuee from acquiring property in future nor does it prevent him from entering into any transactions unconnected with the property which has already vested in the Custodian.

Held, therefore, that the constitutionality either of the Ordinance or of the Act could not be successfully challenged. Both the legislations were within the legislative competence of the respective Legislatures which passed them and did not in any way violate any of the fundamental rights guaranteed to the citizens.

Section 7 of the Ordinance requires in the first instance that the Custodian should form an opinion that there is some property which is evacuee property within the meaning of the Ordinance and also to form an opinion that the person whose property he wishes to proceed against is an evacuee within the meaning of the Act. Further, property obtained by a person from an evacuee after August 14, 1947, may also be evacuee property. Having formed the opinion, two conditions have got to be satisfied before the Custodian can issue an order declaring any property to be evacuee property namely, he must give a notice in the prescribed manner to the persons interested in the property and he must hold such inquiry into the matters as the circumstances of the case permit.

These conditions are conditions precedent to the exercise of his jurisdiction and if either of these conditions are not complied with then the order passed under s. 7 (*1*) would be an order without jurisdiction. It is for the Court to consider whether a non-compliance with the mandatory provisions of a statute is merely procedural in character or substantive in nature and there is no doubt that under s. 7 (*1*) the two conditions are not merely procedural in character but are substantive conditions and must be strictly complied with.

Therefore, the notice must specify with sufficient clarity and particularity what are the grounds which have led the Custodian to come to the conclusion that the person against whom action is going to be taken is an evacuee. The Legislature has made the Custodian a quasi-judicial officer and the inquiry a quasi-judicial proceeding.

Held, therefore, that as the notice in question did not mention any grounds whatsoever on which the property of the first petitioner was sought to be declared evacuee property the notice was not in compliance with s. 7 (*1*) of the Ordinance and, therefore, the order of the Custodian was without jurisdiction.

Rule 25 made under the Ordinance prescribes the manner of service or publication of notice, summons or order and one of the modes laid down is by sending the notice, summons or order by registered post. The mode laid down by r. 25 would not be complied with merely by sending a notice by registered post to any address that the Custodian may think proper. When a rule prescribes the service of a summons by registered post, it implies that the service must be made at the proper address of the person to be served and this rule casts an obligation upon the Custodian if he serves a notice by registered post to make all reasonable enquiries to ascertain the proper address of the person whom he chooses to serve by registered post.

In the present case the notices issued against the first petitioner and the other shareholders were returned undelivered by the postal authorities with the endorsement "left without particulars and not known" and thus none of the shareholders received any notice nor given a hearing. The order made against the first petitioner was, therefore, made *ex parte* and without giving him a hearing.

Held, therefore, that the order against the first petitioner was passed in violation of the fundamental principles of natural justice and, therefore, the order and the notification both dated March 28, 1950 made by the Custodian were bad to the extent that they affected the shares of the first petitioner.

In such a case where the Court finds that a fundamental principle of justice has been violated, the Court will not refuse to issue a writ merely on the ground that there is an alternative, adequate remedy in existence, viz., an appeal to the Custodian General.

There Lordships, therefore, set aside the order and notification both dated March 28, 1950 to the extent that they affected the first petitioner, and granted a declaration that the shares of the first petitioner had not vested in the Custodian.

Held, also that under s. 10 (*2*) (*l*) the Custodian had power to issue a requisition to the directors of the Second Petitioner Company, namely, Ahmed Abdul Karim Bros., Ltd. to call an extraordinary general meeting to make certain additions and alterations in the articles of association of the Company.

The mere vesting of the shares of the Company in the Custodian did not bring an end to the Company or destroy the entity of the shareholders. The shareholders continued to remain the registered shareholders of the Company and the Custodian was only given the right of exercising the rights of the shareholders.

Chintaman Rao v. *State of Madhya Pradesh,*[1] followed.

Khurshed Mody v. *Rent Controller, Bombay*[2] and *Rashid Ahmed* v. *Municipal Board Kairana,*[3] relied upon.

The second petitioner was a private limited company incorporated on July 14, 1933 with a share capital divided into 44,149 shares of Rs. 100 each. There were 35 shareholders including the first petitioner who held 2,715 shares. The Company held property in Bombay and Thana.

On October 7, 1949 two notifications were issued by the Deputy Custodian of Bombay one under s. 4 (*2*) of the Bombay Evacuees (Administration of Property) Act (Bom. Act XXIV of 1949) vesting the property of the second petitioner company in the custodian and the second notification under s. 6 (*1*) of the same Act dealing with the possession and control of that property.

(1) [1950] S. C. R. 759.
(2) (1946) 48 Bom. L. R. 565.
(3) [1950] S. C. R. 566.

On October 14, 1949, two similar notifications were issued by the Deputy Custodian of Evacuee Property of Thana relating to the property of the second petitioner company in Thana.

On December 6, 1949 the company appealed to the additional Custodian under s. 24 of Ordinance No. XXVII of 1949 which had replaced the Bombay Act on October 18, 1949. This appeal was heard by the Custodian on March 2, 1950.

On March 3, 1950 the Custodian issued the following notice to the share holders of the second petitioner company.

Whereas record of the proceedings of the Deputy Custodian of Evacuee Property, Thana, and the Deputy Custodian of Evacuee Property, Bombay, in respect of the properties of Messrs. Ahmed Abdul Karim Bros. Ltd., at Ambernath, and Bombay, is before me.

And whereas I consider it necessary to revise or modify the orders passed therein in exercise of powers conferred on me under sub-s. (*i*) of s. 26 of the Administration of Evacuee Property Ordinance No. XXVII of 1949.

Now, therefore, I, P. R. Naik, I. C. S., Custodian of Evacuee Property, Bombay, hereby call upon you to appear and show cause with all material evidence why orders should not be passed declaring you an evacuee under cls. (*i*) (*ii*) and (*iii*) of s. 2 (*d*) of the Administration of Evacuee Property Ordinance of 1949 and all your properties as evacuee property under the provisions of the said Ordinance.

The hearing is fixed before me, Secretariat Building, 3rd floor, on the 17th day of March 1950 at 11-30 a. m.

On March 28, 1950 the Custodian decided the appeal holding that the notifications issued by the Deputy Custodians of Bombay and Thana were bad and he gave the following judgment:

This is an appeal from the orders of the Deputy Custodian, Bombay, dated October 7 and 12, 1949, and the orders of the Deputy Custodian. Thana, dated October 14 and 25, 1949, notifying certain properties of the appellant company as evacuee property and assuming control over and possession of the same under the Bombay Evacuee (Administration of Property) Act, 1949 (now repealed) since property declared to be evacuee property under that Act is deemed to have been so declared under the Central Ordinance XXVII of 1949, the appellant Company has come in appeal under the provisions of the said Ordinance.

The only point urged in the appeal is that a joint stock company as such cannot be treated as an evacuee and that, therefore, its property cannot be declared as evacuee property. It is, therefore, contended that the orders referred to above are bad in law and should be set aside. I find that this contention must be upheld and that the orders are technically defective.

It appears from the record of the proceedings before the two Deputy Custodians that there was definite information that almost all the share-

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holders of the company had left for Pakistan after the partition and are now residents of that country. Against this background, I infer that the orders notifying the properties of the company as evacuee property were really intended to declare the properties of the shareholders as evacuee property; and the fact that the company as such could not be deemed to be an evacuee was not properly recognised by the Deputy Custodian. The illegality or impropriety of any orders passed can, however, be put right by a Custodian under s. 26 (*1*) of the Ordinance. Accordingly, a notice was issued by me to the 35 shareholders of the company on March 3, 1950, notifying them of my intention to proceed under s. 26 and asking them to appear before me on March 17, 1950, and show cause why order should not be passed declaring each of them as evacuee under cls. (*i*) (*ii*) and (*iii*) of s. 2 (*d*) of the Ordinance XXVII of 1949, and his or her property as evacuee property under the provisions of the said Ordinance. The second portion of this notice is in terms analogous to a notice under s. 7 (*1*) of the Ordinance. These notices were sent by registered post, as prescribed by r. 25 (*3*) of the rules framed under the Ordinance to the shareholders at their addresses as given in the Annual List and summary of shares made up to December 30, 1949, and filed by the company on January 16, 1950. All the notices were returned undelivered by the postal authorities with the endorsement "left without particulars" and "Not known." All the shareholders have thus been properly served with notices as prescribed by law.

There is positive evidence on record to show that a very large number of the shareholders have left their original homes in Bombay or Kathiawar after the partition on account of civil disturbances, and the fear of such disturbances, and have settled down in Pakistan. This undoubtedly explains the non-delivery of the notices sent. Since the shareholders are all closely related members of a family, I must assume, in the absence of any proof to the contrary, that the few remaining shareholders, barring one, about whose whereabouts there is no clear information, are also in Pakistan, having left India in similar circumstances. On this evidence, I am satisfied that 34 of the shareholders of the company, that is all except one, referred to earlier, are evacuees under cls. (*i*) and (*ii*) of sub-s. (*d*) of s. 2 of the Ordinance. I, therefore, order that they may be so declared and that the property belonging to each of them, be declared as evacuee property under the provisions of the Ordinance. The one remaining shareholder, Abdul Majid Haji Mahomed, is now in Bombay. He has come to India on a multi-journey permit which he seems to have obtained by declaring himself as Pakistani. He, too, must have gone to Pakistan earlier and returned on this permit on the basis of a declaration of Pakistani domicil. On this ground, he can be properly held to be an evacuee under s. 2 (*d*) (*i*) of the Ordinance. Incidently, the multi-journey permit has since been cancelled, and he is now in India without any authority.

In the result, I order that the notifications dated October 7 and 12, 1949, issued by the Deputy Custodian, Bombay, and the notifications dated October 14 and 25, 1949, issued by the Deputy Custodian, Thana, be set aside. The necessary notifications under s. 7 (*3*) in respect of the property of the 35 shareholders are being issued.

On the same day i.e. March 28, 1950 the Custodian issued the following notification :—

In supersession of the Notification No. ADM. 240/148 dated October 7, 1949, and No. ADM 240/148 dated October 12, 1949, issued by the Deputy Custodian, Bombay, and Notifications Nos. 278 of 1949 and 279 of 1949, dated October 14, 1949, and Nos. 311 of 1949 and 312 of 1949, dated October 25, 1949, issued by the Deputy Custodian, Thana, notifying the properties of Messrs. Ahmed Abdul Karim Bros. Ltd., in Bombay and at Ambernath, as evacuee property, and assuming control over and possession of the same, the Custodian for the State of Bombay, in pursuance of sub-s. (3) of s. 7 of the Administration of Evacuee Property Ordinance, 1949, is pleased to notify for general information the list of the evacuee properties specified in the Schedule annexed hereto, which have vested in him.

The schedule to the notice specified the names of 35 shareholders in petitioner No. 2 company together with the number of shares held by each one of them.

On April 4, 1950 the Custodian issued a requisition upon the directors of the second petitioner company as follows :—

Re: Requisition to call an Extraordinary General Meeting.

