

Mohd. Hayat
v
Govt. of West Pak.
Anwarul Haq, J

say a word as to whether the records of Martial Law trials can subsequently be used for any collateral purpose or not. The petitioner's evidence recorded on oath during the Martial Law trial appears to us to be a piece of evidence in the nature of his previous admissions, which would be admissible in any subsequent proceedings in accordance with the law of evidence by which those proceedings are governed. All that we wish to say at this stage is that the immunity section does not appear to us to extend to the petitioner or to the petitioner's evidence given before the Martial Law Court. Our observations should not, therefore, be regarded as concluding the question of the admissibility of this piece of evidence in the departmental proceedings. It will be open to the petitioner to agitate that point before the Inquiry Officer, if he is so advised.

21. In view of the foregoing reasons, we do not see any merit in this petition which is dismissed *in limine*.

A. H.

Petition dismissed.

P L D 1964 (W. P.) Lahore 274

Before Muhammad Yaqub Ali, Inamullah Khan, Waheeduddin Ahmad, Anwarul Haq and Muhammad Daud Khan, JJ

Syed ALI IQTIDAR SHAH DARA AND OTHERS—Petitioners

versus

THE CUSTODIAN, EVACUEE PROPERTY, WEST PAKISTAN, LAHORE—Respondent

Writ Petition No. 556 of 1960, Reference answered on 5th March 1964.

Ali Iqtidar Shah

v.
Custodian, Evacuee Property

Muhammad Yaqub Ali, Inamallah Khan, Wahiduddin, Anwarul Haq and Muhammad Daud Khan, JJ

(a) Pakistan (Administration of Evacuee Property) Act (XII of 1957)—Genesis. [p. 217]A et seq

(b) Pakistan (Administration of Evacuee Property) Act (XII of 1957), S. 3 (1), (2) (a), (b) read with Ss. 7, 11 & 20—Scope and import—Overriding provision—Places restriction on power of Custodian—Mere “vesting” of property in Custodian or holding property on behalf of Custodian not tantamount to “treating” such property as evacuee—Overt act in respect of some specific property necessary before word “treating” could be used with regard to it—Vast difference between “vesting” of property and “treating” such property as evacuee property—Property, transfer of which has been confirmed by Custodian, ceases to be evacuee property—Custodian, Tribunal of special jurisdiction—Has no jurisdiction to recall any order procured by fraud—Custodian cannot invoke S. 44, Evidence Act (I of 1872), to treat an order obtained by fraud as nullity—Provision ousting jurisdiction of Special Tribunal to be strictly construed—Only remedy open to Custodian is to file a suit in Civil Court—Pakistan (Administration of Evacuee Property) Act (XII of 1957), S. 41—No bar to such civil suit—Interpretation of Statutes—Principle of implied repeal—

Matters in which Custodian ceases to have jurisdiction become triable by Civil Courts — Section 3 (2) (a) excepts persons or property regarding which proceedings have commenced or are pending before 1-1-1957 from operation of S. 3 (1)—Section 3 (2) (b) excepts from operation of S. 3 (1) only property which is occupied, supervised or managed by a person whose authority or right to do so has not been accepted or approved by Custodian — Section 3 (2) (b) does not except transferees, trespassers or agents—Immunity under S. 3 (1) not confined to citizens of Pakistan but includes all persons owning property—Section 3 (2) (b) applies only to property which is “admittedly” evacuee—Section 3 (2) (b) covers also cases of agents, transferees, representatives of evacuees and trespassers where property is “admittedly” evacuee—Section 3 (2) (b) does not exclude from operation of S. 3 (1) “all” hidden property but only hidden evacuee property in illegal occupation, supervision, or management of persons other than owners of such property—
Interpretation of Statutes—Speeches made in Legislature though not admissible as aids to interpretation can be referred to as relevant and material to discover the circumstances under which particular Legislation was passed and reasons which necessitated it—
Section 3 (2) (b) does not apply to owners of property or to persons whose possession, supervision or management has been approved by Custodian—Interpretation of Statutes—Enactment barring jurisdiction, to be interpreted strictly even if such interpretation renders some provisions nugatory—Person declared non-evacuee, his property cannot be declared as evacuee—
Transactions confirmed by Custodian or approval given by Custodian of a right to manage, supervise, or possess property cannot be re-opened and property declared evacuee—Owners of property not covered by S. 3 (2) (b)—Agents and transferees claiming through evacuees covered by S. 3 (2)(b)—[Conclusions on law points, epitomised in para. 18 of judgment]—[Perumal v. Central Government of Pakistan P L D 1963 S C 127 ; Kishanchand Jethanand and others v. Custodian, Evacuee Property, Karachi P L D 1961 Kar. 589 ; Ahmad Khan and others v. Custodian of Evacuee Property, West Pakistan and others P L D 1963 Kar. 450 ; Mst. Siraj Fatima and others v. Mahmood Ali and others A I R 1932 All. 293 ; Biswambar Biswas v. Aparna Charan Mohary and others A I R 1935 Cal. 290 ; Ambikamoni Dasi v. Khettra Ghosai and others 30 C W N 59 ; Bishunath Tewari and others v. Mst. Mirchi A I R 1955 Pat. 66 ; Hewson v. Shelley (1914) 2 Ch. 13 ; Debendra Nath Dutt v. Administrator-General of Bengal 35 I A 109 ; Devachand Muljimal v. Deputy Settlement and Rehabilitation Commissioner and others Civil Appeal No. 40 of 1962 (unreported) ; Rais Ghazi Muhammad v. The Custodian, Evacuee Property, West Pakistan P L D 1960 Lah. 862 ; Qutab Ali v. Custodian, Evacuee Property, Lahore Writ Petition No. 197 of 1961 (unreported) and The Punjab Province v. L. Sita Ram and others P L D 1956 F C 157 ref. ; Sardar Nur Muhammad v. Custodian of Evacuee Property, West Pakistan, Lahore Writ Petition No. 634 of 1959 (unreported) dissented from].

