

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2177 OF 2014

M/s. Jay Construction Co. } a partnership firm registered } under the Indian Partnership } Act, 1932 having its office at D-10, } Everest, Tardeo, Tardeo Road, } Mumbai – 400 034 }	} } } } } }	Petitioner
versus		
1. The Custodian of the Enemy } Property, having its office at } Kaiser-i-Hind, Currimbhoy Road, } Ballard Estate, Mumbai – 400 001 }	} } } }	
2. Union of India } through the Deputy Secretary } to the Govt. of India, Ministry of } Home Affairs, having its address } at NDCC Building, Palika Kendra, } Jai Singh Road, } New Delhi – 110 001 }	} } } } } }	
3. The Under Secretary to Govt. } of India, Ministry of Home Affairs, } having its office at 2nd floor, } NDCC Building, Palika Kendra, } Jai singh Road, } New Delhi – 110 001. }	} } } } } }	Respondents
4. Central Bureau of Investigation } Anti-Corruption Branch, 3rd floor, } Tanna House, 11-A, Nathalal } Parikh Marg, Colaba, } Mumbai – 400 039 }	} } } } }	Intervener

Mr. Janak Dwarkadas-Senior Advocate with
Ms. Rishika Harish, Ms. Bindi Dave and Mr.
Pradeep Bakhru i/b. M/s. Wadia Ghandy and
Co. for the Petitioner.

Dr. G. R. Sharma with Mr. D. P. Singh for
Respondent Nos. 1 to 3.

Mr. Ajay Patil for Respondent No. 4.

**CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.**

**RESERVED ON JUNE 23, 2015
PRONOUNCED ON JULY 31st 2015**

JUDGMENT :-(Per S.C.Dharmadhikari, J.)

In view of the earlier orders passed by this Court, we have,
with the consent of parties, heard the Petition finally.

2) Hence, Rule. Respondents waive service. By consent, Rule
made returnable forthwith.

3) This Writ Petition, under Article 226 of the Constitution of
India challenges the order passed by the Deputy Secretary, Ministry of
Home Affairs, Government of India, dated 16th May, 2014.

4) The Petitioner is also aggrieved and dissatisfied with the
sealing of the immovable property under a notice dated 19th May, 2014,
issued by the Custodian of the Enemy Property (Respondent No. 1).

5) The Petitioner is a partnership firm carrying on business as
Builder and Developer. It is the case of the Petitioner that land
admeasuring 2862.9 square meters situated at Survey No. 276, Hissa

No. 4(part) at H- Ward No. 1068(2), Street No. 760, C. T. S. No. B/973/4, Chapel Road, Bandra (West), Mumbai (hereinafter referred to as “the said property”) was purchased by one Ms. Mariam Yacoob Tabani (MYT) and Mr. Aziz Yacoob Tabani (AYT) by way of registered deed. By virtue of this registered deed dated 13th September, 1956, they became entitled to one half undivided share in the said property. The case of the Petitioner is that MYT and AYT are brother and sister. At the time of the purchase of this property, both of them were Indian Citizens.

6) The further case of the Petitioner is that sometime in 1983, it was approached by one Chandrakant Mulchand Shah with an offer to acquire the said property. On evincing interest, the said Chandrakant Shah informed the Petitioner about the title of MYT and AYT and that they were not Indian Nationals. The said Chandrakant Shah further informed the Petitioner that in or around July, 1962, MYT migrated to England and thereafter acquired British Citizenship on 29th August, 1967. AYT migrated to Pakistan in August, 1969 and acquired Pakistani Citizenship on or about April, 1970. Since MYT and AYT both were not in India, it became impossible to safeguard the said property. As a result, there was an encroachment on the said property. Since it was unlikely that either MYT or AYT would return to India to recover possession of the said property from the encroachers and apprehensive

of the fact that the encroachers would eventually acquire an adverse title, Mariam Tabani and Aziz Tabani decided to sell the same.

7) In October, 1980, MYT and AYT entered into an agreement for sale of the said property in favour of Mr. Chandrakant Shah or his nominees on the terms and conditions set out therein. It is then stated that MYT made an application for sale of her share in the said property and approached the Reserve Bank of India, pursuant to which, the Reserve Bank of India granted such permission by its letter dated 19th February, 1981. On or about the same time, AYT also made an application to Respondent No. 1 for sale of his undivided share in the property along with the valuation report valuing the said property at Rs.4,10,520/-. AYT also made a declaration dated 14th March, 1983, whereby he had *inter alia* declared/stated that he was granting his consent and concurrence to Respondent No. 1 to sell and convey his one half undivided share in the said property at the price of Rs.2,25,000/- to the said Chandrakant Shah or his nominees and received the net price in respect thereof. It is stated that he declared that he will not raise any objection to the Respondent No. 1 alienating his property in this manner and for the aforesaid consideration. Annexure 'A' is the copy of the impugned order and from Annexure 'B' to 'D' are copies of the plans of the property, Mariam's letter dated 19th February, 1981 and declaration of Aziz Tabani dated 14th March, 1983.