By virtue of the vesting in me of the shares of the members (as per particulars attached hereto) of your company under the provisions of the Administration of Evacuee Property Ordinance, 1949, *vide* Notification, dated March 28, 1950, and in exercise of the powers conferred on me by sub-s. 2 (*l*) of s. 10 of the said Ordinance, I hereby request you to call an Extraordinary General Meeting under art. 40 of the articles of association of the Company for considering the following special resolution which I propose to move:

"Resolved that the Articles of Association of the Company be amended as follows:—

(1) Delete Article 70 and substitute, therefore, the following new article:

"Save as provided below the qualification of a Director shall be not less than seven hundred and fifty ordinary shares in the Company held in his own right and not jointly with any other person. Every such Director may act before acquiring his qualifications but shall acquire the same within two months after the registration of the Company. A governing Director need not hold the qualification shares."

(2) Delete Article 74 and substitute, therefor, the following new Article:—

"The Custodian of Evacuee Property, Bombay (hereinafter called 'the Custodian') shall be entitled to appoint two Directors who shall be the Governing Directors of the Company and each of them shall continue to be a Governing Director until he resigns, dies, or is removed from office by the Custodian. The Custodian shall have the power to fill in the vacancies amongst the Governing Directors."

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(3) Delete Article 75 and substitute, therefore, the following new Article:

"Forthwith in the appointment by the Custodian of the Governing Director the Government and control of the Company shall be divested from the other Directors if any and shall become vested in the Director or Directors appointed by the Custodian, and they or he may exercise all the powers, authorities and discretions in the Directors."

(4) Delete Article 80.

(5) In Article 81 line 1 after the words 'Subject to the provisions of Articles 73 to 79 above' add the words 'and to the supervision and control of the Custodian.'

(6) At the end of cl. (3) in Article 82 add the following proviso:—

"Provided that the powers under this clause shall not be exercised without the previous sanction of the Custodian."

(7) Delete Article 83 and substitute therefor the following article:—

"Subject to the provisions of Articles 85 and 74 at the ordinary meetings all Directors except the Permanent or Governing Directors shall retire from office. A retiring director shall retain his office until his successor is elected."

(8) in Article 100 line 1 after the words 'the Directors may' add the words 'with the previous sanction of the Custodian.'

On April 18, 1950 the petitioners Nos. 1 and 2 filed this petition challenging the orders passed by the Custodian as being illegal and *ultra vires.*

The petition was heard by Shah J. who held that the Bombay Evacuee (Administration of Property) Act XXIV of 1949 and the Administration of Evacuee Property Ordinance No. XXVII of 1949 were not *ultra vires*; that the said Act and the Ordinance were also not inconsistent with the provisions of the Constitution in so far as they conferred power and authority upon the Custodian to declare property to be evacuee property and to vest the property in the Custodian without provision for compensation being granted. His Lordship further held that it was not open to the Court by reason of s. 46 of the Administration of Evacuee Property Act to question the legality of any action taken by the Custodian and accordingly dismissed the petition.

The petitioners appealed.

M. L. Maneksha with *M. M. Desai, K. S. Cooper* and *S. K. Desai,* for the appellant.

H. M. Seervai with *C. K. Daphtary*, Advocate-General, for the respondent.

H. M. Seervai for *M. C. Setalvad*, Attorney-General.

CHAGLA C. J. This appeal arises out of petition filed to challenge certain orders passed by the Custodian of Evacuee Property. The facts briefly stated leading up to the petition are that the second petitioner, which is a limited company, was incorporated on July 14, 1933, as a private limited company with a share capital divided into 44,149 shares. The number of shareholders was 35 and the first petitioner is a shareholder of this limited company with a holding of 2,715 shares. On October 7, 1949, two notifications were issued by the Deputy Custodian of Bombay, one under s. 4 (*2*) of Bombay Act XXIV of 1949 vesting the property of the second petitioner company in the Custodian, and the second notification under s. 6 (*1*) of the same Act dealing with the possession and control of that property. On October 14, 1949, two notifications were issued by the Deputy Custodian of Evacuee Property of Thana, one again under s. 4 (*2*) and the other under s. 6 (*1*) also relating to the property of the second petitioner. On December 6, 1949, the second petitioner appealed to the Additional Custodian under s. 24 of Ordinance No. XXVII of 1949 which had replaced the Bombay Act on October 18, 1949. This appeal was heard by the Custodian on March 2, 1950, and on March 3, 1950, the Custodian directed that notices be issued to the shareholders of the second petitioner company. These notices were issued in exercise of the powers of revision conferred upon the Custodian under s. 26 (1) of Ordinance No. XXVII of 1949. These notices called upon the shareholders to show cause why orders should not be passed declaring them evacuees under cls. (*i*), (*ii*) and (*iii*) of s. 2 (*d*) of the Ordinance and all their property be declared evacuee property. On March 28, 1950, an order was passed by the Custodian on the appeal preferred by the company holding that the orders of the Custodian and the Deputy Custodian were bad and those orders were set aside. On March 28, 1950, a notification was issued by the Custodian under s. 7 (*3*) of the Ordinance and by this notification the Custodian notified the evacuee properties specified in the schedule as having vested in him under that section, and the properties notified were the shares of all the 35 shareholders of the company including obviously the shares of the first petitioner. On April 4, 1950, the Custodian issued a requisition under s. 10 (*2*) (*l*) of the Act upon the Directors of the company requesting them to call an extraordinary general

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meeting of the company under art. 40 of the articles of association to consider a special resolution which the Custodian proposed to move at that meeting. By the petition the petitioners challenged the notification issued by the Custodian vesting the shares of the shareholders in the Custodian and also the requisition issued by the Custodian under s. 10 (2) (l) of the Act. The petition came before Mr. Justice Shah who dismissed the petition. Before us the orders passed by the Custodian have been challenged on various grounds. In the first place it is contended that the orders were issued under a piece of legislation which was passed by the Legislature without having legislative competence. The orders are also challenged on the ground that the legislation in question is unconstitutional as violating the fundamental rights guaranteed to the subject by our Constitution. The orders are further challenged on the ground that they are in excess of jurisdiction conferred upon the Custodian and also as violating the fundamental principles of natural justice.

Before these points can be considered, it is necessary to look at the scheme of the Ordinance under which the orders challenged were issued. We are not concerned in this appeal with the Bombay Act because the orders issued by the Custodian and the Deputy Custodian against the second petitioner were held to be bad by the Custodian himself. The orders now challenged are those issued under the Ordinance, and therefore what is necessary to be considered is the scheme of the Ordinance. It might be stated that this Ordinance was replaced by an Act of the Union which came into force on April 7, 1950, being Act XXXI of 1950, and substantially the Act reproduces the provisions contained in the Ordinance. Now the object and purpose of the legislation is stated in the preamble as being.

"Whereas an emergency has arisen which makes it necessary to provide for the administration of evacuee property and for certain matters connected therewith."

Then s. 2 of the Ordinance deals with definitions, and the important definition is one of an "evacuee". The definition falls under three parts. The first part deals with a person 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 March 1, 1947, left, any place in a province for any place outside the territories forming part of India. The second category consists of any

person who is 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 Ordinance 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. And the third category consists of persons who have, after August 14, 1947, acquired by way of allotment or by means of unlawful occupation or other illegal means any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan. Then we have the definition of "intending evacuee" with which we are not concerned for the purpose of this appeal. Then we have the definition of "evacuee property" which is defined as any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity), and includes any property—(1) which has been obtained by any person from an evacuee after August 14, 1947, by any mode of transfer, unless such transfer has been confirmed by the Custodian, or (2) belonging to any person who, after the commencement of this Ordinance, does any of the acts specified in cl. (*e*) of s. 2, or in which any such person has any right or interest, to the extent of such right or interest. The acts specified in cl. (*e*) are the acts which would make a person an intending evacuee. Then certain properties are excluded from this definition with which we are not concerned. Then we have s. 7 which confers the power upon the Custodian to declare certain property as evacuee property. Sub-section (*1*) provides that where the Custodian is of the opinion that any property is evacuee property within the meaning of the Ordinance, then he may pass an order declaring any such property to be evacuee property, provided he causes notice thereof to be given in such manner as may be prescribed to the persons interested and he holds such inquiry into the matter as the circumstances of the case permit. Then s. 8 deals with the vesting of evacuee property in the Custodian, and any property which is declared to be evacuee property under s. 7 vests in the Custodian. Section 9 gives the power to the Custodian to take possession of evacuee property which is vested in him. Section 10 deals with the powers and duties of the Custodian generally. Sub-section (*1*) gives wide powers to the Custodian to take such measures as he considers necessary or expedient for the purposes of securing, administer-

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ring, preserving and managing any evacuee property which has vested in him, and, for any such purpose as aforesaid, do all acts and incur all expenses necessary or incidental thereto. Then sub-s. (*2*), without prejudice to the generality of the powers conferred under sub-s. (*1*), indicates various specific powers which are conferred upon the Custodian, and the important ones to notice are those under sub-cl. (*1*) which provides that where the property vesting in the Custodian consists of share or shares in a company, the Custodian, notwithstanding anything to the contrary contained in the Indian Companies Act or the articles of association of the company, may exercise the same rights in the matter of making a requisition for the convening of a meeting as the evacuee shareholder himself would have done. Therefore, in effect, under this sub-clause the rights of the shareholder for the purpose of convening a meeting are made exercisable by the Custodian in whom the shares have vested, and it is under this power that the Custodian issued the requisition which has been challenged in this petition. Then sub-cl. (*n*) gives the power to the Custodian to pay to the evacuee or to any member of his family or to any other person as in the opinion of the Custodian is entitled thereto, any sums of money out of the funds in his possession; and sub-cl. (*c*) empowers him to transfer in any manner whatsoever any evacuee property, notwithstanding anything to the contrary contained in any law or agreement relating thereto. Then s. 13, sub-s. (*1*), provides that any amount due to any evacuee in respect of any property which is vested in the Custodian or in respect of any transaction entered into by the evacuee, shall be paid to the Custodian by the person liable to pay the same; and sub-s. (*2*) provides that any payment made otherwise than in accordance with sub-s. (*1*) would not be a proper discharge of the person making the payment. Section 15 imposes an obligation upon the Custodian to maintain accounts of the property vested in him. Section 16 deals with restoration of property and it provides that the property may be returned to the evacuee provided the evacuee produces in support of his application for restoration a certificate from the Central Government or from any person authorised by it in this behalf to the effect that the evacuee property may be so restored if the applicant is otherwise entitled to it. Then Chapter V, which contains ss. 24 to 28, deals with appeals, review and revision. The scheme of s. 24 is that when the original order has been passed by a Deputy or Assistant Custodian, an appeal lies to the Custodian, and when the original order

has been passed by the Custodian, Additional Custodian or Authorised Deputy Custodian, an appeal lies to the Custodian General, and there is a special provision with regard to an appeal when a person is declared to be an evacuee within the meaning of s. 2 (*d*) (*iii*) and the person is aggrieved by that decision or when the property is declared to be evacuee property within the meaning of s. 2 (*f*) (2). Under s. 25 appeals that arise from a decision under sub-cl. (*iii*) of cl. (*d*) of s. 2 or under sub-cl. (2) of cl. (*f*) of s. 2 lie to the District Judge designated by the Provincial Government. Then s. 26 gives the power of review or revision to the Custodian, Additional Custodian or Authorised Deputy Custodian and the power of review or revision consists in calling for the record of any proceeding under the Ordinance which was pending before or has been disposed of by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any orders passed in the said proceeding, and it confers the jurisdiction upon the Custodian to pass such order in relation thereto as he thinks fit. It also provides that the Custodian will not pass any order under this sub-section prejudicial to any person without giving such person a reasonable opportunity of being heard. Similar powers of revision are also vested in the Custodian General under s. 27. Section 28 makes the orders passed final and declares that they shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding. Chapter VI deals with penalties and procedure. Chapter VII deals with miscellaneous matters, and s. 43 bars the jurisdiction of civil Courts in certain matters, and by sub-cl. (*c*) no Court shall have jurisdiction to question the legality of any action taken by the Custodian General or the Custodian under this Ordinance. Section 53 confers power upon the Central Government to make rules to carry out the purposes of the Ordinance.