[pp. 278, 279, 280, 281, 282, 283, 284, 285, 288, 289, 290, 291] AA, B, C, D, E, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y & Z

Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Muhammad
Yaqab Ali,
Inamullah
Khan,
Wahiduddin,
Anwarul Haq
and
Muhammad
Daud Khan,
JJ

Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property

Wahiduddin,
J

Wahiduddin,
J

(b) Interpretation of Statutes—Language of provision taking away certain powers of Tribunal—Mere hardship to Department not a ground for interpreting provision so as to remove such hardship. [p. 280]F

Sh. Bashir Ahmad assisted by S. M. Zafar and Inayat Ullah Khan for Petitioners.

Major Ishaq Muhammad Khan Settlement Commissioner (Legal) for Respondent.

Dates of hearing : 3rd, 4th and 5th April and 14th October 1963.

JUDGMENT

WAHIDUDDIN AHMAD, J.—This writ petition is directed against the order of the learned Custodian of Evacuee Property, Lahore, dated the 8th of February 1960. By this order the learned Custodian in his *suo motu* revisional powers set aside the order of the Additional Custodian dated the 12th of June 1952, which declared the property in dispute as non-evacuee.

2. It is unnecessary to give in detail all the facts of the case. It will be sufficient to mention that one Bakhat Bedar Shah sold on the 23rd of April 1935 certain agricultural land in Lyallpur District for Rs. 55,250 to one Sohan Singh. The vendor died in the year 1945. Brigadier Riaz Hussain Shah, Col. Muhammad Mukhtar Shah and Ali Iqtidar Shah, the sons of the vendor, along with the sons of Bakhat Bedar Shah, another son of the deceased, on the 30th of October 1947 brought a suit against the purchaser for a declaration that the alienations of ancestral lands did not affect their reversionary interests on the ground that the sale was without legal necessity. The suit was decreed on the 19th of February 1948 *ex parte* by Ch. Fazle Illahi, the then Senior Sub-Judge, Lyallpur. After the introduction of the Evacuee Laws, the petitioners filed an application under section 18 of Ordinance No. XV of 1949 for a declaration that the lands in dispute were not evacuee properties. The learned Deputy Custodian, Lyallpur, by order dated the 26th of March 1952, accepted the contention of the petitioners and granted them a declaration subject to confirmation by the Custodian. In giving the above-mentioned declaration he relied on the judgment and decree passed by the Civil Court. Mr. Fateh Khan, the then Additional Custodian of Evacuee Property, by order dated the 12th of June 1952, confirmed the order of the Deputy Custodian and declared $\frac{3}{4}$ share in the property in dispute as non-evacuee. This was followed by mutation in the revenue records. In November 1959 this case was brought to the notice of the Custodian of Evacuee Property, Lahore, who on 13-11-1959 issued notices to the petitioners for *suo motu* revision of the order passed by the learned Additional Custodian referred to above. On the 8th of February 1960 the learned Custodian set aside the order of the learned Additional Custodian and remanded the case for further inquiry. The petitioners seek to challenge this order in this writ petition on the ground that it was passed without jurisdiction.

3. The writ petition came up for hearing before a Division Bench of this Court. It was brought to the notice of the Court that there is a conflict of opinion about the interpretation of section 3 of Act XII of 1957 expressed in some of the reported and unreported decisions of this Court. In view of this divergence of view, my Lord the Chief Justice referred this question to the Full Bench for disposal.

*All Iqtidar
Shah
v.
Custodian,
Evacuee
Property*

*Wahiduddin,
J*

4. The question for consideration before the Full Bench is about the scope and true import of section 3 of Act XII of 1957. Has it completely taken away the jurisdiction of the Custodian to declare any person or property as evacuee, who or which was not treated as evacuee immediately before the 1st of January 1957 or is it still open to him to declare the person or properties as evacuee without any limitation? The answer to this question depends on the interpretation of this section, which is reproduced below:—

“Property not to be treated as evacuee property on or after 1st January 1957.—(1) Notwithstanding anything contained in this Act, no person or property not treated as evacuee or as evacuee property immediately before the first day of January 1957, shall be treated as evacuee or, as the case may be, as evacuee property, on or after the said date.

(2) Nothing in subsection (1) shall apply—

(a) to any person in respect of whom or to any property in respect of which any action has commenced or any proceedings are pending immediately before the date mentioned therein for treating such person as evacuee or such property as evacuee property; or

(b) to any property which is occupied, supervised or managed by a person whose authority or right so to do after the twenty-eighth day of February 1947, has not been accepted or approved by the Custodian.”

Mr. Bashir Ahmed, the learned counsel for the petitioners, pressed at the hearing that any person or property who or which was not treated as evacuee for whatever reason immediately before the 1st January 1957, now cannot be declared as evacuee. He contended that only concealed evacuee agricultural land is not covered by this provision of law in view of section 3 of the Displaced Persons (Land Settlement) Act, 1958. On the other hand, Major Ishaq Muhammad Khan very strongly urged that every concealed and hidden evacuee property is outside its purview. His contention is that under sub-clause (b) of section 3(2) the Custodian has unlimited power to pass such orders as he deems fit in respect of hidden evacuee property. He can still declare such property as evacuee property for inclusion in the compensation pool under the Displaced Persons (Compensation and Rehabilitation) Act.

