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IN THE HIGH COURT OF DELHI AT NEW DELHI

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LPA 375/2008

Date of decision: 13th April, 2009

U.O.I.

..... Appellant

Through Mr. Sanjay Kumar Pathak, Advocate.

versus

QAYYUM KHAN & ORS.

..... Respondents

Through Ms. Maninder Acharya, Advocate for respondent No. 1 along with respondent No. 1 in person.

Ms. Sangeeta Chandra & Mr. Deepak Khandaria, Advocates for DDA.

Mr. Manish Paliwal & Mr. Sumit Bansal, Advocates for respondent No. 3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not ? | No. |
| 3. Whether the judgment should be reported in the Digest ? | No. |

AJIT PRAKASH SHAH, CJ (ORAL)

Chand Khan, father of the first respondent, was the owner of half share measuring 211 square yards falling in Khasra No. 591, Bhogal, Jungpura (hereinafter called "the suit property"). He was also owner of other adjacent properties bearing Khasra Nos. 593 and 594. Chand Khan

had apparently gone missing or at least was not available for sometime in the wake of post partition riots. Apparently, it was reported that either he was killed during the riots or had migrated to Pakistan. The properties of Chand Khan including the suit property were declared evacuee property under the Administration of Evacuee Property Act, 1950 (hereinafter referred to as "1950 Act") and they vested in the Custodian. Chand Khan had in fact never migrated to Pakistan; he was alive and working in New Delhi. In 1954 he moved an application for restoration/restitution of the properties. An enquiry report dated 11th October, 1962 confirmed the veracity of Chand Khan's claims. A further report was prepared on 27th December, 1963 by the Assistant Custodian recommending issuance of final order for restoration. Even when the process for restoration was on, another wing of the Central Government put the suit property to auction. As a result of this, the suit property was purchased by one Chhida Ram for Rs.4,768/- in 1965 and a conveyance was executed in his favour on 30th July, 1965. Chhida Ram sold the property to Smt. Kala Wati by virtue of a sale deed dated 11th October, 1965.

2. On 1st August, 1966, the Central Government acting through the Settlement Commissioner passed an order in terms of Section 16 of the 1950 Act for restoration of properties to Chand Khan. The relevant portion of that order reads as follows:-

"AND WHEREAS the Central Government is

satisfied:

- (i) That the conditions prescribed in the rules made in his behalf have been satisfied;
- (ii) That the evacuee properties described in the schedule are the properties of the applicant and
- (iii) that it is just and proper that the said evacuee properties should be restored to applicant;

NOW THEREFORE, in exercise of the powers conferred by section of the Administration of Evacuee Property Act, 1950, the Central Government hereby declares that applicant to be entitled to the restoration of the evacuee properties described in the schedule and directs that action may be taken in regard to the said properties under Section 20-A of the Displaced Persons Compensation and Rehabilitation Act, 1954, by the persons authorized in this behalf subject to the condition that the amount due to the Custodian in respect of the properties or the management thereof shall be paid by the applicant to the Custodian.

SCHEDULE:

Half share of lease rights in khasra No. 591 measuring 422 square yards corresponding to plot No. 107 and Municipal No. 4934 and full share of lease rights in Khasra No. 593 and 594 situated in Jangpura, Bhogal, New Delhi corresponding to plot No. 108 and 109 and Municipal Nos. 4935-36.

Sd/-

A.C. Vaswani
Settlement Commissioner & Ex-Offi:
Under Secretary to the Govt. of India."