Now looking to the various provisions of this Act, it is clear that the object and purpose of the Legislature in enacting this Ordinance was to deal with the custody, management and administration of evacuee property. The evacuee was to be prevented from exercising any rights as an owner in respect of his property, and the property was to vest in the Custodian. But the property was not to vest in him as an owner with the rights of an owner; it was to vest in him for the purposes of the Ordinance ; his powers and rights were confined to the provisions contained in the Ordinance itself. A further significant

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feature of the Ordinance that has to be noticed is that the Ordinance did not provide for the ultimate destination of the property which was taken away from the evacuee and vested in the Custodian. Although s. 16 provided for restoration of property, that was only in special cases referred to in that section. The legislation is very analogous to the legislation enacted in different countries during the war. When the provision was made for the appointment of Custodian of enemy property, the property of the enemy vested in the Custodian and no provision was made for the ultimate destination of that property. The ultimate destination was left to be determined by any treaties that might be signed by countries at war.

The question that arises *in limine* is whether in view of s. 43 (*c*) it is open to the Court to question the legality of any action taken by the Custodian under the Ordinance. There can be no doubt that what the petitioner is doing is to question the legality of the action taken by the Custodian in vesting his property and also in issuing directions relating to that property. Mr. Justice Shah took the view that the jurisdiction of the Court was barred under this section. It is clear that whether under s. 28 or under s. 43, the jurisdiction of the Court to consider any orders passed by the Custodian or any action by him would not be barred if the orders passed or the action taken was without jurisdiction. It is only with regard to orders passed under the Ordinance or the action taken under the Ordinance that the jurisdiction of the Court is taken away. But if a party succeeds in establishing that the action taken or the orders passed were outside the purview of the Ordinance, then those would not be the orders or the action taken within the meaning of s. 28 or 43. Any order passed or any action taken in execess of jurisdiction or in the improper exercise of jurisdiction would not be an order or action contemplated by these two sections. It is also to be borne in mind, and it is not disputed by Mr. Seervai, on behalf of the State, that the orders passed which are the subject-matter of the petition are *quasi*-judicial orders and that the Custodian in passing those orders was exercising *quasi*-judicial functions. Therefore, if those orders were in excess of jurisdiction or were passed in violation of the fundamental principles of justice, then those orders could be corrected by the issue of a writ of *certiorari* by this Court. In this connection it is also necessary to bear in mind art. 226 of the Constitution. That article not only confers wider powers upon the High Courts, but also declares the powers already enjoyed by the High Courts. But art. 226 in declaring

the powers of the High Court and making those powers a part of the Constitution, has placed those powers beyond the challenge of the Legislature. Whereas before the enactment of the Constitution the powers of the High Court to issue various writs could have been affected or modified by the appropriate Legislature, now inasmuch as these powers are embodied in the Constitution and form part of the Constitution they cannot be altered or affected by any legislation. It would only be by means of the amendment of the Constitution that these powers of the High Court could be in any way touched. Therefore, to the extent that any legislation seeks to take away the power of the High Court to issue any writ, direction or order contemplated by art. 226, that legislation would be *ultra vires* of art. 226, and therefore even if s. 28 and s. 43 are construed to bar the jurisdiction of the civil Court to challenge any order or action of the Custodian, however illegal or without jurisdiction, to the extent that these sections seek to oust the jurisdiction of the High Court to issue the appropriate writs under art. 226, the sections must be considered to be *ultra vires* of the Constitution. Therefore, the power of the Court to correct any order made by any executive officer, which power emanates from art. 226, cannot be assailed or challenged by any legislation, and therefore to the extent that the petitioner seeks to correct the orders of the Custodian by a writ of *certiorari,* the power of the High Court which now arises under art. 226 must be exercised if the petitioner is entitled to the writ notwithstanding any provision in the Ordinance or in the subsequent Act which seeks to oust the jurisdiction of the civil Courts

It has been contended by Mr. Seervai that an order which is made final by a legislation cannot be challenged even though in excess of jurisdiction, if the order was made *bona fide* by the officer empowered to pass the order although on a mistaken view of the law which gave him the power. According to Mr. Seervai, it is only when the officer acts *mala fide* or dishonestly that his order can be challenged in a Court of law. That contention appears to me to be contrary to what is now well established as the ambit within which a Legislature can make orders of officers conclusive and final. As I said before, that ambit must be restricted to orders passed with jurisdiction. That ambit cannot be extended to cover orders which are found to be without jurisdiction or in excess of jurisdiction. In support of his argument Mr. Seervai has relied upon a decision of a division bench of this Court in *Shaikh Ahmed* v. *Collr. of*

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Bombay.[1] The Court there was dealing with s. 226 of the Government of India Act, which excludes the jurisdiction of the Original Side of the High Court in revenue matters, and that section provides that until otherwise provided by the Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force ; and what was held by the division bench, following a long line of authorities of the Privy Council, is that even though a revenue officer may act contrary to the law, if his action is based upon an erroneous view of what the law is and that view is arrived at *bona fide,* then his action cannot be challenged on the Original Side of the High Court, although it is not an action according to law ; and the argument based by Mr. Seervai on this decision is that although the action of a revenue officer may be without jurisdiction in being contrary to law, still that act cannot be challenged in a civil Court by reason of s. 226 which ousts the jurisdiction of the High Court. Now, in the first place, s. 226 does not make the orders of the revenue officer final in the sense in which the orders of the Custodian are made final under the Ordinance, but it expressly excludes the jurisdiction of the High Court to deal with revenue matters, and as pointed out by Mr. Justice Rangnekar in *Dewarkhand Cement Company, Limited* v. *Secretary of State,*[2] s. 226 is a protective provision for the protection of revenue authorities and the words used in that section must not be given the literal and etymological meaning, and it is rightly pointed out by the learned Judge that if that section was construed to mean that only those acts of revenue officers were protected which were according to revenue law, then s. 226 would afford no protection whatever. The whole object and purpose of s. 226 was not to permit the Original Side of the High Court to deal with revenue matters and to deal with orders passed and action taken by revenue officers. Therefore this decision is no authority for the proposition for which Mr. Seervai is contending. As against that there is the observation of the Privy Council in *Secretary of State* v. *Mask & Co.,*[3] that it is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil

(1) (1949) 51 Bom. L. R. 589.
(2) (1938) 41 Bom. L. R. 297.
(3) (1940) 42 Bom. L.R. 767, P. C.

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. Further, in *Province of Bombay* v. *Hormusji Manekji,*[1] their Lordship observed (p. 528) :—

> "The appellant maintains that the subject-matter of the present suit is an objection to the amount, incidence or mode of assessment of land revenue, within the meaning of s. 4 (b), but Sir Cyril Radcliffe, on behalf of the appellant, rightly conceded that the civil Courts have jurisdiction to determine a question as to excess of the statutory powers conferred by the Code."

Therefore it is clear that notwithstanding s. 28 and s. 43 (c) it is open to the petitioner to challenge the validity of the orders of the Custodian, if they either contravene any of the fundamental rights guaranteed to the subject under the Constitution or they are in execess of the jurisdiction conferred upon him to pass the orders under the Ordinance.

The next question that arises is whether the Legislature had legislative competence to enact this particular Ordinance. An Act was passed by the Indian Legislature on August 18, 1949, being Act IV of 1949, by which a new entry was added in the Concurrent List, being entry 31 (B), and that entry was to the following effect: "Custody, management and disposal of property including agricultural land declared by law to be evacuee property," and the competency of the Legislature to enact the Ordinance must be in the first instance decided with reference to this entry. What is contended by the petitioner is that it is only with regard to property which is declared by law to be evacuee property that the Legislature had the competence to legislate with regard to custody, management and disposal of that property. But what is urged is that there is no entry in any of the parts of the 7th Schedule which entitles the Legislature to pass any law declaring any property to be evacuee property. It is well settled that in construing the various entries in the schedule a large and liberal interpretation must be placed upon them. Further, in order that the power conferred upon the Legislature should be effective, the Courts must assume that all ancillary and subsidiary power necessary for the purpose of legislating upon the main topic referred to in the entries was also conferred upon the Legislature by the Constitution. The Legislature being sovereign within its own sphere, the Court must assume that Parliament

[1] (1947) 50 Bom. L. R. 524, P. C.

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when it gave the competence to the Legislature to legislate upon a particular topic gave that competence to a sovereign authority, and therefore that sovereign authority carried with it all powers necessary and incidental for the purpose of effectively legislating upon the particular topic mentioned in any entry. Therefore when power was conferred upon the Legislature to legislate upon custody, management and disposal of property declared by law to be evacuee property, we must read in that entry all ancillary and incidental powers necessary for the purpose of legislating upon this particular subject. It would be impossible for the Legislature to legislate with regard to the custody, management and disposal of evacuee property unless it had the power to decide and determine what property was to be evacuee property, and therefore although the power to declare what property was to be evacuee property is not in terms conferred upon the Legislature by entry 31 (B), that power is incidental to the exercise by the Legislature of the power conferred to legislate upon the topic referred to in entry 31 (B). Therefore, if by the Ordinance the Legislature has not only legislated with regard to the custody, management and disposal of evacuee property, but it has also by that very piece of legislation declared what property is evacuee property, it was acting within its legislative competence.

There is one other aspect of the matter which also requires consideration. Act XXXI of 1950 was passed by Parliament after the Constitution was enacted, and as far as the legislative competence of Parliament is concerned, the new scheme adopted by the Constitution confers upon Parliament the residuary legislative powers which were not conferred upon the Central Legislature under the Government of India Act. Under entry 97 of List I power is given to Parliament to legislate upon any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. Therefore, unless a subject-matter falls exclusively within the competence of the State Legislature, there can be no doubt as to the legislative competence of Parliament with regard to a subject which would either fall in the Concurrent List or if not specifically enumerated in the first List, would undoubtedly fall in entry 97 to which I have just referred. With that legislative competence Parliament by s. 58 of this Act repealed the Ordinance No. XXVII of 1949 and in repealing the Ordinance it provided:—

"The repeal by this Act of the Administration of Evacuee Property Ordinance 1949 (XXVII of 1949) shall not affect the previous operation

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thereof, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under that Ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the day on which such thing was done or action was taken."