5. Before dealing with the legal aspect of the case it will be convenient to notice the background and legislative history of the impugned legislation. Immediately after Partition, in West Pakistan in almost all the then existing Provinces, the evacuee law was introduced in some shape or other. The idea behind this

Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,
J

legislation was to protect the property left by the non-Muslims on their migration to India. In October 1948, the Central Government introduced the Evacuee Law by Ordinance No. VIII of 1948 for the whole of Pakistan. The salient features of this legislation were to protect and take care of the property left by the evacuees in Pakistan, and to restore it if the evacuee had returned to Pakistan with the *bona fide* intention of permanent residence. But in October 1949 the trend of legislation changed and by Pakistan (Administration of Evacuee Property) Ordinance No. XV of 1949 this concession was withdrawn. Section 6 of this Ordinance provided that all evacuee property shall vest and shall be deemed to have always vested in the Custodian with effect from the 1st of March 1947. By section 7 it was further provided that every person holding the possession of or managing or supervising any evacuee property shall be deemed to hold or have held it on behalf of the Custodian. This legislation was further amended in 1951 and 1952. The effect of the amended legislation was that the scope of the definition of "evacuee" was enlarged; provision was further made for declaring certain persons residing in Pakistan as "intending evacuees" and under certain circumstances such persons without any formal declaration could be treated as evacuees.

6. The history of the legislation further shows that in 1956 there was a departure in the policy of the State in respect of evacuee legislation. By Ordinance No. XX of 1956 the provisions of "intending evacuees" contained in Chapter 6 were omitted from the statute. Under section 3 of this Ordinance it was provided as under :

"Notwithstanding anything contained in this Ordinance, no person or property not treated as evacuee or evacuee property immediately before the first day of January 1957, shall be treated as evacuee or as the case may be, evacuee property, on or after the said date."

Thus, under this legislation the Custodian or the Rehabilitation Authorities were permitted or given time to treat a person or property as evacuee within a month and thirteen days of the commencement of this legislation. In effect after the 1st of January 1957 this power, without any reservation, was taken away. It, however, appears that this legislation did not achieve satisfactory result and, therefore, a fresh permanent legislation was brought into force in the shape of Act XII of 1957. Under section 3 of this enactment certain exceptions were made and the power of the Custodian Authorities to treat certain properties as evacuee was restored. The text of the relevant provision has already been reproduced in the earlier part of the judgment. It consists of two parts. In subsection (1) the original section 3 of Ordinance No. XVIII of 1956 is kept intact, but under subsection (2) certain class of persons and properties are exempted from the purview of sub-clause (1). There is not much difficulty in the interpretation of subsection (1) of section 3. It is an overriding provision of law and has far-reaching consequences. It contains a positive direction that in spite of what is contained in other parts of the Act no person or property not treated as evacuee

or evacuee property immediately before the 1st day of January 1957, shall be treated as evacuee on or after the said date. On a plain reading of this part of the section it cannot be doubted that it places restriction on the power of the Custodian in respect of persons or property which were not treated as evacuee before the above-mentioned date by prohibiting him to treat such person or property as evacuee. The form of the words used is a well recognised and convenient method of repealing inconsistent provisions of the statute.

7. Major Ishaq Muhammad Khan, on behalf of the Department, has strenuously argued that the scope of this subsection is very narrow and limited. He contended that it would not apply to those properties which admittedly were evacuee properties and vested in the Custodian. He further urged that both under section 4 of Act VII of 1948 of former West Punjab Province and section 7 of Ordinance No. XV of 1949 all evacuee properties are held on behalf of the Custodian and have thereby been treated as evacuee property. This argument has not impressed me. In the first place, the vesting of property in the Custodian or the holding of property on behalf of the Custodian is only by fiction of law. In that application these provisions are of a general nature because they do not deal with any specific or identified property. In the second place, the most formidable hurdle in the way of the Department pertains to the words "not treated" used in the subsection under consideration. B The significance of these words cannot be overlooked. In my opinion their meaning is that the mere vesting of the property in the Custodian is not sufficient. The competent authorities must have done some overt act in respect of some specific property, namely that any particular person or any particular property must have been treated by a competent authority as evacuee or evacuee property. This view is strengthened by the fact that in another part of the enactment the Legislature has specifically provided a remedy to the parties who feel aggrieved from the treatment of their properties as evacuee. In section 22 of Act XII of 1957, which corresponds to section 18 of Act V of 1949 it is provided that any person claiming any right or interest in any property treated by the Custodian or Rehabilitation Authorities as evacuee property may prefer a claim to the Custodian on the ground that the property is not evacuee property or his interest in the property has not been affected by the provisions of this Act. In other words, it means that no person should feel aggrieved by the mere fact that under section 7 of Act XII of 1957 all evacuee property vests in the Custodian. That by itself is nothing. There must be some overt act on the part of the Rehabilitation Authorities or the Custodian Authorities in respect of a specific property before the aggrieved party should approach the Custodian Authorities for a declaration that his property has been wrongly treated as evacuee by any competent authority. In a recent case: *Perumal v. Central Government of Pakistan* (1), their Lordships of the Supreme Court of Pakistan have also adverted to this aspect of the question and observed that "an application under section 18 is competent only if the property in dispute was treated as evacuee C

*Ali Iqtidar
Shah*

v.
*Custodian,
Evacuee
Property*

—
*Wahiduddin,
J*

Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,
J

property by a Rehabilitation Authority or the Custodian". Their Lordships further observed that "whenever a person applies under section 18 he has to assert that the action taken by the Rehabilitation Authorities is illegal and *ultra vires* and if the Custodian grants him a declaration it amounts to saying that the action of the Rehabilitation Authorities was *ultra vires*". It seems to me that there is a vast difference between the two notions, namely, the vesting of the property and the treatment of a property. In the first case, by fiction of law the property generally vests in the Custodian, to enable him to take possession or to take other steps for the protection of specified properties. In the other, some overt act in respect of a particular property is implied. The use of the words "not treated" clearly suggests that mere vesting of the property generally in the Custodian under section 7 of Act XII of 1957 is not treatment of a particular person or property as evacuee or evacuee property. I am, therefore, of the opinion that neither the vesting of the property in the Custodian nor the holding of the property on behalf of the Custodian has any material bearing on the interpretation of this subsection.