3. Later, on 4th October, 1971 in supersession of 1966 order apparently in view of the declaration of law by the Supreme Court , the Central

Government acting through the Department of Rehabilitation passed the following order:-

"AND WHEREAS the Central Government is satisfied;

- (i) That the conditions prescribed in the rules made in this behalf have been satisfied:
- (ii) that the evacuee property described in the scheduled is the property of the applicant; and
- (iii) that it is just and proper that the said evacuee property should be restored to the applicant;

NOW, THEREFORE, in exercise of the powers conferred by Section 16 of the Administration of Evacuee Property Act, 1950, the Central Government hereby directs that the evacuee property described in the Schedule shall be restored to the applicant subject to the following conditions namely:-

- (i) that the amount due to the Custodian in respect of the property or the management thereof shall be paid by him to custodian of Evacuee Property;
- (ii) that he shall not evict any allottee/tenant of the said property except in the circumstances in which lessees can be evicted under the law for the time being in force;

SCHEDULE:

Half share of lease rights in Khasra No. 591 measuring 422 sq. yards corresponding to plot No. 107 and Municipal No. 4934 and full share of lease rights in Khasra Nos. 593 and 594 situated in Jungpura, Bhogal, New Delhi corresponding to plots No. 108 and 109 and Municipal Nos. 4935-36.

S/-(P.L. Gupta)
Deputy Secretary to the
Government of India."

4. Although the condition was put for the payment of management charges to the Custodian, it is admitted position that no such demand has been made till this date.

5. Chand Khan approached the Assistant Custodian for restoration of possession of the properties. The Assistant Custodian passed order dated 2nd February, 1972 issuing notices to occupants to the other properties, which had been restored to him. It is not clear as to whether he had issued any notice in respect of the suit property. Be that as it may, the occupants of those properties claimed that in the absence of any lawful authority, the direction to evict them was illegal. They approached this Court by filing W.P.(C) No. 123/1972 challenging the notices issued by the Assistant Custodian. Chand Khan and the official respondents defended those proceedings claiming that the restoration orders authorized issuance of a direction to grant possession. The petition was disposed of finally by Avadh Behari Rohtagi, J. vide order dated 2nd February, 1972 whereby the eviction orders were quashed, leaving it open to the respondents to pursue their remedies as per law for securing vacant possession. Chand Khan died during the course of the litigation in 1979. The legal heirs of Chand Khan including the first respondent carried the judgment of Rohtagi, J. in appeal. None of the parties are able to tell us about the fate of the appeal or whether it was disposed of.

6. The first respondent claims that by virtue of a will, Chand Khan bequeathed the suit properties in his favour. He had filed a suit for declaration and injunction against the occupants of the property. Temporary injunction was declined in those proceedings. In the course of

the order of the civil court declining the temporary injunction, the stand of the other heirs has been recorded while denying the will, the other legal heirs have spoken of entitlement as per a family arrangement. The family arrangement/settlement deed dated 16th August, 1979 recognises the rights of the parties to various properties; the first respondent's right to a half share of the suit property has been acknowledged. At this stage, it may be noted that by his letter dated 6th August, 1992, addressed to the first respondent, Assistant Custodian Evacuee Property (Cell) reiterated that the properties in question including the suit property are restored to Chand Khan by the Central Government under Section 16 of the Administration of Evacuee Property Act vide order dated 4th October, 1971 and he was advised to deal directly with the occupants of the properties. The first respondent then requested the DDA in 1992 to mutate the suit property in his favour. The DDA informed him that the property had been sold to Chhida Ram by a conveyance deed in 1965 and that it had been further sold to Smt. Kala Wati and request cannot be accepted. He was advised to seek remedy from the court of law.

7. Being aggrieved, the first respondent filed the present petition being Writ Petition No. 778/1993 seeking a direction to restore to him vacant physical possession of the suit property and in the alternate to allot an alternative land admeasuring 211 square yards or thereabout adjoining to Bhogal, Jungpura. The first respondent based his claim on the footing that

the action of the Central Government in recognizing Chand Khan's right to the properties in 1966 and 1971 and reversing the process of take over on the assumption of his being an evacuee no longer exist. Hence, the foundation of the title and possession vesting with the Custodian stood effaced. The auction to Chhida Ram and his sale of the suit property to Smt. Kala Wati was, therefore, illegal. It was, therefore, prayed that the respondents were duty bound to give complete restitution and ensure that possession of the suit property is made over to the first respondent, who is the sole heir of Chand Khan in respect of the suit property.