It is not disputed that Parliament had the power to validate orders passed under the Ordinance even though the Legislature had no legislative competence to pass the Ordinance. The only question is whether in enacting this section Parliament has exercised their power. On the one hand it is contended that the object of this section was not to validate orders which were *ultra vires* or illegal. On the other hand it is contended that the object of this Act was to validate all orders which would have been valid if they had been made under this Act and if this Act had been in operation at the date when these orders were passed. The language used in s. 58 is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act, but it provides that the orders passed under the Ordinance shall be deemed to be orders under this Act as if this Act were in force on the day on which certain things were done or action was taken. Therefore, the object of this section is, as it were, to antedate this Act so as to bring it into force on the day on which a particular order was passed which is being challenged. In other words, the validity of an order is to be judged not with reference to the Ordinance under which it was passed, but with reference to the Act subsequently passed by Parliament. Therefore if the order was a valid order judged by the Act, then its validity must be upheld although it was invalid or illegal or *ultra vires* if judged with reference to the Ordinance. Therefore, even though the Legislature may not have the legislative competence to enact the Ordinance, if the Parliament had the legislative competence to pass the subsequent Act, then the invalidity of the order under the Ordinance resulting from the lack of legislative competence in the Legislature would not affect the validity of the order passed.

Mr. Maneksha has drawn our attention to a judgment of a Full Bench of this Court in *Emperor* v. *Dantes.*[1] There a notification issued by the Government of Bombay under the Bombay Abkari Act, 1878, was held by the High Court to be *ultra vires* and of no effect. Immediately thereafter the Provincial

[1] (1940) 42 Bom. L. R. 791 S. B.

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Legislature passed an amendment which provided that any rule, order or notification made or issued under the Abkari Act, before the commencement of that Act shall be deemed to have been made or issued under the said Act as amended by the Act being passed by the Legislature, and the contention put forward was that the notification, although held to be *ultra vires* and of no effect, was cured by the amending Act. That contention was rejected by the Full Bench. What is to be noticed is the difference in language in the enactment passed by the Provincial Legislature there and the Act passed by Parliament here. All that the Provincial Legislature enacted in the case before the Full Bench was that the orders and notifications passed under the old Act shall be deemed to have been passed under the new Act and the Legislature stopped there, whereas here the Legislature has gone much further and has given, as it were, a retrospective effect to a piece of legislation which it was passing and has in terms provided that any orders previously passed must be judged with reference to the subsequent legislation and not in reference to the legislation in existence at the time when the orders were passed. Therefore, in my opinion, the Full Bench decision, on which Mr. Maneksha relies, does not help us to construe s. 58 of the Act which is in very different language from the language of the amending Act in the Full Bench case.

I should also like to say that I do not find myself in agreement with the view taken by Mr. Justice Bhagwati in *Sir Currimbhoy Ebrahim* v. *M. R. Meher*,[1] with regard to the interpretation of entry 8 in List III. It was contended, although it is not wholly necessary to consider it now, that both the Bombay Act and the Ordinance may be justified with reference to this entry which is in the following terms: "Transfer of Property other than agricultural land; registration of deeds and documents." The view taken by Mr. Justice Bhagwati was that "transfer of property" in entry 8 must be confined to the expression "Transfer of Property Act," and therefore the legislative competence of the Legislature under entry 8 was to deal with matters which arise out of the Transfer of Property Act. In other words, the competence was confined to dealing with immoveable property with which the Transfer of Property Act deals and also to deal with transfer as understood by that Act. I see no warrant whatever to restrict and confine the language of entry 8 which is very wide to the

[1] (1950) Misc. No. 122 of 1950, June 30, 1950 (unrep.).

narrow compass within which the learned Judge has attempted to confine it. Whenever any entry in the Government of India Act seeks to refer to a particular Act, the entry says so. For instance, we have the Code of Civil Procedure mentioned in various entries, we have the Code of Criminal Procedure mentioned in various entries, and if the intention of Parliament was to confer legislative competence under entry 8 upon the Legislature only with regard to matters arising out of the Transfer of Property Act, there is no reason why Parliament should not have said so in clear language. Parliament was aware of the existence of the Transfer of Property Act on the statute book of India and it could have referred to this Act in the same clear and explicit language as it has referred to the other enactments passed by the Indian Legislature. Therefore, "transfer of property" in entry 8 must be interpreted as every other entry must be interpreted in its widest significance. It may refer to any transfer whether by act of parties or not, and it may refer to any property whether immoveable or otherwise. As I said before, it is perhaps unnecessary to consider whether this legislation falls under entry 8, because I have taken the view that it falls under the new entry 31 (b) incorporated in List III of Schedule VII by an Act of the Central Legislature. But I have expressed this opinion with regard to entry 8 because the question of legislative competence of the Legislature may arise in future and I thought it best to express my opinion on the view taken by Mr. Justice Bhagwati.

Therefore, it is clear to my mind that there was legislative competence in the Legislature, whether by reason of entry 31 (B) or by reason of s. 58 of Act XXXI of 1950.

The next question—and that is a question of considerable importance—is whether this Act or any of its provisions violate any of the fundamental rights of the subject, and what is urged on behalf of the subject is that the legislation when considered as a whole and when its true purport is understood does violate the rights to property guaranteed by the Constitution. The rights to property are guaranteed by art. 19 and art. 31. Article 19 (*1*) (*f*) guarantees to all citizens the right to acquire, hold and dispose of property. Article 31 guarantees certain rights to all persons residing in India, whether they are citizens or not. Sub-clause (*1*) of art. 31 precludes the deprivation of property of any person save by authority of law, and sub-cl. (*2*) introduces the principle that

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no property shall be taken possession of or acquired except on two grounds, one, that the acquisition or taking possession of must be for a public purpose, and the other that compensation should be paid for the property taken possession of or acquired. It may be noticed that as far as art. 31 (*1*) is concerned, the first important safeguard conferred upon the subject is that he cannot be deprived of his property by any executive act or fiat. It is only by authority of law, that is, by a valid law passed by a Legislature that he can be deprived of his property. Article 31 (*1*) and (*2*) must be read in conjunction with art. 19 (*1*) (*f*), and we have already taken the view in *Dwarkadas Shriniwas* v. *Sholapur Mills*[1] that the rights guaranteed by art. 19 (*1*) (*f*) can only be enjoyed provided the citizen is in a position to enjoy those rights and provided those rights can be enjoyed although he has been deprived of his property under art. 31 (*1*) or his property has been acquired or taken possession of under art. 31 (*2*). It would be impossible for a citizen to say that he has a right to hold and dispose of property if that property has been validly taken away from him under art. 31 (*1*) or 31 (*2*). Therefore the proper and the logical approach to the subject must be first to consider whether the effect of this legislation is either to deprive the subject of his property under art. 31 (*1*) or to acquire or take possession of it under art. 31 (*2*). If the answer to either of these queries is in the affirmative, then the only question that would remain to be considered would be whether, after deprivation of his property or taking possession or acquiring of his property, any rights remain in the citizen which can be asserted under art. 19 (*1*) (*f*) of the Constitution.

The effect of the Ordinance is not to transfer the title vested in the evacuee as the owner of the property to the State or to any other person. As I said before, the only effect of vesting the property in the Custodian is to give the Custodian certain powers enumerated in the Ordinance for the purpose of managing and administering the evacuee property. The title of the evacuee remains, as it were, in statutory suspense until it is determined by Parliament as to how that title is to be dealt with or disposed of. It would not be true to say that the title of the evacuee is destroyed or extinguished. The title is in existence, but its exercise has been suspended by

[1] (1950) 53 Bom. L. R. 218.

reason of the Ordinance. This is not clearly a case where a property is destroyed by the State and both the property and the title disappear. There is neither destruction of property nor extinguishment of title. There is only a prohibition against the owner from exercising his rights of ownership until at a future indefinite date Parliament in its wisdom decides what is to happen to his property and what is to happen to his rights as an owner. Mr. Seervai contended that the effect of the legislation was a temporary extinguishment of the title of the evacuee and according to him there is no reason why we should interpret art. 31 (*1*) as referring only to permanent extinguishment of title and not to temporary extinguishment. Now in the *Sholapur* case to which I have just referred, the division bench pointed out that art. 31 (*1*) reproduced the principle well understood and well established in American law of police power, and art. 31 (*2*) represented the principle of eminent domain. But even in America the line between the two is extremely difficult to define and Judges and Courts have differed from time to time as to whether a particular case falls on one side of the line or the other. The power given to the State under art. 31 (*1*) is a very drastic power, but, as we again pointed out in the *Sholapur* case, it is a power which it is necessary to confer upon any State, and the State must be armed with such a power to be exercised wisely and under circumstances where its exercise would be absolutely necessary. On the other hand, the Courts must also be careful to see that any deprivation of property by the State is not too easily put in the category of deprivation referred to in art. 31 (1) so as to entitle the State to take possession of the property of the subject without the very salutary limitations laid down upon its power under art. 31 (*2*).

Now, the contention of Mr. Serrvai is that this is not a case which can possibly fall under art. 31 (*2*), because possession of the property of the evacuee is not taken within the meaning of art. 31 (2). Mr. Seervai draws our attention to what this Court said in the *Sholapur* case, that in the case of possession referred to in art. 31 (2) the beneficial interest in the property must pass although the title does not pass as it does in the case of acquisition. It is perfectly true that in this case the State does not make any beneficial use of the property of the evacuee which is vested in the Custodian. Neither the title is transferred to the State or to any other person, nor is the beneficial use of the

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property transferred either to the State or to any other person. Possession and custody remains with the Custodian, but he has to administer it for the purposes of the Act and not for the beneficial use of any person or of the State. Therefore, if the expression "taking possession" in art. 31 (2) can have the only meaning which we gave to it in the *Sholapur* case, then undoubtedly Mr. Seervai is on very strong ground when he suggests that this particular case cannot fall under art. 31 (2). But in the Sholapur case we were considering the narrow question as to whether the Sholapur Ordinance offended against art. 31 (2) inasmuch as there was no provision for payment of compensation, and the view that was taken by the Court was that the provisions of that Ordinance did not result in any property within the meaning of art. 31, being taken possession of by the State at all, and further that as the taking possession of by the State was not for its own beneficial use, no question of compensation arose under art. 31 (2). Therefore we were dealing with the question of possession solely with reference to the liability of the State to pay compensation under art. 31 (2). But when we are dealing with evacuee property we have a specific provision in sub-cl. (5) of art. 31 which provides that nothing in cl. (2) shall affect the provisions of any law which the State may hereinafter make in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property. Therefore the effect of this provision is that if the Indian Government takes possession of any property declared by law to be evacuee property, then the conditions laid down in art. 31 (2) for the valid taking of such possession would not apply. In other words, the Legislature may pass a law for taking possession of evacuee property without providing for compensation and without such taking possession of being for public purposes.