8. I will now pass on to another argument, namely, that section 3 (1) is not applicable to those cases where a property admittedly was evacuee property and is claimed by a third party on the basis of a transfer in his favour. It is contended that even if such transfer is confirmed, it is open to the Custodian Authorities under their revisional or review powers to re-open the confirmation of such transaction. This contention also cannot be supported on the language of the above-mentioned provision of law. Once the Custodian Authorities have confirmed the transfer in favour of a third party such property ceases to be evacuee property and by no stretch of imagination can be considered to have been treated as evacuee property immediately before the 1st of January 1957. It was urged that if this view is taken, the revisional and review powers given to the Custodian Authorities would become nugatory. It was also suggested that if a case is decided about ten days before the 1st of January 1957 by the Custodian Authorities, the aggrieved party on this interpretation will be deprived of his right to move the Custodian Authorities in their appellate, revisional or review jurisdiction. The hardships pointed out by the learned counsel for the Department are no doubt there, but if the language of the section takes away these powers of the Custodian no Court of law, simply on the ground of hardship, can interpret any provision of law in order to remove such hardships. These arguments were also advanced before a Division Bench of this Court at Karachi in the case of *Kishanchand Jethanand and others v. Custodian, Evacuee Property, Karachi* (1), and were repelled. It was observed in that case as under :—

"That section 3 is an over-riding provision of law and if in its application in certain cases the other provisions in the evacuee law are rendered ineffective, the Courts of law cannot question the wisdom of the Legislature. The very fact that

(1) P L D 1961 Kar. 589

revisional and review powers under section 43 are not specifically saved clearly indicates that it is also subject to the provisions of section 3."

The learned representative for the Department, who very ably put his case, has not been able to persuade me that the view taken in the above decision is not consistent with the language employed in the subsection under consideration, or in accordance with well accepted principles of interpretation of statutes. In the above-mentioned Karachi decision every aspect of the case was considered and there is no escape from the conclusion that if any person or property was not treated as evacuee or as evacuee property immediately before the 1st day of January 1957, the Custodian has no jurisdiction to deal with the case of such person or property. There is a complete prohibition in this respect and the jurisdiction of the Custodian in such matters has been, subject to clause (2), totally taken away.

9. It was next urged on behalf of the Department that in a case where a party has obtained an order by practising fraud on the Custodian, it is open to him on discovery of the fraud to reopen and examine such case and treat it as a nullity. In support of this contention the learned representative of the Department has placed reliance on a Division Bench decision of this Court at Karachi, in *Ahmad Khan and others v. Custodian of Evacuee Property, West Pakistan and others* (1). As will be presently shown the contention of the Department cannot be accepted. In the first place the Custodian as Tribunal of Special Jurisdiction does not possess or exercise any inherent jurisdiction which the ordinary Civil Courts exercise, to recall *suo motu* an order procured by fraud. In *Mst. Siraj Fatima and others v. Mahmood Ali and others* (2) Sulaiman, J., rejected the contention that the Revenue Courts in exercise of inherent jurisdiction could set aside orders obtained by practising fraud on them. At page 301, of the report, Sulaiman, J., on this aspect of the question, observed as under:—

"In the present case there is clear reason for allowing a separate suit. There is no provision for a review of judgment by a subordinate Revenue Court under the U. P. Land Revenue Act. The doctrine of inherent jurisdiction can hardly be invoked in such a case. It would not be open to the Revenue Court to reopen the partition on the allegation that the guardian of the minor had been negligent. As a matter of fact so far as the provisions of that Act go there is no section expressly applying the provisions of Civil Procedure Code relating to the appointment of a guardian for a minor to the proceedings in the Revenue Court. The remedy of the minor, if any, can be only by a separate suit. The suit for avoidance of a previous order of a competent Court is undoubtedly one of a civil nature and falls within the scope of section 9, Civil Procedure Code. Such a suit is maintainable in a Civil Court. If a review of judgment by the Revenue

(1) P L D 1963 Kar. 450

(2) A I R 1932 All. 293

Ali Iqtdar
Shah

v.
Custodian,
Evacuee
Property

—
Wahlduddin,
J

Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property

Wahiduddin,
J

Court is not permitted, there is no reason why remedy by way of a fresh suit in the Civil Court should not be allowed."

In another Full Bench case, *Biswambar Biswas v. Aparna Charan Mohary and others* (1), the learned Judges of the Calcutta High Court in an application for rateable distribution held that the executing Court has no power to inquire as to whether decree is proper or *bona fide* one. Their Lordships on this point observed as under:—

"The dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connection with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of section 73 of the Act, 1908, and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a *bona fide* or proper decree."

On this view of the matter it is abundantly clear that those tribunals which either act in an administrative capacity or do not possess inherent jurisdiction are not competent to disregard any order passed by them on the ground that it was obtained by fraud.