8. Union of India, who is impleaded as the respondent No. 1 in the writ petition in its reply has not disputed the basic facts leading to the order of 1971 under the 1950 Act. Its defence was that Chand Khan had to comply with two conditions imposed in the order before he could be restored with the suit property. It was alleged that the conditions were not complied with and the party had approached this Court after delay of 12 years. In addition, it was contended that the intervening rights of Chhida Ram and Smt. Kala Wati and subsequently her legal heirs, cannot be set at naught at the behest of a person whose entitlement is under a cloud and at any rate has approached the Court belatedly. Smt. Kala Wati, the subsequent purchaser from Chhida Ram died during the pendency of these proceedings. Her legal heirs were impleaded as parties. They contended that they are innocent purchasers without notice. They also alleged that

the first respondent could not claim any legal right, title or interest since the basis of his claim had not been established through any known procedure. It is also alleged that the first respondent had filed a suit for declaration against the stepbrothers and other legal representatives of Chand Khan who had disputed his sole entitlement. The civil court refused the interim injunction sought for by the first respondent. It was, therefore, established that the first respondent cannot claim any equitable relief under Article 226 of the Constitution.

9. The learned single Judge held that issuance of two orders in 1966 and 1971 expressly recognized the right, title and interest of Chand Khan to properties in question. He went on to observe that "Chand Khan was certainly entitled to restoration/restitution in view of what was undeniably a wrong done to him, namely, taking over of his properties on the premise of his being an evacuee. That premise was mistaken is also not disputed". Learned single Judge further observed that under Article 226 this Court has ample powers to issue appropriate directions including the grant of inequitable relief for restitution. Learned single Judge, however, declined the prayer for alternative plot or for restoration of his property in view of the fact that he approached the Court in 1993 and not by 1984 or 1985. Instead learned single Judge directed the Union of India to return the sum of Rs.12,500/- received from Chhedi Ram in 1965 with a further direction to pay interest on that amount with the following rates:-

- a) Compound interest @ 15% per annum from 01.04.1965 to 31.12.1984;
- b) Compound interest @ 12% on the above amounts of Rs.12500/- plus the compound interest as per direction (for the period 01.01.1985 to 31.12.1994);
- c) Compound interest on the amounts indicated as per directions (a) and (b) @ 8% per annum from 01.01.1995 till 31.12.2005.

10. Being aggrieved, the Union of India has preferred this Letters Patent Appeal. The first respondent, i.e., the original writ petitioner has filed cross-objections making a grievance that the learned single Judge ought to have granted an alternative plot or restitution of the suit property.

11. Learned counsel appearing for the appellant-Union of India contended that even as per the finding of the learned single Judge, the first respondent ought to have approached this Court in 1984-85 and no attempt has been made to explain the delay. He submitted that the principle of laches or undue delay would disentitle the first respondent from claiming any discretionary relief even assuming that he had a legal right. Learned counsel referred to the decision of the Supreme Court in ***State of Maharashtra Vs. Digambar***, reported in AIR 1995 SC 1991, where the Court held that the discretionary relief in exercise of power under Article 226 should not be granted to a person without considering his disentitlement for such relief due to his blameworthy conduct of undue

delay or laches in claiming the same. He submitted that the conditions attached to the orders of 1966 and 1971 were not complied with by Chand Khan. According to him, in the event, the learned single Judge made an error in computing the amount of compensation inasmuch as the property was sold to Chhedi Ram in public auction for Rs.4,768/- and not Rs.12,500/-. He submitted that in view of this mistake, as per the order of the learned single Judge, the amount of compensation comes to Rs.15 lacs. If the sale consideration of Rs.4,768/- is considered, the amount of compensation will not exceed Rs.5 lacs.