Now, when one interprets a Constitution, it is permissible —nay, it is even obligatory—to bear in mind legislative history, and we cannot overlook the fact that when the Constituent Assembly was enacting the Constitution, the Ordinance with regard to evacuee property was on the statute book and the Constituent Assembly was called upon to make some provision with regard to future legislation dealing with evacuee property. Therefore in providing in sub-cl. (5) of art. 31 that

nothing in cl. (2) shall affect legislation with regard to evacuee property, it is clear that the Constituent Assembly came to the conclusion that legislation by which evacuees were deprived of their property fell under art. 31 (2) and not under art. 31 (1). Therefore when under art. 31 (2) it is permissible for the State to take possession of property without paying compensation, that possession need not be of the same quality and need not possess the same characteristics as when possession is taken by the State and when compensation has got to be paid for. Whereas in the latter case the very idea of compensation must carry with it the necessary corollary that the State should have the use and benefit of the property for which it is paying compensation, in the former case when possession is taken without the obligation to pay any compensation there is no reason why the necessary attribute of possession should be the beneficial enjoyment of the property by the State or by any other person. Therefore the mere fact that under the Ordinance no one has the beneficial use of the property of the evacuee and the property merely remains vested in the Custodian for the purposes of the Act should not deter us from coming to the conclusion that the property is taken possession of within the meaning of art. 31 (2), and by reason of cl. (5) no obligation attaches to the State to pay compensation for taking possession of that property.

The sharp line to be drawn between art. 31 (1) and art. 31 (2) as suggested by Mr. Seervai may lead to other difficulties as well. If that sharp line were to be adhered to, then in cases where there is destruction or extinguishment of title the case would fall under art. 31 (*1*), and where the property is either acquired or taken possession of for beneficial use the case would fall under art. 31 (2). But there may be many cases where the State may want to take possession without making beneficial use of the property or without destroying the title of the owner. Take for instance the case contemplated by the Constitution itself under art. 31 (5) (*b*) (*ii*), legislation for the promotion of public health or the prevention of danger to life or property. In that case also nothing in cl. (2) shall affect legislation in regard to the subject. Therefore you may have a case where the State may take possession of the property for promotion of public health or the prevention of danger to life or property without making beneficial use of the property and temporarily suspending the rights and title of the owner. If Mr. Seervai's contention

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were right, it would be difficult to put such a case either under art. 31 (*1*) or art. 31 (*2*). Therefore, although it is true that a Division Bench of this Court did place a certain interpretation upon the expression "taking possession of" used in art. 31 (2), that interpretation was placed in the particular context of the facts to be decided in that case, and it would be erroneous to take the view that that is the only interpretation of this expression under any circumstances that may arise and that may have to be considered by the Court. In this particular case we are assisted in the interpretation we are putting upon the expression "taking possession" by the view which was obviously taken by the Constituent Assembly itself, and it is difficult to conceive of a better interpreter of the Constitution than the Constituent Assembly itself. Of course, the interpretation put by the Constituent Assembly can only be judged by the language used by the Constituent Assembly, but in this case the language used makes it reasonably clear what interpretation was sought to be put by the Assembly upon the expression used in art. 31 (T).

Therefore, if the case of an evacuee and the case of evacuee property falls under art. 31 (*2*), then to the extent that possession is taken it is justified by the Constitution, and no demurrer can be made to the legislation on the ground that possession is taken without any compensation or for a purpose which is not a public purpose. But what is contended is that after the rights of possession are discounted, certain rights still remain with the evacuee which are protected under art. 19 (*1*) (*f*). It is pointed out that he cannot hold the property because the possession is not in him, but he may dispose of property notwithstanding the fact that possession has been transferred to the Custodian, and the provisions of the Act which prevent disposal of the property by the evacuee and gives the power to the Custodian to dispose of the property are challenged as being in violation of the fundamental right conferred under art. 19 (*1*) (*f*). The power of disposal given by the law to the Custodian with regard to disposal of property is very wide. Under s. 10 (*o*) of the Ordinance he has the power to transfer in any manner whatsoever any evacuee property, notwithstanding anything to the contrary contained in any law or agreement relating thereto. The question is whether this restriction is a reasonable restriction because notwithstanding the fundamental right conferred upon the subject under art. 19 (*1*) (*f*) the State has been given

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the power to impose reasonable restrictions on the exercise of this right in the interests of the general public.

Now a few preliminary observations are necessary before we deal with restrictions which are challenged as being unreasonable restrictions. It is always for the Legislature to determine what its purpose is and what its object is in placing a particular legislation upon the statute book. However wide the powers conferred upon the Courts are under the Constitution, I hope it will never be suggested that the Courts constitute a third chamber, and it can exercise a power of veto upon the Legislature. When I said that the principle underlying the legislation and the objective is a matter for the consideration of the Legislature, I said this with this important qualification that that principle and that objective must not in itself be in violation of any fundamental right conferred upon the citizen. One may well imagine cases, though they are extremely rare, where the very object with which the Legislature launches upon a particular legislation may be opposed to the fundamental rights conferred by the Constitution. But if the principle underlying the legislation and its object are constitutional, then it is not for the Court to question the policy underlying that legislation. It is not for the Court to sit in judgment upon what the Legislature has decided and to weigh the pros and cons of the policy which led the Legislature to pass a particular legislation. Further, any restrictions upon the fundamental rights of the subject which are necessary for effectuating the object and purpose of the legislation must be considered to be reasonable restrictions. The function of the Court is to look at the legislation, to look at its purpose and object, and then to consider what restrictions are placed upon the citizen, and to decide, whether in reference to the purpose and object in the light of what the legislation is intended for are those restrictions reasonable or are they excessive and unnecessary and going beyond the purposes for which the legislation has been placed on the statute book.

The test I am suggesting is not unsupported by authority because in a very recent decision of the Supreme Court in *Chintaman Rao* v. *State of Madhya Pradesh*[1] in what is known as the *Bidi* case, the Supreme Court was considering a rather unusual piece of legislation, and the legislation was

[1] [1950] S. C. R. 759.

to forbid all persons residing in certain villages from engaging in the manufacture of *bidis*, and the object of the legislation was to provide agricultural labour and to divert people from making bidis to working as agricultural labourers. This legislation was challenged as being in violation of the fundamental rights guaranteed to the subject to carry on any business under art. 19 (*1*) (*g*), and the Supreme Court by an unanimous judgment came to the conclusion that the legislation was *ultra vires* because the restrictions placed upon the *bidi* manufacturers were unreasonable. The Supreme Court accepted the object and purpose of the legislation, viz. the supply of agricultural labour. They also accepted the principle that to the extent that restrictions may be necessary in order to effectuate that object or purpose the restrictions would be reasonable. But the reason why they held the legislation to be bad was that by prohibiting all persons in particular villages from engaging in the manufacture of *bidis* the Legislature had prevented old women and children who could never be employed as agricultural labourers from manufacturing *bidis*. Therefore that particular restriction upon women and children was unreasonable as it was not necessary for the purpose of effectuating the object and purpose of the legislation, and in his judgment Mr. Justice Mahajan at p. 573 points out that unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it. Therefore we have got to take the provisions of any impugned legislation, then consider the purpose that the Legislature has in view, and if we find that there is a reasonable relation between the former and the later, then any restrictions imposed by the provisions of the legislation must be held to be reasonable. But if there is no relationship between any provision of the Act and the purpose in view, then, if those provisions contain any restrictions, the restrictions would not be reasonable. Approaching that question from that angle, we have got to look at the purpose in view of the Legislature in enacting the Ordinance and the Act dealing with evacuees and evacuee property, and taking the purpose in view we have got to study the various provisions to see whether those provisions contain any restrictions which are not related to the purpose in view.

Now, the Evacuee Ordinance and the Act is the result of one of the most unfortunate and tragic chapters in the

history of our country and one cannot altogether divorce oneself from past history which led up to the passing of this Act. When partition came there was migration of large populations from our country to the Dominion of Pakistan and *vice versa*. People fleeing from Pakistan left property behind and people fleeing from India also left property behind, and provision had to be made with regard to the property left by people in this country who, either because they were terrified by reason of communal disturbances or because they wanted to migrate to another country or for reasons connected with this, left their property behind. Similarly, some arrangement had to be arrived at with regard to the property which people left behind in Pakistan and who came here and became citizens of this country. Any law passed under unusual circumstances must result in a certain amount of hardship. Undoubtedly, it is the duty of the Court to see that these hardships are reduced to a minimum. But one cannot apply the yardstick of normal and peaceful conditions to conditions which resulted from an upheaval, rare in the history of our country and perhaps rare in the history of any country in the world, and, therefore, one must approach this legislation knowing that it is an emergency legislation, an offspring of emergency, and intended to deal with abnormal and unusual times and conditions.

Our attention has been drawn to the fact that the definition of "evacuee" is so wide and the net cast is so extensive that within it may come not only persons who have migrated to Pakistan or who have ceased to be citizens of India, but even those who continued to remain citizens of India. It is pointed out, for instance, that in the definition of "evacuee" in s. 2 (*d*) (*i*) any person who, on account of civil disturbances has left India after March 1, 1947, for any place outside India, becomes an evacuee. It is suggested that this would embrace the case of a person who may leave India, not for Pakistan, but for any country other than Pakistan. It is said that a loyal citizen devoted to his country may out of fear leave India without the slightest intention of changing his allegiance or without any attachment to Pakistan and may yet fall in the category of evacuee defined in s. 2 (*d*) (*i*). With regard to s. 2 (*d*) (*ii*) it is pointed out that a person may go to Pakistan for legitimate work or business and by this definition he would be looked upon as a resident, and if he is unable to supervise or manage his property in person he would again risk being

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brought within the category of an evacuee. We may point out that as far as this definition is concerned, the apprehension on the part of the petitioner is perhaps not wholly justified, because we take it that the expression "resident" used in this sub-clause must connote a certain amount of permanency. A mere temporary abode in Pakistan on legitimate business or occupation would not make a person a resident for the purpose of this sub-clause. Then with regard to sub-cl. (*iii*) no serious objection is taken to that definition, because if a person in India wishes to benefit out of the distress of people who have left Pakistan and left property behind, he should have no grievance if he is treated as an evacuee and his property is taken away. It is also pointed out that although a particular act on the part of a citizen was perfectly legal and valid and he did not then know what the consequences of such an act might be, by reason of the Ordinance retrospectively his status and his property is endangered by reason of something that he did in the past which when he did it was perfectly innocent. There is some force in this criticism, but, as I said before, no one anticipated what would happen after August 14, 1947, and in view of the events that took place our Legislature had to deal with a situation which had not been anticipated and to a certain extent provision had to be made retrospectively for acts which were done prior to the passing of the legislation which did not seem to be against the interest of the State then, but in the light of what happened subsequently were looked upon as not in the interest of the State. It is also pointed out that "evacuee property" includes property which has been obtained by any person from an evacuee after August 14, 1947, by any mode of transfer. So that, even if an honest bona fide person purchases a property from someone who subsequent to the purchase becomes an evacuee, the rights of the bona fide purchaser are jeopardized under this definition. But here again power is given to the Custodian to confirm certain transfers although they come within the ambit of this sub-section, and I have not the slightest doubt that the Custodian in proper cases would confirm honest and bona fide transactions as contemplated by s. 38. It is not out of place to draw attention to the fact that very wide, very extensive and very far-reaching powers are conferred upon the Custodian, and a humane and just administration of this drastic law must largely depend upon how the Custodian looks upon his own powers and duties. I have not the slightest doubt that the Custodian, who is a

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public officer, realises the limitations upon his powers and also understands and appreciates that the Legislature did not intend to punish or penalize innocent and honest citizens of this country. Therefore to the extent that this legislation can be administered without affecting the rights of honest and loyal citizens, I am sure the Custodian will so administer this law and so exercise the powers conferred upon him. But when we come to consider the restrictions in the light of what I have just said, all the restrictions pointed out are really necessary and ancillary to the main purpose and object of the legislation which is to provide for the administration of evacuee property. It will be found that all the restrictions are to protect the possession of the Custodian and to prevent the evacuee from dealing with the property, the object being that this property should be secured and safeguarded until its ultimate destination is determined by Parliament.