Secondly in Pakistan, apart from this inherent power, the ordinary civil Court exercises the power to treat a judgment or order as nullity on the ground of fraud under section 44 of the Evidence Act. This section provides that where one of the parties to a suit or other proceeding tenders or has put in a judgment, order and decree under sections 40, 41, 42, it is open to the party against whom it is offered to avoid its effect on the ground of fraud. It is based on the well-established rule of law that a judgment or decree obtained by fraud upon a Court does not bind such Court or any other and its nullity upon this ground could be alleged in a collateral proceeding. It is on this basis that every civil Court of competent jurisdiction, whether superior or inferior can treat as nullity any judgment which is proved to have been obtained by fraud discovered after judgment. But unfortunately as the law stands in cases covered by section 3 of Act XII of 1957, the Custodian cannot invoke the provisions of section 44 of the Evidence Act to treat any order obtained by fraud as nullity. In law, judgment or order obtained by fraud is voidable and not void *ab initio*. In *Ambikamoni Dasi v. Khettra Ghosai and others* (2), this view was enunciated by a Division Bench of the Calcutta High Court. In this connection their Lordships observed as under:—

"That a decree tainted with fraud but passed by a Court competent to try the suit is not void but only voidable and will be binding unless avoided within the prescribed period of the limitation by suitable proceedings."

In *Bishunath Tewari and others v. Mst. Mirchi* (3), this view was

(1) A I R 1935 Cal. 290

(2) 30 C W N 59

(3) A I R 1955 Pat. 66

also taken by the majority of the Judges of the Patna High Court. Ramaswami, J., on this point observed as under :—

“Fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit or application for review. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or *res judicata* founded upon the judgment.”

In *Hewson v. Shalley* (1), the English Court of Appeal also held that a grant of letters of administration obtained by fraud is not when revoked by the probate Court void *ab initio* but only as from the date of the revocation. In *Debendra Nath Dutt v. Administrator-General of Bengal* (2), it was pleaded before the Privy Council by the sureties that the letters of administration having been annulled by the Court on the ground of fraud must be regarded as nullity from the beginning and that the bond was, so far as the sureties were concerned void and of no effect. Their Lordships repelled this contention and observed as under :—

“But there is really no substance in the appellant’s contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges for all monies received by him as administrator. As administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as administrator the appellant and his co-surety became and must remain responsible.”

It is thus perfectly clear that so long as a judgment or order stands or is not set aside it is valid and becomes inoperative only after it is established that it was obtained by fraud. Fraud being a mixed question of law and fact can only be established in an elaborate enquiry. I have no doubt that in ordinary cases the Custodian can investigate this question in his revisional or review jurisdiction. But in those cases which are covered by section 3 (1) of Act XII of 1957, the Custodian is not competent and has no jurisdiction to enter upon any such enquiry. In clause (2) of this section the Legislature has specifically saved certain class of cases from the purview of subsection (1) but the cases involving the question of fraud do not find any place in it. It is, therefore, not possible in such cases to treat an order obtained by fraud on a different footing from an order which is otherwise illegal or bad. Either section 3(1) applies to such cases or it does not apply. I am not inclined to interpret this subsection in a manner which would destroy its full effect, particularly as the provision relating to ouster of jurisdiction of special tribunal is to be construed in a strict manner. On the

(1) (1914) 2 Ch. 13

(2) 35 I A 109

All Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,
J

All Iqtdar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,

language of the subsection under consideration the jurisdiction of the Custodian except in those cases which are provided in subsection (2) is totally barred. In view of this, it cannot be held that the Custodian in such cases is competent to treat any order passed by him or his subordinate as a nullity on the ground that a person or a property was illegally treated as non-evacuee. In such cases the only remedy open to the Custodian is to file a suit in a competent Court of civil jurisdiction.

10. It was urged that section 41 of Act XII of 1957, would be a bar to entertain any such suits. In law when the language of a section of an Act is not ambiguous, in interpreting the plain words of such a positive enactment ousting the jurisdiction of a tribunal any suggestion of hardship is irrelevant and out of place. But on a recent decision of the Supreme Court in *Devchand Muljimal v. Deputy Settlement and Rehabilitation Commissioner and others* Civil Appeal No. 40 of 1962, decided on 19th November 1963, there should be no such apprehension. The following observations of the Supreme Court in a settlement case throw abundant light on this aspect:—

“Learned counsel appearing for the respondent and the Settlement Authorities have of course, contended that it would even now be within the jurisdiction of the Custodian to decide this question under section 41 of the Act of 1957, and nobody else would have the jurisdiction to adjudicate in respect of any such matter. Section 41 excludes the jurisdiction of the Civil or Revenue Court only with regard to a matter which the Custodian is empowered to decide under the said Act. Under the said Act, the Custodian has the power to decide as to whether the property is an evacuee property or not. There is, in the present case, however, no dispute that the property is evacuee property. So there is nothing left for the Custodian to decide. Even otherwise as soon as a property is acquired by Notification under section 3 of the Act of 1958, it ceases to be evacuee and the Custodian has, thereafter no further jurisdiction with regard to it.”

Their Lordships further observed:—

“We have come to the conclusion therefore, that in the present case by reason of the property having been acquired by a Notification issued under section 3 of the Act of 1958, the Custodian Authorities ceased to have any jurisdiction in respect of the said property. Furthermore, even otherwise the Custodian Authorities would not have in our opinion, had any jurisdiction to decide this particular question under the Act of 1957. Again under the Act of 1958, the Settlement Authorities do not also appear to have acquired any jurisdiction to decide this question. The appellant must therefore of necessity have recourse to the civil Courts to have the character of this trust adjudicated upon after the taking of evidence, particularly, since the transferee-respondent is also challenging the validity of the trust itself on the ground that a trust for *Dharam simpliciter* is void under the Hindu Law.”