12. In reply, Ms. Maninder Acharya, Advocate who has been appointed as Amicus Curiae by this Court, submitted that the learned single Judge having accepted all the major contentions of the first respondent ought not to have declined the prayer for grant of alternative plot or for restoration of the property only on the ground that he approached the Court in 1993 and not by 1984-85. She submitted that no action could be taken by Chand Khan because the very issue was pending in this Court during the period from 1973 to 1980-82. Chand Khan died during the pendency of the proceedings. The first respondent, who is the sole legatee under the will of the Chand Khan is an illiterate person, came to know about the sale in favour of Chhedi Ram only in 1992 that the property had been illegally sold by the Government of India and immediately thereafter approached the Court and thus there is no delay in

filing the writ petition. She pointed out that the first respondent had earlier filed a civil suit pursuant to order of Avadh Behari Rohatgi, J. to establish his rights. She submitted that even as late as 1992, the Assistant Custodian wrote to the first respondent that the suit property stood restored to Chand Khan and he should directly deal with the occupants of the property. Pursuant to this direction, the first respondent approached the DDA, who declined to enter the name of the first respondent in respect of the suit property because of the subsequent sales in favour of Chhide Ram and Smt. Kala Wati. She also drew our attention to the finding in the judgment of the learned single Judge that the delay was on account of the fact that official respondents took more than 12 years to decide and pass effective orders. She submitted that there is a clear cut finding recorded by the learned single Judge that the orders dated 1st August, 1966 and 4th October, 1971 expressly recognized the right, titled and interest of Chand Khan to the properties including the suit property and yet the relief of restitution or grant of alternative plot was not accorded to the first respondent.

13. Before we advert to the contention made at the Bar, we may refer to certain relevant provisions of the 1950 Act and the Rules framed under the said Act. Sections 16 and 54 of the Act read as follows:-

"16. Restoration of evacuee property.—[(1)
Subject to such rules as may be made in this
behalf, any evacuee or any person claiming to be

an heir of an evacuee may apply to the Central Government or to any person authorised by the Central Government in this behalf (hereinafter in this section referred to as the authorised person) that any evacuee property which has vested in the Custodian and to which the applicant would have been entitled if this Act were not in force, may be restored to him.]

[(1-A) No application made under sub-section (1) shall be entertained unless—

(a) before making the application, the applicant has filed all appeals and revision applications permissible under this Act against the order declaring the property of the evacuee to be evacuee property and the Custodian-General has made a final order in the case; and

(b) the application is made within sixty days of the final order of the Custodian-General:

Provided that any such application by an evacuee who migrated to West Pakistan from the State of Uttar Pradesh during the period between the 1st day of February, 1950 and the 31st day of May, 1950 and who is permitted to return to India for permanent resettlement may be entertained if it is made within sixty day of the return of the evacuee to India:

Provided further that nothing contained in this sub-section shall apply to an application under sub-section (1) which is pending on the commencement of the Administration of Evacuee Property (Amendment) Act, 1954 (42 of 1954).

Explanation.—In this sub-section, the expression 'Custodian-General' shall include a Deputy Custodian-General and an Assistant Custodian-General.]

[(2) On receipt of an application under sub-section (1), the Central Government or the authorised person, as the case may be, shall cause public notice thereof to be given in the prescribed manner, and after causing an inquiry into the claim to be held in such manner as may be prescribed, shall—

(a) if satisfied—

(i) that the conditions prescribed by rules made in this behalf have been satisfied;
(ii) that the evacuee property is to property of the applicant; and
(iii) that it is just or proper that the evacuee property should be restored to him; make an order restoring the property to the applicant, or

(b) if not so satisfied, reject the application:

Provided that where the application is rejected on the grounds that the evacuee property is not the property of the applicant, the rejection of the application shall not prejudice the right of the applicant to establish his title to the property in a civil court, or

(c) if there is any doubt with respect to the title of the applicant to the property, refer him to a civil court for the determination of his title:

Provided that no order for the restoration of any evacuee property shall be made under this sub-section unless provision has been made in the prescribed manner for the recovery of any amount due to the Custodian in respect of the property or the management thereof.]