Turning to s. 10 (*2*) (*o*) which deals with the power of transfer given to the Custodian and which deprives the evacuee of the right of dealing with his own property, surely the power of disposal must be given to the Custodian if the power of administration, custody and possession has to have any meaning or significance. This is not an independent power given to the Custodian in derogation of the title of the evacuee, but it is given as ancillary to the main purpose of the Act which is for the administration of evacuee property. Attention is also drawn to s. 13 and it is urged that the effect of this section is to prevent an evacuee from acquiring any property in future and therefore is in violation of the fundamental right guaranteed under art. 19 (*1*) (*f*). It is perfectly true that even though a case may fall under art. 31 (*2*) and it may be a case of possession being taken, that would not affect the right of the subject under art. 19 (*1*) (*f*) to acquire property in future. Article 31 (2) can only deal with property in possession of the citizen which has been taken away under a valid piece of legislation. But whether the citizen should be prevented from acquiring property in future must be dealt with independently of any consideration as to art. 31 (*2*). But, fortunately, a proper construction of s. 13 does not make it necessary for us to consider whether any provision in this Ordinance preventing the evacuee from acquiring property in future is or is not a reasonable restriction on the right to property guaranteed to him under art. 19 (*1*) (*f*), because a proper construction of s. 13,

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which provides that any amount due to any evacuee in respect of any property which is vested in the Custodian or in respect of any transaction entered into by the evacuee, shall be paid to the Custodian by the person liable to pay the same must be that the expression "any transaction" must have reference to the property of the evacuee referred to in the first part of s. 13. What was suggested was that not only any amount due in respect of any property vested in the Custodian, but any amount due in respect of any transaction entered into by the evacuee has to be paid to the Custodian. But the transaction contemplated by s. 13 must be a transaction in respect of property which is vested in the Custodian. There is no bar under this section against an evacuee doing any business or carrying on any profession which entitles him to earn and acquire property. Whether, after he has earned any money or acquired any property, that property should vest in the Custodian or not, is an entirely different matter which would have to be determined by the Custodian under the provisions of the Act. But the Ordinance does not prevent the evacuee from acquiring property in future, nor does it prevent him from entering into any transactions unconnected with the property of his which has already vested in the Custodian.

Mr. Palkhivala wanted to draw our attention to the various penal provisions of this Act contained in Chapter VI and he wanted to argue that the penalties prescribed under these sections make it impossible for the evacuee to carry on any business or receive any payment, even though the property concerned was not declared to be evacuee property and had not vested in the Custodian. We have not permitted Mr. Palkhivala to go into these sections, because in our opinion no question with regard to any of these sections arises on this appeal. If there is a prosecution of any evacuee under any of these sections and he is penalized, it would be open to him to challenge his conviction and sentence, if he is so advised, on the ground that the particular section under which he was prosecuted and convicted was in violation of any fundamental rights guaranteed to him by the Constitution. Hardship has also been pointed out with regard to people who have now settled down in Bombay as citizens of the State whose property has been taken away and who have no wherewithal to sustain themselves. Mr. Seervai rightly points out that there is a provision in s. 10 (2) (*n*) which empowers the Custodian to pay to the evacuee or to any member of his family or to any other person,

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as in the opinion of the Custodian is entitled thereto, any sums of money out of the funds in his possession. These are powers similar to powers that a Court of law has which administers any particular property or estate which comes before it. The Custodian under this Act is also administering evacuee property. He must not forget that he is not the owner and the rights of ownership in the evacuee have not been extinguished by this Act. Therefore the law rightly provides that while he is administering the property he should make proper provision for the maintenance of those whose property has been taken away and which has been placed in the custody of the Custodian. Various considerations would naturally arise as to when and what maintenance should be paid to any evacuee or to the member of his family. But we have no doubt that in deciding this the Custodian would approach the matter from an equitable and humane point of view. It may be, as Mr. Seervai points out, that in every case it may not be possible for the Custodian to apply the same principles as to the awarding of maintenance as a Court of law would. But without applying these principles in their technicality and in all their strictness, the Custodian can—and we are sure will—see that no citizen is put to unnecessary trouble or hardship whose property has been taken away from him and which is being administered by him as a Custodian under the Act.

It has also been suggested that one of the effects of this legislation is to create a class of inferior citizens and a parallel is sought to be drawn between what is happening to our Indian national in South Africa and the evacuees in our country. I do not think it can be too emphatically stated that our Constitution creates only one class of citizenship and it ensures to that class, irrespective of caste, community or creed, the same fundamental rights which are embodied in the Constitution. It is pointed out that under art. 7 of the Constitution, citizenship is only denied to those who have migrated to the territory now included in Pakistan, whereas the effect of evacuee law is to deny rights of citizenship even to those who may not migrate to Pakistan, but, as pointed out, who may only reside in Pakistan. In this connection it is pointed out that it would give Parliament very wide power to describe and define any section of citizens as evacuee and then to fetter and affect their rights as have been done under the evacuee law. I have already pointed out, while dealing with the question of legislative competence, that it is left to Parliament to define what

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evacuee property is and then to legislate with regard to the custody, management and possession of that property. Undoubtedly, in defining evacuee property the Parliament would also have to define who an evacuee is. But it does not follow that because Parliament has been given the right to declare what is evacuee property and who an evacuee is, its legislative competence would go to the length of describing a class of citizens as evacuees who have no connection whatever with the connotation that must apply to the expression "evacuee" There must be some connection between the idea conveyed by the expression "evacuee" and the class of citizens whom Parliament declares to be evacuees. To that extent, undoubtedly, there is a limitation upon the legislative competence of Parliament. In this connection I should like to point out that I have never been considerably impressed by the argument that Parliament or State Legislatures have been given very wide powers under the Constitution. People are apt to forget that there is no limitation whatever on the powers of British Parliament and the British Parliament can legislate on any subject under the sun. It is never suggested in England that the possession of power need necessarily lead to the abuse of power. There is always public opinion, and I hope enlightened public opinion, to control the power which Constitution has conferred upon Parliament. But it would be a dangerous conclusion and an entirely unjustifiable conclusion to restrict or limit the powers of a sovereign Legislature by considering what abuse that power might lead to, and, therefore, although it is within the legislative competence of the Legislature to declare a section of the citizens as evacuees and to define and declare evacuee property and to legislate about it, there is no reason to fear or apprehend that the Legislature in the exercise of its wide powers will unfairly or unjustly affect the rights of citizens of this country. Even when we turn to the definition of "evacuee" under the Ordinance or under the Act, one does find that there is some connection between setting up of the new Dominion of Pakistan and the disturbances that sprung from partition and the citizens who were in some way or other connected with those disturbances. It may be said that in some respect the definition is too wide. It may be said that in that definition may be included citizens who are loyal citizens. But here again, as pointed out by Mr. Seervai, the law contains a provision which entitles Government to exempt any section of persons

who are included in the definition of "evacuee" from the operation of the Act. That is s. 49 of the Ordinance which provides: "The Central Government may, by notification in the Official Gazette, exempt any person or class of persons or any property or class of property from the operation of all or any of the provisions of this Ordinance." This section has been enacted, I have no doubt, for the express purpose of dealing with those hard cases to which reference has been made at the bar by counsel appearing for evacuees, and Mr. Seervai has drawn our attention to notifications which have been issued by Government from time to time exercising power under this section.

On a careful consideration of all the points that have been urged, we are of the opinion that the constitutionality either of the Ordinance or of the Act cannot be successfully challenged. Both the pieces of legislation are within the legislative competence of the respective Legislatures that passed them and do not in any way violate any of the fundamental rights guaranteed to the citizens.

Now turning to the facts of the appeal before us, the notification issued by the Custodian on March 28, 1950, vesting the shares of the first petitioner and the other shareholders in the Custodian, has been challenged on various grounds. The first ground on which it is challenged is that it was not competent to the Custodian, while exercising his appellate powers under s. 26 (*1*), to proceed against the property of a party who was not a party to the appeal and who was not before him. The powers of review or revision of the Custodian under s. 26 (*1*) are confined to passing such orders as he thinks fit in relation to the orders passed by his subordinate officer and which have been called up for review or revision. Therefore the orders which were before the Custodian under his revisional powers were the orders passed by the Deputy Custodian of Bombay and the Deputy Custodian of Thana holding that the property of the second petitioner was evacuee property. These orders in no way dealt with the property of the first petitioner, and therefore the powers of review and revision which the Custodian could exercise were limited to correcting the orders passed by the Deputy Custodian against the second petitioner. In fact, when he passed the order in appeal, the Custodian held that these orders were bad and set them aside. But what is urged is that he also in exercising those powers issued a notice on March 3, 1950, against the shareholders which he was not entitled to do, because in the notice of March 3, 1950, the Custodian expressly states that he is issuing this notice because

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he considers it necessary to revise or modify the orders passed in respect of the property of the second petitioner company and he is exercising the powers under s. 7 (*1*) of the Ordinance.