8) Since Chandrakant Shah apprised the Petitioner of the agreement for sale and the declaration, the Petitioner showed their interest and accordingly desired to step in as the nominee of Chandrakant Shah. They therefore deposited the consideration amount towards the half undivided share of MYT in the said property with her Solicitor on 23rd March, 1983. Before Mariam could complete the sale and transfer her share in the Petitioner's favour, she died intestate at Dhaka on or about 20th April, 1991. In the circumstances, the heirs and legal representatives of the deceased Mariam, by their respective Power of Attorney appointed a common Constituted Attorney, who then executed the conveyance dated 29th June, 1999 duly registered it and thus, sold, transferred and conveyed in favour of the Petitioner, the half undivided share of MYT in the said property. Annexure 'E' is a copy of the conveyance deed.

9) In the mean time and on or about March/April, 1994, the Petitioner had approached Respondent No. 1 for sale of AYT's half undivided share in the said property in accordance with the agreement for sale entered into in October, 1980. Respondent No. 1 raised several queries in respect of the said property and after satisfying himself in every respect acceded to the Petitioner's request and accordingly vide its letter dated 27th June, 1994, granted its no-objection to transfer the

right, title and interest of AYT in the said property in favour of the Petitioner. Annexure 'F' is a copy of this letter dated 27th June, 1994. In compliance with the above, the Petitioner deposited, with Respondent No. 1, a sum of Rs. 2,25,000/- being the entire consideration towards the one half undivided share of AYT in the said property. The said deposit is evidenced vide receipt No. 72 dated 4th July, 1994 issued by Respondent No. 1 and Annexure 'G' is a copy of the same. AYT, however, died intestate at Karachi on 19th May, 1997 leaving behind him his legal heirs and representatives and with whom as well there was a conveyance deed executed by the Petitioner on 8th April, 1999. This conveyance was executed because all the heirs of ATY appointed a Attorney to complete this transaction. Annexure 'H' is copy of the deed of conveyance dated 8th April, 1999 and which also has been duly registered.

10) The Petitioner urges that on the basis of the above, it became an absolute owner of the said property. It thereafter negotiated with the illegal occupants on the said property and entered into settlement with them at considerable costs. After removing all the encroachment and obtaining all necessary approvals, the Petitioner commenced construction on the said property. They have constructed a 10 stored building on the said property. The Petitioner has spent

approximately 10 crores on development of the said property. They have also created certain third party rights. Those are styled as agreements with intended flat purchasers. The Petitioner also acquired the neighbouring property bearing CTS Nos. 973/5 and 973/6.

11) However, the Petitioner was surprised to receive the letter dated 2nd January, 2004 from Respondent No. 1 *inter alia* informing it that pursuant to an inspection carried out by Respondent No. 1, it was noticed that certain construction work was in progress in the said property. The Petitioner was called upon to stop all construction work on the said property. It was informed by this letter, copy of which is at Annexure 'I' that the said property was being managed and preserved by Respondent No. 1 and that any sale, conveyance effected by any persons in respect thereof was invalid and would thus be cancelled by the Government of India. The Petitioner replied to this letter on 29th March, 2004. A copy of the Petitioner's letter is at Annexure 'J' to the Writ Petition. Thereafter, the Petitioner's Advocates clarified the entire issue by their letter dated 1st July, 2004, copy of which is at Annexure 'K'.

12) The Petitioner then received a notice to show cause dated 29th November, 2005, copy of which is at Annexure 'L', that the said property is vested in Respondent No. 1. It continues to vest in it as per certificate dated 17th February, 2005 issued under section 12 of the

Enemy Property Act, 1968 (for short “the said Act”). The Petitioner was called upon to show cause as to how construction was undertaken on the said property and as to why proceedings under the said Act shall not be initiated against it for violating the provisions of the Act. The Petitioner replied to this letter cum show cause notice dated 29th November, 2005 by its letter dated 6th December, 2005. It relied upon the documents and deeds in their favour. It requested for personal hearing. Annexure 'M' is the copy of the Petitioner's reply dated 6th December, 2005. Thereafter, a personal hearing was granted by Respondent No. 1 Custodian. The Petitioner also addressed letter dated 5th January, 2006 Annexure 'N' and thereafter it is stated in the Writ Petition that a site visit was made by the Custodian/Respondent No. 1 on 10th February, 2006, whereafter, the Petitioner forwarded to Respondent No. 1 the title documents. Annexure 'O' is a copy of the letter dated 15th February, 2006.