(3) Upon the restoration of the property to the evacuee or to the heir, as the case may be, the Custodian shall stand absolved of all responsibilities in respect of the property so restored, but such restoration shall not prejudice the rights, if any, in respect of the property which any other person may be entitled to enforce against the person to whom the property has been so restored:

Provided that every lease granted in respect of the property by or on behalf of the Custodian shall have effect against the person to whom restoration is made until such lease is determined by lapse of time or by operation of law.

[*Explanation.*—For the purpose of the proviso to this sub-section, an allotment shall be deemed to be a lease and shall have effect against the person to whom restoration is made to the same extent and in the same manner as if it were a lease.]

(4) The Custodian shall, on demand, furnish to the evacuee or to the heir, as the case may be, a statement containing an abstract of the account of the income received and expenditure incurred in respect of the property.

54. Power of Central Government to take action with regard to evacuee property.—

The Central Government may, for the purpose of regulating the administration of any property which has vested in the Custodian under the provisions of this Act, pass such order or direct such action to be taken in relation thereto as, in its opinion, the circumstances of the case require and as is not inconsistent with any of the provisions contained in this Act.”

14. Rule 37 of the Administration of Evacuee Property (Central Rules) framed by the Central Government under provisions of the 1950 Act provides for restitution. The Rule reads as follows:-

“Rule 37. “Restitution – When any property taken into possession as an evacuee property is subsequently declared by the custodian or any other competent authority to be a non-evacuee property, the custodian may, on the on the application of any party entitled to the actual possession thereof, take such action as will place the parties in the same position in which they were date on the date of the possession. For this purpose, the custodian may order the person in occupation of the property to vacate the same and the custodian may use such force as may be necessary for the purpose.”

15. The factual matrix is not in dispute. The authorities had slept over Chand Khan’s application, which was moved in 1954 for restoration of his

property. It took the Custodian more than 12 years to process the application of Chand Khan and pass any effective order. Though, in the meantime two reports were made confirming Chand Khan's right to restoration of the property but nevertheless no action was taken. When the final decision on the application of Chand Khan was awaited, another arm of the Rehabilitation Ministry auctioned the suit property oblivious to the fact that the alleged evacuee was in fact alive and there was a move to restore his properties. It is also not disputed before us that Chhida Ram and Smt. Kala Wati to whom the properties were sold were innocent purchasers without notice. When they purchased the suit property, there was no defect in the title. The argument that Chand Khan did not comply with the conditions attached to the orders of 1966 and 1971 is devoid of any merit. The suit property was already sold for valuable consideration; the other properties had been allotted to tenants. Under the circumstances that there was no question for making any demand for the management charges and thus the condition is *ex facie* untenable. Moreover, the so-called management charges were never computed by the authorities and no demand for such charges was ever made. So, the argument that the non-compliance hampered the right of restitution must be rejected.

16. We are in agreement with the finding of the learned single Judge that the issuance of two orders in 1966 and 1971 expressly recognized the

right, title and interest of the Chand Khan's properties including the suit property. Chand Khan's properties were declared to be evcuae properties on a mistaken premise that he had been killed in riots or migrated to Pakistan. That mistaken premise is also not disputed. Both Section 16 of the Act and Rule 37 of the Rules embody the restitutionary principle. In fact, the Assistant Custodian proceeded to issue orders for restoration of the properties of Chand Khan on the basis of his power under Section 16. The issue of delay and laches has to be examined on this factual background. In fact, it is the authorities, who slept over the application of the Chand Khan for more than 12 years. Although the first order came to be passed in 1966. When it was realized that erroneous reference was made to Section 20-A of the Act, which was declared to be unconstitutional by the Supreme Court, a fresh order came to be passed only in 1971. The Assistant Custodian thereafter issued notices to the occupants of the other properties but then the jurisdiction and authority of the Assistant Custodian to issue the said notice questioned in this Court by filing a writ petition. The writ petition filed by the occupants came to be disposed of only on 29th November, 1982 whereby the notices were quashed and parties were asked to resort to the remedies as permissible by law. Pursuant to this order, the first respondent also filed a civil suit for declaration and injunction but he could not get temporary injunction. In the meantime, the Assistant Custodian vide his letter dated 6th April, 1997