There is no doubt and there can be no doubt that to the extent that the Custodian issued this notice in the exercise of his revisional powers under s. 26 (*1*), the notice is invalid. But we are not concerned with the notice. We are concerned with the notification issued under s. 7 (*3*) on March 28, 1950, and the question is whether that notification is valid. That notification has been issued under s. 7 (*3*) of the Ordinance, and when we turn to that section, it requires in the first instance that the Custodian should form an opinion that there is some property which is evacuee property within the meaning of the Ordinance, and in order that he should form that opinion he would also have to form an opinion that the person whose property he wishes to proceed against is an evacuee within the meaning of the Act, because evacuee property is property in which an evacuee has any right or interest. It may also be property which has been obtained by any person from an evacuee after August 14, 1947, by any mode of transfer, unless such transfer has been confirmed by the Custodian. Having formed that opinion, two conditions have got to be satisfied before he can issue an order declaring any property to be evacuee property, and those two conditions are that he must give a notice in such manner as may be prescribed to the persons interested in the property, and the second condition is that he must hold such inquiry into the matters as the circumstances of the case permit. Those two conditions are conditions precedent to the exercise of his jurisdiction, and if either of those two conditions are not complied with, then the order passed by him under s. 7 (*1*) would be an order without jurisdiction. It is true that it is not in the case of every procedural requirement that the failure to comply with that requirement would make an order without jurisdiction. It is for the Court to consider in every case whether a non-compliance with the mandatory provisions of a statute is merely procedural in character or substantive in its nature. But if the Court comes to the conclusion that certain conditions are laid down by statute as conditions precedent and those conditions have got to be satisfied in order that the officer exercising his powers should have jurisdiction at all, that failure to comply with those conditions would make the order without jurisdiction. In my opinion, under s. 7 (*1*) the two

conditions which I have indicated are not merely procedural in character, but they are substantive conditions laid down by the Legislature as a safeguard for the citizen and those conditions must be strictly complied with.

Now, the manner of giving the notice and the contents of the notice have been prescribed by the rules framed under the Ordinance. Rule 5 (*1*) says:

"After a survey of any property is made and the Custodian is satisfied that his information and the survey *prima facie* disclose that the property or any interest therein is evacuee property, he shall cause a notice to be served, in Form No. 1, on the person claiming title to such property or interest and on any other person or persons whom he considers to be interested in the property."

Sub-rule (*2*) says:

"The notice shall, as far as practicable, mention the grounds on which the property is sought to be declared evacuee property and shall specify the provision of the Ordinance under which the person claiming any right to, or interest in, such property is alleged to be an evacuee property."

And when we turn to the form, the form states:

"Whereas there is credible information in possession of the Custodian that you are an evacuee under cl. (*iii*) of s. 2 (d) of Administration of Evacuee Property Ordinance on account of the grounds mentioned below;"

and then the grounds at the foot of the notice mentioned as an illustration, "acquisition of evacuee property by way of allotment in Pakistan." What is contended by Mr. Seervai is that neither under the rule nor under the form it is incumbent upon the Custodian to do anything more than to set out the section or sub-section under which he proposes to hold the person upon whom the notice is served to be an evacuee and his property evacuee property. When we turn to the notice under consideration which was served by the Custodian on March 3, 1950, all that it states is:

"I hereby call upon you to appear and show cause with all material evidence why orders should not be passed declaring you an evacuee under cls. (*i*), (*ii*) and (*iii*) of s. 2 (*d*) of the Administration of Evacuee Property Ordinance of 1949 and all your properties as evacuee property under the provisions of the said Ordinance."

It will be noticed that all the three clauses of s. 2 (*d*) are set out in the notice. Mr. Seervai says—it may be possible, but it is rather difficult to believe—that the Custodian might have

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thought that the particular person satisfied all the three definitions appearing in s. 2 (*d*). But what is important to note is that this notice does not give the grounds at all why the property of the first petitioner is sought to be declared evacuee property. Mr. Seervai says that sub-r. (*2*) of r. 5 says that grounds should be given so far as practicable and therefore it does not cast any obligation upon the Custodian to furnish grounds at all. In my opinion, that is not a tenable submission. "As far as practicable" in this context can only mean and must be construed to mean "to the extent that it is practicable." If one realises the object of serving this notice, which is to give an intimation to the person against whom action is proposed to be taken that he is going to be held to be an evacuee and that all his property is going to vest in the Custodian, then it is clear that the notice must specify with sufficient clarity and particularity what are the grounds which have led the Custodian to come to the conclusion that the person against whom action is going to be taken is an evacuee. The Legislature very wisely made the Custodian a *quasi*-judicial officer, made the inquiry a *quasi*-judicial proceeding, so that the rights of any citizen should not be lightly taken away. If that was the object of the Legislature, then it was in furtherance of that object that s. 7 (*1*) required a proper notice to be served upon the citizen, and it is difficult to believe that a notice can ever be a proper notice which does not state the grounds which led the Custodian to come to a particular conclusion and which would enable the citizen to meet the case as presented to the Custodian and as *prima facie* accepted by him. It is also difficult to understand how under any circumstance it would not be practicable for the Custodian to state the grounds as required by r. 5. As I said before, s. 7 requires that the Custodian should form an opinion as to the nature of the property and as to the character of the person against whom he is proceeding. He could not come to this conclusion in vacuo, he could not come to this conclusion without any materials being placed before him, and therefore when he proceeds to issue a notice, he has in his own mind come to a *prima facie* conclusion, and what the law requires is that he must state in the notice what factors or circumstances led him to form the opinion and which resulted in a notice being served upon the person alleged to be an evacuee whose property the Custodian wishes to notify under s. 7. Further, this notice does not state the particulars of the property in respect of which the Custodian proposes to

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make an order. It may be true that when a Custodian proposes to notify all the properties belonging to an evacuee, perhaps a statement that he wishes to declare all the properties of the person against whom the notice is served may be sufficient. But I should like to point out that there may be cases where a notice may have to be served not against evacuees but against persons interested in evacuee property. In such a case it would be necessary to state in the notice the particulars of the property which the Custodian seeks to notify. It is only when the person interested knows the particulars of the property that he can appear and show cause and defend the title of his own property. But in any view of the case, inasmuch as the notice of March 3, 1950, does not mention any grounds whatsoever on which the property of the first petitioner is sought to be declared evacuee property, the notice is not in compliance with s. 7 (*1*) of the Ordinance and to that extent one of the two conditions precedent for the making of the order by the Custodian has not been complied with and therefore the order is without jurisdiction.

Mr. Seervai drew our attention to the new form of the notice now published under the rules framed under the Act. One change that is made in that form is that whereas in the form under the Ordinance after the word "grounds" it was stated "in practice as an illustration," the words "as an illustration" are omitted under the new form, and this particular form relates to a notice issued under s. 2 (*d*) (*iii*) and the grounds mentioned are, "Acquisition of any right to interest in or benefit from any evacuee or abandoned property in Pakistan otherwise than by way of purchase or exchange." Mr. Seervai says that the grounds are nothing more than the reproduction of the section and therefore under the form the only obligation is merely to indicate the section or reproduce the section and nothing more. In my opinion, this form does not substantially alter the form to be found under the rules framed under the Ordinance. Apart from the notice being in compliance with the form, r. 5 (*1*), r. 5 (*2*) independently of the form makes it incumbent upon the notice mentioning the grounds on which the property is sought to be declared evacuee property, and therefore even assuming that the form does not require the stating of grounds to the extent that the form does not comply with r. 5 (*2*) the form would be bad and it would be incumbent upon the

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Custodian to comply with r. 5 (2) and state the grounds in the notice which he issues under s. 7 (*1*) of the Ordinance. It is clear, as I said before, that it is incumbent upon the Custodian not to state the grounds merely by reproducing the section, but to state them with sufficient particularity in order to convey to the person against whom the notice is served as to the reasons which have led the Custodian to form the opinion which he has to form under s. 7 (*1*) of the Ordinance.

The second ground on which the notification of the Custodian is challenged is that the order was passed in violation of the fundamental principles of natural justice inasmuch as the first petitioner and the other shareholders were never heard before the order was passed by the Custodian. The order which the Custodian passed on March 28, 1950, itself states that all the notices issued against the shareholders were returned undelivered by the postal authorities with the endorsement "left without particulars and not known." Therefore it is clear that none of the notices ever reached any of the shareholders and there is no suggestion that any of these shareholders had any notice otherwise that the Custodian was proposing to hold an inquiry under s. 7 (*1*) of the Ordinance. Rule 25 made under the Ordinance prescribes the manner of service or publication of notice, summons or order to be issued or made under the Ordinance, and one of the modes laid down is by sending the notice, summons or order by registered post. In this case all these notices were served by registered post and the contention of the Custodian is that in sending these notices by registered post he was adopting one of the modes laid down in r. 25 and therefore there was proper service upon the first petitioner and the other shareholders. It is clear that the mode laid down by r. 25 would not be complied with merely by sending a notice by registered post to any address that the Custodian may think proper. It is obvious that when a rule prescribes the service of a summons by registered post, it implies that the service must be made at the proper address of the person to be served, and this rule casts an obligation upon the Custodian, if he wishes to serve a notice by registered post, to make all reasonable inquiry to ascertain what is the proper address of the person whom he chooses to serve by registered post. This position is not seriously disputed by the Custodian, but what he says is that in this particular case a list of addresses

was filed by the Registrar of Companies in January 1950 and he proceeded to address the notices according to the addresses given in this list, and as it happened the address of the first petitioner was somewhere in Saurashtra and therefore he addressed the notice there. Now there are certain undisputed facts in this case to which attention might be called. A list of addresses of all the shareholders was filed by the first petitioner before the Deputy Custodian of Thana. Those were according to the first petitioner the correct addresses. It also appears that on March 2, 1950, a day before the notice was served by the Custodian, the first petitioner was personally present at the hearing of the appeal in connection with the notifications issued by the Deputy Custodian to which reference has been made. Therefore the Custodian knew that on March 2 the first petitioner was in Bombay and yet, as I said before, the notice addressed to the first petitioner was sent on March 3 to Saurashtra. The first petitioner's contention is that the notice was not properly served, that he had no hearing and the order was made *ex parte*, and therefore the rules of natural justice were not complied with. The Custodian has given an answer in his affidavit and his contention is that it was reasonable for him to have relied on the addresses filed with the Registrar of Companies and that was the best evidence available to him as far as the addresses of the shareholders were concerned. It is unnecessary to decide on this particular point whether the contentions of the first petitioner are right or the contentions of the Custodian are sound, because at our instance Mr. Seervai very fairly and very properly prevailed upon the Custodian in this particular case to agree to this particular order passed by him being set aside and also to agree to serve a proper notice upon the first petitioner and to give him a proper hearing before he makes up his mind as to whether an order under s. 7 (*1*) of the Ordinance or the corresponding section under the Act should be passed or not. Mr. Seervai also wished to contend that in this particular case the right to receive a notice in a particular form and the right to be heard had been waived by the petitioner. Mr. Seervai may be right that if a statute lays down conditions precedent to the exercise of power by an officer and if those conditions precedent are for the benefit of the person against whom power is to be exercised, those conditions may be waived by that person. But in view of the Custodian's decision to give a hearing to the first petitioner, Mr. Seervai has not pressed that point before us, nor has he

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taken us through the record to satisfy us how and under what circumstances he could maintain that the first petitioner had waived the notice or the right to be heard before the Custodian.