It will thus follow that in those cases where the Custodian has ceased to have jurisdiction there would be no bar for

the civil Courts to adjudicate upon a question which ordinarily falls within the purview on their jurisdiction. This is the natural consequence of the rule of implied repeal, a well recognised principle of interpretation of statute. It seems to me that on this view of the matter the Custodian has ample remedy for the redress of such grievances in suitable cases.

*Ali Iqtidar
Shah
v.
Custodian,
Evacuee
Property*

*Wahiduddin,
J*

11. I will now proceed to consider the effect of subsection (2) of section 3 of Act XII of 1957. This subsection is subdivided into two parts. Clause (a) provides that nothing in subsection (1) shall apply to any person in respect of whom or to any property in respect of which any action has commenced or any proceedings are pending immediately before the date mentioned therein for treating such person as an evacuee or such property as evacuee property. There is no dispute about the interpretation of this clause of the subsection. It was conceded that if no action had commenced immediately before the 1st of January 1957, and no proceedings were pending before that date, such cases are not covered by this clause.

12. The difficulty, however, arises in interpreting clause (b) of subsection (2) of section 3. Under this sub-clause the effect of section 3(1) has been taken away in respect of any evacuee property which is occupied, supervised or managed by a person whose authority or right so to do after the 28th day of February 1947, has not been accepted or approved by the Custodian. The interpretation of this sub-clause arose in three cases before Division Benches of this Court at Lahore. In the case of *Rais Ghazi Muhammad v. The Custodian, Evacuee Property, West Pakistan* (1), Kayani, C. J., observed that "it was not possible to accept the argument that it applies to the cases of all persons other than original owners of property as, for instance, transferees, trespassers and agents". He further observed that "On its plain language it applies only to a person whose authority or right to occupy, supervise or manage any property has not been accepted or approved by the Custodian". In a subsequent unreported case *Qutab Ali v. Custodian, Evacuee Property, Lahore* Writ Petition No. 197 of 1961, decided on the 22nd of December 1961, though the case was decided under section 3 of the Displaced Persons (Land Settlement) Act 1958, the Division Bench referred to certain other aspects involved in the interpretation of this subsection. But did not give any firm decision on it. Kayani, C. J., who was party to both the decisions, made certain weighty observations. In order to bring out the doubt lurking in his mind it will be useful to reproduce the relevant portion of this judgment. His Lordship observed as under:

"*Prima facie*, one gets an impression from this definition that clause (b) of section 3, subsection (2), was intended to apply to the case of persons who were residents in India even before the Partition but owned property in Pakistan which before the Partition, was held and managed by other persons. We notice, however, that in other parts of the Act, such as section 11 also the same or similar words have been used in

(1) P L D 1960 Lah. 862

286 LAHORE

Ali Iqtidar
Shahv.
Custodian,
Evacuee
PropertyWahiduddin,
J

respect of evacuee property whether it belonged to persons originally resident in India or to persons who resided in Pakistan but who left the country at the time of the Partition. Thus, subsection (2) of section 10 requires 'every person who is in possession, supervision or management of any evacuee property or property which he knows or has reason to believe is evacuee property, and whose authority or right to occupy, supervise or manage such property after the 28th day of February 1947, has not been accepted or approved by the Custodian', to intimate to the Custodian his willingness to surrender such property to the Custodian, etc. It could not have been argued that section 10 or section 11 confined themselves only to one category of evacuee property, namely, that which was managed in Pakistan on behalf of persons who are resident in India. Further, it could not be reasonably argued that clause (b) of section 3, subsection (2) removed from the general protection of that section property which belongs to residents in India but protected the property which had been left by persons who became evacuees in 1947.

In order to strengthen his case, learned counsel for the Custodian referred to section 3 of the Displaced Persons (Land Settlement) Act 1958, which provides in subsection (1) that within ninety days of this Act 'every person who is in possession, supervision or management of any land which he knows or has reason to believe to be concealed evacuee property shall submit to the Rehabilitation Authority, or the Settlement Authority of the area concerned, full information relating to such land'. Subsection (2) is to the following effect:

'Any such property as is referred to in subsection (1) shall, notwithstanding the provisions of section 3 of the Pakistan (Administration of Evacuee Property) Act 1957, be treated as evacuee property, and shall vest and be deemed to have vested in the Custodian in accordance with the provisions of subsection (1) of section 7 of that Act.'

Learned counsel argued that after the commencement of this Act, which came into force on the 23rd of September 1958, even if any property was protected under section 3 of the Pakistan (Administration of Evacuee Property) Act 1957, that protection was taken away from it if it was concealed evacuee property'. In one sense the property was not concealed because the petitioner had a mutation effected through an appeal to the Collector. It was argued, however, for the Custodian, and with some reason, that the Collector being not an authority under the Act, any information to him was not information to the Custodian or to one of his subordinates. Section 10 of the Act requires every person who is in possession, supervision or management of evacuee property to intimate to the Custodian his willingness to surrender such property, and section 11 requires him to submit information to the Custodian. In the present case, in addition to these provisions, there was a separate provision under section 20 for obtaining a confirmation of the sale from the Custodian. We should, therefore, hold that so far as the

Custodian goes, the present land is 'concealed evacuee property' to which section 3 of the new Act applies. Incidentally the fact that subsection (2) of section 3 of this new Act makes a provision expressly against section 3 of the Pakistan (Administration of Evacuee Property) Act, would show that it was believed at the time when the new Act was drafted that section 3 of the Pakistan (Administration of Evacuee Property) Act 1957, applied to concealed evacuee property also. If this is so, then the argument of the learned Custodian that section 3 applies only to original owners of the property and not to trespassers, transferees and agents, will become more unacceptable."

All Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,
J

13. In an unreported case: *Sardar Nur Muhammad v. Custodian of Evacuee Property, West Pakistan, Lahore* Writ Petition No. 634 of 1959, decided on the 1st of June 1960, another Division Bench of this Court recorded a discordant note on the interpretation of the sub-clause under consideration. The contention that clause (b) applies only to those cases in which the property in dispute is in the hands of an agent and not of a trespasser was repelled by the Division Bench to which Yakub Ali, J. was a party. On the point urged their Lordships observed as under :—

"Firstly, we are clearly of the view that the disputed property does not at all fall in the ambit of section 3 for it had in law already been treated as evacuee property as long ago as 24th December 1947, when the Custodian Evacuee Property, West Punjab, issued a notification under Ordinance V of 1947, assuming possession of all evacuee property in the Province. Thereafter, the petitioner was in possession on behalf of the Custodian Evacuee Property and the fact that on account of deceit the petitioner did not surrender the disputed property to the Custodian or to the Rehabilitation Authorities does not entitle him to any premium. If any other view is adopted a startling result will be achieved, viz., that hidden evacuee property shall remain in the hands of wrong-doers who under law can be prosecuted and punished for the very act of concealing and continuing to remain in possession of evacuee property without any legal authority. The intention behind section 3 clearly is that in future no citizen of Pakistan will be treated as evacuee and his property shall be immune from being treated as such. The section is in negation of the earlier law of "intending evacuees" and does not purport to apply retrospectively to those persons and properties who had already become evacuee in law."

Thus, on this view, the provision of section 3 (1) has no effect in those cases where any person or property had already become evacuee in law or if the property is hidden evacuee property. I have already pointed out the distinction between the notion of vesting of the property in the Custodian and treatment of the property as evacuee. In my opinion the mere vesting of the property or a general provision such as section 11 that every person in possession, supervision or management of any evacuee property shall be deemed to hold it on behalf of the Custodian or

*All Iqtdar
Shah
v.
Custodian,
Evacuee
Property
Wahiduddin,*

a general notification by the Custodian resulting in holding possession of certain class of property on his behalf is not in the nature of treatment of any particular person or property as evacuee. This by itself cannot be considered as treatment of any particular property as evacuee and therefore, is clearly affected by clause (1) of section 3. With profound respect to the observations in the last-mentioned case it is not possible for me to accept the view to the contrary in this case on this point. This point need not detain me in view of the full discussion in the earlier part of the judgment.

14. The view that all hidden evacuee property is outside the purview of section 3 (1) in view of clause (b) requires further consideration. In my opinion the immunity under section 3 (1) of Act XII of 1957, is not confined to the citizens of Pakistan but to every one owning property in Pakistan. No distinction can be made in this behalf. Sub-clause (b) of section 3(2) refers only to those cases where the property being admittedly evacuee property is occupied, supervised or managed by a person whose authority or right so to do after the 28th day of February 1947, has not been accepted or approved by the Custodian. Now who are those persons, whose authority or right require the approval or acceptance of the Custodian? There is little doubt that such persons cannot be the owners of the property because their occupation, supervision or management is in their own right and their right so to do cannot be assailed on the ground that they had already become evacuee and their property vests in the Custodian. Therefore, by process of reasoning it shall have to be applied only to those persons whose right to do any of the above acts is expected to receive the consent or approval of the Custodian. Looking at this provision from this angle it appears to me that in the first place this sub-clause applies to those persons who claim to have derived their title through the evacuees and the transaction in their favour for some reason or other remains unconfirmed by the Custodian Authorities. Secondly, it applies to those cases where any such property is occupied by an agent or representative of an evacuee residing in India. It further applies to those cases where an evacuee property is occupied by a person without any legal or valid right, which will also include the case of a trespasser. This is evident from the words "right so to do" used in the subsection. If a trespasser is found to be in possession of an evacuee property, he will certainly be occupying, managing and supervising it without the approval of the Custodian and his right to hold it can be challenged on the ground of his unauthorised occupation. One can conceive of a trespasser who is in possession of a property since before the 28th of February 1947, which has ripened into adverse possession or title before that date. But such a case, besides rate, stands on a different footing and would be decided by the Custodian on the general principle of law applicable to such cases. I am, therefore, of the view that it covers not only the case of agents, transferees and representatives of evacuees but also the case of trespassers.

15. The argument that it applies to all hidden evacuee property cannot be accepted in view of the subsequent trend of legislation pertaining to this provision of law. In the Displaced Persons (Land Settlement) Act, 1958, under section 3 a special provision was made for hidden evacuee property and it was excluded from the purview of section 3 of Act XII of 1957. Similarly, after the promulgation of Martial Law, in Regulation No. 49 of 1958, similar provision was introduced. Under Para. 3 of this Regulation it was provided as under :

All Iqtidar
Shah
v.
Custodian,
Evacuee
Property
—
Wahiduddin,
J

“3. (i) Whoever has acquired possession of any immovable evacuee property, the ownership of which did not vest in him before the 1st March 1947, whether such property has been treated by the Custodian or the Rehabilitation Authorities as evacuee property or not, by making false representations of fact, or by suppressing true facts, and whoever is in possession of such property, shall before the 31st December 1958, make a declaration to the Deputy Rehabilitation Commissioner of the area where the property is located, giving full particulars of :—

- (a) the property in question ;
- (b) the date on which and the manner in which he came into possession of it ;
- (c) the true facts in respect of the matters previously misrepresented or suppressed ; and
- (d) the total amount, if any, which has been derived as benefit from its use.

(ii) Possession of the property in question shall on demand be handed over by the person making the declaration to the Deputy Rehabilitation Commissioner, who shall treat it as evacuee property, and the property shall vest in the Custodian.