reiterated that the properties stood restored to Chand Khan under Section 16 of the Act and the first respondent was directed to deal directly with the occupants of the properties. The first respondent then approached the DDA for mutating his name in the property register but that request was also declined on the ground that the property has been already transferred to subsequent purchasers and he was asked to approach the Court of law. Under these circumstances, it is not possible to accept the contention of the appellant that the writ petition was belated. It is no doubt true that if there is undue delay in filing the writ petition and there is no plausible explanation for the same, the Court can refuse to entertain it on the ground of laches but the factual situation is entirely different in the present case. The question of any delay or laches does not arise in the present case. It is also pertinent to note that throughout this period, the authorities never disputed the title of Chand Khan and his son and it is by a letter dated 1st December, 1992 they asked the first respondent to approach the court of law.

17. It is well settled that Article 226 of the Constitution is not confined within the narrow bounds of traditional writ jurisdiction as was understood in English. The High Court under Article 226 has ample powers to issue appropriate direction while moulding the relief in ensuring that a party who suffered injustice is suitably restituted or placed in a position as nearly as possible. In ***Kavita Trehan Vs. Balsara Hygiene Products Ltd,***

reported in (1994) 5 SCC 380 the Supreme Court observed that the jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. The Court explained the law of restitution in the following terms:-

"16. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. 'Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. The law of quasi-contract is "that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebant claims". [See *The Law of Restitution* — Goff & Jones, 4th Edn., page 3.] *Halsbury's Laws of England*, 4th Edn., page 434 states :

"Common Law. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

For historical reasons, quasi-contract has traditionally been treated as part of, or together with, the law of contract. Yet independently, equity has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed 'restitution'."

17. Recently the House of Lords had occasion to examine some of these principles in *Woolwich Equitable Building Society v. IRC*.

18. In regard to the law of restoration of loss or damage caused pursuant to judicial orders, the Privy Council in *Alexander Rodger Charles Carnie v. Comptoir D'Escompte De Paris* stated :

"... one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

19. In *Jai Berham v. Kedar Nath Marwari*, the Judicial Committee referring to the above passage with approval added :

"It is the duty of the Court under Section 144 of the Civil Procedure Code to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'.

Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."

20. In *Binayak Swain v. Ramesh Chandra Panigrahi*, this Court stated the principle thus : (SCR p. 27)

"The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in

making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from."

21. Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive. (See *Gangadhar v. Raghubar Dayal* and *State Govt. of A.P. v. Manickchand Jeevraj & Co.*"

18. The Court's power to apply equitable principles has been dealt with in several decisions of the Supreme Court. For instance, in the case of ***Gurbax Singh Vs. Financial Commissioner and Another***, reported in 1991 Supp (1) SCC 167 the Supreme Court was concerned with the rival claims between the bona fide purchaser and the sub-lessee of the property who has been in possession for more than 40 years. The Supreme Court observed that while the Court is to administer justice according to law there may be scope for doing justice and equity between the parties.

"23. Under the above circumstances we feel that while this Court is to administer justice according to law there may be scope for doing justice and equity between the parties. In such a situation we remember what the *Institutes of Justinian, De Justitia Et Jure*, in 'Liber Primus' Tit. I said: "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*". Justice is the constant and perpetual wish to render everyone his due. "*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*" Jurisprudence is the knowledge of the things divine and human; the science of the just and unjust. The divine is that which right reason commends. The human is also in the contents of the law. As Max Rumelin said, in the *Struggle to Govern Law*, "Justice is rivaled by equity." The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice has troubled us. Gustav Radbruch