There is one further contention which was also urged by Mr. Seervai. Mr. Seervai says that while admitting that the order made by the Custodian is a *quasi*-judicial order and also admitting that such an order can be corrected by this Court by a writ of *certiorari* in appropriate cases, his contention is that this is not a case where the Court would exercise its discretion in issuing a prerogative writ of *certiorari*, and the reason why we should not exercise our discretion is that there is a specific and adequate alternative remedy open to the first petitioner, which remedy he should have availed himself of rather than come to this Court on a petition for a writ of *certiorari*. The alternative remedy suggested by Mr. Seervai is the right of appeal that the first petitioner has against the order of the Custodian to the Custodian General provided by s. 24 of the Ordinance. Now a Division Bench of this Court in *Khurshed Mody* v. *Rent Controller, Bombay*,[1] took the view that although the High Court was ordinarily very loath to issue the high prerogative writ of *certiorari*, if there was another suitable remedy open to the petitioner, as for instance a right of appeal, it may issue a writ even though such a suitable remedy was open, if it was satisfied that the officer against whom the writ was sought had acted in a manner which was contrary to the fundamental principles of justice. I was a party to this decision and speaking for myself I should like to explain the effect of this decision as some doubt has been cast upon its correctness. When there is an alternative adequate and specific remedy, it is always a factor which the Court must take into consideration in deciding whether a writ of *certiorari* should or should not issue. If the Court finds that a fundamental principle of justice has been violated, that is an important factor which the Court should also take into consideration, and if it finds that a fundamental principle of justice has been violated, it should not refuse to issue a writ merely on the ground that there is an alternative adequate remedy in existence. It is not as if this decision laid down that in every case where there is a violation of the fundamental principles of justice the Court was bound to issue a writ, but the bench negatived the contention put forward before it that a mere existence of an adequate alternative remedy in

[2] (1946) 48 Bom. L. R. 565.

itself was sufficient to disable the Court from issuing a writ of *certiorari*. We have held in this case that there is a violation of fundamental principles of justice in refusing to the first petitioner a right of hearing. The mere fact that it was open to the first petitioner to appeal to the Custodian General should not by itself lead us to the conclusion that we should not issue a writ of *certiorari*. But it is open to Mr. Seervai to satisfy us that although the fundamental principles of justice were violated in this case, still under the circumstances of this case it would not be proper for us to issue a writ of *certiorari*. I fail to see what special circumstances there are in this case which should operate against the petitioner in obtaining the relief which he seeks by this petition. It must be borne in mind that the first petitioner came here on a petition, not merely to challenge the order on the ground that it was without jurisdiction, but he also challenged the order on the ground that it violated his fundamental right. The second ground he could certainly not have urged before the Custodian General. It is true that he has failed on that ground, but if we do not give him relief it would mean this that we have come to the conclusion that he should have filed one appeal before the Custodian General challenging the order on the ground of want of jurisdiction, and should have challenged the same order by a petition before this Court on the ground that it violated his fundamental rights. It is difficult to hold that the petitioner was in error in coming to this Court on a consolidated petition challenging the order both on the ground that it violated his fundamental right and it was in violation of the fundamental principles of justice. As we pointed out in that decision, ordinarily when fundamental principles are violated, the Court should not be reluctant to exercise its power to issue a prerogative writ in the nature of *certiorari*.

Mr. Seervai has drawn our attention to the latest decision of the Supreme Court in *Rashid Ahmed* v. *Municipal Board, Kairana*,[1] and the statement of the law in the judgment of Mr. Justice Das relied upon appears at p. 572, and the statement is this:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under art. 32 are much wider and are not confined to issuing prerogative writs only."

[1] [1950] S. C. R. 566.

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It does not seem that this statement of the law in any way runs counter to what we held in *Khurshed Mody* v. *Rent Controller, Bombay.*[1] Certainly the existence of an adequate legal remedy should be taken into consideration, but Mr. Justice Das does not say that the existence of an adequate legal remedy disentitles the petitioner from obtaining a writ of *certiorari* from the Court. Further, the Supreme Court emphasises the fact that under art. 32 the powers of the Supreme Court are much wider. Similarly under art. 226 of the Constitution the powers of the High Court are much wider than they were before the Constitution came into existence. In our opinion, therefore, the mere fact that there was a right of appeal given to the petitioner under the Ordinance and under the Act should not by itself disentitle him to the relief which he seeks in this Court.

There is one other question which has got to be considered and that is the question with regard to the power of the Custodian to issue a requisition to the directors which he did on April 4, 1950. The position is this. Under the articles of association of the company, art. 40 casts an obligation upon the directors to call an extraordinary meeting whenever a requisition in writing, signed by members of the company holding in the aggregate not less than one-tenth in amount of the issued capital of the company upon which all calls or other sums then due shall have been paid up, and stating fully the objects of the meetings, shall be deposited at the office; and the Custodian has issued a requisition upon the directors under this article to call an extraordinary meeting for amendment of some of the articles of association of the company, and Mr. Maneksha's contention is that this requisition is bad in law. The power to issue this requisition has been conferred upon the Custodian under s. 10 (*2*) (*l*) of the Ordinance. Under s. 10 (*2*) (*l*) the Custodian has the same rights in the matter of making a requisition for the convening of a meeting as the evacuee shareholder whose share or shares had vested in him had, and therefore it is this right which the Custodian was exercising by the requisition. Mr. Maneksha's contention is that when the shares of the shareholders vest in the Custodian, the company becomes a one member company and has no legal existence, and the Custodian cannot exercise the right given to the shareholders under art. 40 of the articles of association. That contention is obviously erroneous because the result of the shares

[1] (1946) 48 Bom. L. R. 565.

vesting in the Custodian is not to bring an end to the Company or to destroy the entity of the shareholders. The same shareholders continued to remain the registered shareholders of the company. Only the shares by law become vested in the Custodian and the Custodian is given the right of exercising the rights of those shareholders. Therefore the Custodian was not issuing this requisition as a shareholder or as the sole shareholder. He was issuing the requisition exercising the rights of each shareholder whose shares had vested in him. Apart from that, s. 4 of the Ordinance is wide enough to give effect to the provisions of the Ordinance even though those provisions may override or are inconsistent with any other law for the time being in force, and even if Mr. Manekshah was right that the effect of vesting the shares in the custodian may be inconsistent with or override the provisions of the Companies Act, s. 4 gives effect to the provisions of the Ordinance notwithstanding any inconsistency there may be between the provisions of the Ordinance and the provisions of the Companies Act. But apart from that, even assuming the requisition was bad, it is difficult to understand how the second petitioner company or the first petitioner can obtain any relief at our hands by way of any writ. If the requisition is bad, the directors can ignore it and refuse to call a meeting as required by the requisition. If the Custodian can compel the directors to call a meeting, he will have to take appropriate measures and then the directors could question the validity of the requisition. But as the matter stands today, there is no immediate threat of any right of the first petitioner or the second petitioner which requires relief at the hands of this Court. But the question of requisition has now become academic in view of Mr. Seervai agreeing to have the order passed by the Custodian set aside and issuing a fresh notice and giving a hearing to the first petitioner. In any view of the case the Custodian in making the requisition has not purported to exercise the rights of the first petitioner as a shareholder, and therefore the first petitioner is not affected in any way by the requisition. Therefore it is really unnecessary on the first petitioner's petition to consider the validity of the requisition, nor is the second petitioner entitled to have the requisition set aside because the second petitioner has not in any way been affected by the requisition. As I said before, the requisition has been issued to the directors of the company and it is for the directors of the company to decide whether to call a meeting in obedience to that requisition or not.

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The only other question that remains to be considered is whether on this petition the petitioner is entitled to have the order of the Custodian set aside as a whole or only to the extent that it affects his rights. It is rather curious and significant that no other shareholder excepting the first petitioner has challenged the order of the Custodian. Not only the order has not been challenged, but the other shareholders have not even chosen to go in appeal from the order of the Custodian. Therefore, as far as the record shows, they have been content with the order made by the Custodian and they have not taken any steps to challenge the order. There may undoubtedly be cases where although a party affected by an order may come to Court, proper justice can only be done if the order is set aside as a whole and not only to the extent that it affects the interest of the petitioner. I should not be understood to say that the Court has not the power and the jurisdiction in proper cases to set aside an order, which is in excess of jurisdiction or *ultra vires*, as a whole although it is challenged by only one party affected by the order. But the ordinary principle must be that relief must be granted to the party challenging an order to the extent that it is necessary to safeguard the rights of that party. In this particular case the grievance of the petitioner is that his shares have been wrongly vested in the Custodian and that the order declaring him an evacuee and his property evacuee property is a bad order. Therefore full justice will be done to the first petitioner if we were to set aside the order to the extent that it affects his rights. Mr. Manekshah has strenuously urged that if the order is without jurisdiction it is without jurisdiction with regard to all the shareholders. But for ought we know, the other shareholders may be evacuees, they may feel that there is no answer they have on the merits, and they may not want a fresh hearing before the Custodian. Under these circumstances, it is not at all necessary, nor is it desirable, that we should set aside the order of the Custodian as a whole and declare the whole order as bad and in excess of jurisdiction.

Mr. Maneksha has also attempted to argue, but with his usual discretion he has not pressed the point very strenuously, that the second petitioner is also affected by this order and at least at the instance of the second petitioner the whole of the order should be set aside. It is difficult to see how the second petitioner company can be in any way affected by the shares of its shareholders vesting in the Custodian. The company is a separate entity from its shareholders and the company has nothing to do with the personality of its shareholders,

nor is it concerned as to in whom the shares are vested.

Therefore the order we propose to pass on this petition, reversing the order of Mr. Justice Shah, is that the order passed by the Custodian on March 28, 1950 and the notification issued by the Custodian on March 28, 1950, are bad and will be set aside to the extent that they affect the shares of the first petitioner. There will also be a declaration that the shares of the first petitioner have not vested in the Custodian as declared by him by the notification dated March 28, 1950.

Considering the fact that the petitioner made an attack on several fronts and has succeeded on one and a rather narrow front, we think the fairest order to make as regards costs, both of the petition and of the appeal, will be that there will be no order as to costs throughout.

Liberty to the petitioner to withdraw the amount deposited.

Attorneys for appellant: *Taher & Co.*

Attorneys for respondent: *Little & Co.*

Order reversed.

A. J. P.

APPELLATE CRIMINAL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

STATE *v.* HARPRASAD GHASHIRAM GUPTA AND OTHERS (ORIGINAL ACCUSED NOS. 1-3).*

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June 22

High Denomination Bank Notes (Demonetisation) Ordinance (III of 1946), s. 7 (3)—Sanction to prosecute signed by appropriate officer—No mention that it was for and on behalf of Central Government—Validity of sanction—Indian Evidence Act (1 of 1872), ss. 133, 114, ill. (b), 3, 105—Evidence of accomplice witness—Rules for accepting such evidence—Burden of proving exception on accused—Benefit of doubt, when given.

The accused were prosecuted for an offence punishable under s. 7 (*1*) of the High Denomination Bank Notes (Demonetisation) Ordinance of 1946. The previous sanction of the Central Government to prosecute, which is required under s. 7 (*3*) of the Ordinance, was signed by an officer, who was described as "Deputy Secretary to the Government of

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* Criminal Appeal No. 756 of 1950 (with Criminal Appeal No. 796 of 1950 and Criminal Revisional Applications Nos. 1425 and 1428 of 1951 with Review No. 1486 of 1950).