(iii) An equivalent in value of the amount declared under clause (d) of sub-paragraph (i) shall be delivered to the Deputy Rehabilitation Commissioner concerned before the 31st January 1958, by the person making the declaration :

Provided that the Deputy Rehabilitation Commissioner may, for reasons to be recorded, extend the period and vary the mode of payment in any particular case.

(iv) No penalty of any kind whatsoever under any law shall be imposed in respect of any circumstance arising out of the declaration so made before the 31st of December 1958.”

Under this provision of law also persons who were in illegal possession of evacuee property were called upon to make a declaration before the 31st of December 1958, in respect of evacuee property, irrespective of the fact whether, it was treated by the Custodian as evacuee property or not and such property after its possession was demanded by the Deputy Rehabilitation Commissioner was to be treated as evacuee property and vested in the Custodian. These two pieces of legislation give a clear indication that clause (b) of section 3(2) does not exclude all the hidden evacuee property. It is confined only to those hidden evacuee properties which are in

All Iqtidar
Shah
v.
Custodian,
Evacuee
Property
Wahiduddin,
J

illegal occupation, supervision or management of persons other than the owners of the property. This view is further strengthened by the statement of Sardar Amir Azam Khan, Minister of Law, who piloted the Bill on behalf of the Government in his speech delivered in reply to the criticism of the Opposition on 27-2-1957, in the National Assembly of Pakistan. The relevant portion of the speech is reproduced below:

"So it says for all the unauthorised evacuee property or the hidden property if it is in occupation of any person today in any unauthorised manner action lies against that person in spite of the fact that there is this provision that nobody can be declared evacuee. So, Sir, Mr. Farid Ahmad should not think that he has got all the intelligence of the world or all the wisdom of the world or all the patriotism of the world. He should realise that others too have, if not that much of intelligence, at least some intelligence to look after the interest of this country. With these few words, I would request that this Bill be passed."

I am conscious of the fact that speeches made in the Legislative Assembly are not admissible in evidence as extrinsic aid to the interpretation of statutory provisions, but in my opinion it is relevant and material to consider the circumstances under which an Act was passed and the reasons which necessitated it. I have referred to this speech only from this angle.

16. It was urged by Major Ishaq Muhammad Khan, the learned representative for the Department, that if this limited construction is given to sub-clause (b) of section 3 (2) it will render the other provisions in respect of hidden evacuee property in Act XII of 1957, nugatory. In my opinion this apprehension is not well-founded because sections 10 and 11 refer also to cases of those persons who are in unauthorised possession, supervision or management of evacuee property. This is obvious from the fact that this class of property was introduced in sections 10 and 11 of Act XII of 1957, for the first time with a view to bring it at par with section 3(2) of the enactment. Therefore, it is perfectly clear that it does not apply to the owners of the property or to persons whose possession or supervision or management has been approved by the Custodian.

17. It was further urged by Major Ishaq Muhammad Khan that the provisions of the Evacuee Law being of an administrative nature should be given a liberal construction and construed in such a manner that the object of the enactment may be achieved. In this connection the learned counsel has referred to two pronouncements of their Lordships of the Supreme Court of Pakistan: *The Punjab Province v. L. Sita Ram and others* (1) and *Sahibrai v. The Custodian of Evacuee Property, Karachi* (2), but in my opinion the principles enunciated in these decisions have no bearing on the construction of section 3. In the above-mentioned two cases their Lordships only observed that the evacuee law is an administrative law and the principle of finality cannot with any degree of safety be imported to the orders passed

(1) P L D 1956 F C 157

(2) P L D 1957 S C (Pak.) 63

by the Custodian. But in none of these cases the question before their Lordships was about the interpretation of any provision in the nature of barring the jurisdiction of the Custodian. The provision of law under consideration bars the jurisdiction of the Custodian in certain circumstances. Any provision which takes away the jurisdiction of any authority is to be construed strictly and no allowance can be made if other provisions of the same enactment become nugatory in cases covered by such provisions of law.

*All Iqtidar
Shah
v.
Custodian,
Evacuee
Property*
—
*Wahiduddin,
J*

18. My conclusions, therefore, are as under :

(1) That no person or property can be declared as evacuee or evacuee property after the 1st of January 1957 if it was not treated as such before that date by the Custodian. The treatment referred to in this section indicates that some overt act must have been done by the Custodian or Rehabilitation Authorities. Mere vesting of the properties in the Custodian under section 7 or holding possession under section 11 will not mean that such properties were treated as evacuee properties. If a person has been declared as a non-evacuee, his property cannot be declared to be evacuee property. If the Custodian has confirmed a transaction or approved the right of supervision, management and possession of any party, such properties also cannot be declared as evacuee properties.

(2) All cases in which action has commenced or proceedings are pending immediately before the 1st of January 1957, are outside the purview of section 3(1).

(3) Only those properties are covered by clause (b) which are in unauthorised possession, management or supervision of certain parties. These persons cannot be the owners of the property. Amongst them will fall the cases of agents, transferees claiming their right after the 1st of March 1947, through the evacuee. It will also cover the case of a trespasser.

INAMULLAH, J.—I agree.

Inamullah, J

MUHAMMAD YAQUB ALI, J.—I agree with the conclusions reached by my learned brother Wahiduddin Ahmad, J., in paragraph 18 of the judgment.

*Muhammad
Yaqub Ali, J*

ANWAR-UL-HAQ, J.—I also agree with the conclusions reached by my learned brother Wahiduddin Ahmad, J., in paragraph 18 of his judgment.

*Anwarul
Haq, J*

MUHAMMAD DAUD KHAN, J.—I agree with M. Yaqub Ali and S. Anwar-ul-Haq, JJ.

*Muhammad
Daud Khan,
J*

Reference answered.

A. H.