clarifies the mutual relation between two kinds of justice, namely, commutative and distributive. We may call "just" either the application or observance of law, or that law itself. "The former kind of justice, especially the justice of the Judge true to the law," according to him, "might better be called righteousness." Here "we are concerned not with justice which is measured by positive law, but rather with that by which positive law is measured." Justice in this sense means equality. Aristotle's doctrine of justice of equality is called by him commutative justice which requires at least two persons while distributive justice requires at least three. Relative equality in treating different persons while granting relief according to need, or reward and punishment according to merit and guilt is the essence of distributive justice. While in commutative justice the two persons confront each other as co-equals, three or more persons are necessary in distributive justice in which one, who imposes burdens upon or grants advantages to the others, is superior to them. "Therefore, it presupposes an act of distributive justice which has granted to those concerned, equality of rights, equal capacity to act, equal status." According to Radbruch, "distributive justice is the prototype of justice. In it we have found the idea of justice, toward which the concept of law must be oriented." Law offers and protects the conditions necessary for the life of man and his perfection. In the words of Cardozo, "What we are seeking is not merely the justice that one receives when his rights and status are determined by the law as it is; what we are seeking is a justice to which law in its making should conform." The sense of justice will be stable when it is firmly guided by the 'pragma' of objective and subjective interests."

19. In ***Roshanlal Kuthalia and others Vs. R.B. Mohan Singh Oberoi***, reported in (1975) 4 SCC 628 the question before the Supreme Court was whether equitable consideration should be applied while executing foreign decrees. The argument of the respondent was that in India undefined rules of equity cannot override the legal rights.

Rejecting this argument, the Court observed that equity is not anti-law but a moral dimension of law; rather it is the grace and conscience of living law acting only interstitially. The quintessence of this concept was explained by the Court in following words:-

“29.....All great systems of jurisprudence have a mitigating principle or set of principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms of ordinary law seem to be inadequate. From the point of view of general jurisprudence, “equity” is the name which is given to this feature or aspect of law in general.”

20. The Court went on to observe that when law speaks in positive terms, equity may not be invoked against it; but while applying the law the Court can and must ameliorate unwitting rigours inflicted by legalisms, where there is room for play by the use of equity.

21. Our attention was also drawn to a decision of the Supreme Court in ***Hansraj H. Jain Vs. State of Maharashtra and Others***, reported in (1993) 3 SCC 634 where the grievance was about the inordinate delay in completing the acquisition proceedings. In that case, the notification under Section 4 was issued in 1968 and 1970. Declarations under Section 6 was issued in 1971 and 1972 and the award was rendered only in 1985 and 1986. Although the Court upheld the award on the ground that the proceedings were not initially mala fides and there was no deliberate laches and negligence, the Court proceeded to direct the authorities to

offer alternative plots to the affected landowners on the basis of actual cost of development by charging the cost of acquisition and the development charges and not more. Such direction was required to be made particularly in view of the fact that acquisition proceedings had been pending for a number of years, as a result of which the amount of compensation for the acquisition being referable to the period when notice under Section 4 of the Land Acquisition Act were issued, became insignificant and it is reasonably apprehended that unless the land by way of alternative site as per the scheme is offered to the affected landowners at a subsidized rate as indicated there, it will not be possible for the landowners to take such allotment by paying usual prices intended to be changed from them and the offer of alternative site will for all practical purposes be illusory.

22. In the facts and circumstances of the present case, we are of the view that the first respondent's claim for allotment of alternative plot deserves to be accepted. The parties have been litigating for more than 45 years and it would be wholly inappropriate to grant compensation on the price index of 1965. This is a fit case to direct the Union of India to allot an alternate land to the first respondent. Consequently, the appeal filed by Union of India is dismissed and cross-objections filed by the first respondent are allowed. The appellant-Union of India is directed to allot to the first respondent an alternative plot admeasuring 211 square yards

or thereabout in same area or in the adjoining areas within a period of three months from today. It is made clear that the possession of the land shall be handed over to the first respondent subject to his producing a succession certificate establishing his entitlement or in its absence a no objection certificate/indemnity from each of the legal heir of late Chand Khan to the satisfaction of the authorities.

CHIEF JUSTICE

SANJIV KHANNA, J.

APRIL 13, 2009

VKR