13) The Petitioner then stated that they were provided with a copy of the certificate issued under section 12 of the Act. The Petitioner pointed out in its written submissions as to how such certificate is issued on the patently erroneous basis and unmindful of the fact that the property stands duly conveyed and transferred in their favour. Annexure 'P' is copy of the letter dated 13th March, 2006. The Petitioner

also relied upon the opinion of the Ministry of Law and Justice, Government of India, opining that the certificate issued by Respondent No. 1 had no effect. The opinion was that the property cannot be treated as an Enemy Property. Annexure 'Q' is a copy of the said letter/opinion. Then, an order was passed by Respondent No. 1 on 28th June, 2006, copy of which is at Annexure 'R'. In the light of this order dated 28th June, 2006, the Deputy Secretary, Ministry of Commerce and Industry, Government of India addressed a letter dated 7th June, 2007 to the Custodian/Respondent No. 1 *inter alia* informing him that the matter pertaining to the said property has been examined in consultation with the Department of Legal Affairs and it was decided to take further action. Therefore, even the show cause notice and the certificate dated 17th February, 2005 was treated as withdrawn. The letter dated 7th June, 2007, copy of which is at Annexure 'S' records that the proposed suggestion for seeking a differential amount between the consideration paid to AYT and the market price from the Petitioner did not stand legal scrutiny.

14) After a complete closure of the issue, Respondent No. 1, by its letter dated 13th June, 2007, addressed to the Petitioner, *inter alia*, recorded that in pursuance of the letter dated 28th June, 2006, the show cause notice and the certificate stood withdrawn. The matter was

referred to the Government for consideration under section 6 of the said Act. It was also recorded that after considering the matter at an appropriate level, the Central Government had declined to re-vest the said property to Respondent No. 1. It is in these circumstances that the matter was treated as closed. Annexure 'T' is the copy of the order dated 13th June, 2007.

15) The Petitioner then requested for forwarding certain documents relating to the said property and in the light of the Petitioner's application, they came to be supplied by a letter of Respondent No. 1 dated 28th September, 2007, copy of which is at Annexure 'U'.

16) After a period of more than six years, the second Respondent and the third Respondent to this Writ Petition have reopened the issue of vesting of the said property and addressed show cause notices dated 20th December, 2013 and 31st December, 2013 to the Petitioner. They alleged that the property is vested with the Custodian and that the Custodian could not have issued any no-objection for sale of the said property. He could not have passed any order withdrawing the earlier proceedings or his certificate. In the circumstances, the Petitioner was called upon to show cause as to why appropriate orders in accordance with law should not be passed. The Petitioner replied to

this show cause notice on 30th December, 2013 and 14th January, 2014. A hearing was given to them some time in the month of February/March, 2014. They also gave written reply at the said hearing, copies of which are at Annexures 'Z' and 'AA'. Then, there was a further hearing held on 25th March, 2014, at which again, certain documents were relied upon by the Petitioner and they gave written reply dated 25th March, 2014.

17) The Petitioner did not hear anything further from the Respondents after 25th March, 2014. However, to their surprise, on 19th May, 2014, Respondent No. 1 and its officers, without any notice/prior intimation, entered upon the larger property and sealed the same. They sealed the entire larger property and as a whole.

18) It is thereafter the Petitioner approached this Court and when it sought to move for urgent reliefs, a copy of the impugned order was handed over to it on 28th May, 2014. That is how it amended the Writ Petition and incorporated additional grounds. These actions are impugned in the present Writ Petition.

19) Mr. Dwarkadas-learned Senior Counsel appearing for the Petitioner submitted that the Petitioner may not be disputing that the property vested in the Respondent No. 1 as enemy property pursuant to

a Notification dated 10th September, 1965. This Notification is traceable to the Defence of India Rules, 1962. This Notification was subsequently amended and on the 1968 Act coming into force. The Custodian continued to have control inasmuch as any property vesting in him prior to the commencement of the said Act continues to vest in him.

20) Mr. Dwarkadas submits that in the present case, the Respondents have passed an order which is vitiated firstly by non application of mind, secondly it is vitiated because no reasons have been assigned for the conclusions that have been reached and thirdly, the impugned order does not take note of the fundamental aspect of the matter, namely, no permission, approval of the Custodian is required and a property vesting in the Custodian but belonging to the enemy can be transferred and disposed of by the enemy subject. The enemy continues to hold title in the property and a very limited right is created in favour of the Custodian by the Act. The Custodian cannot stop the enemy from dealing with the property nor can the Custodian prevent an Indian citizen from buying and acquiring the property. The only power that is conferred by the Act is to be found in section 6 of the said Act and that very clearly states that where any property vesting in the Custodian under the said Act has been transferred, whether before or after the commencement of this Act and where it appears to the Central

Government that (a) such transfer is injurious to the public interest or (b) evading the vesting or defeating the same, then such transfer can be declared to be void. That is a power not vesting in the Custodian but solely in the Central Government. If this is the only power conferred in the Central Government, then, that can have no effect on section 8 of the said Act. Section 8 confers powers on Custodian and in order to take such measures as he considers necessary or expedient for preserving the property. In order to exercise all such powers he can make any contract and execute any document in the name and on behalf of the enemy. By clause (vii) of sub section (2) of section 8 the Custodian can transfer by way of sale, mortgage or lease or otherwise any of the properties of the enemy. In the circumstances, the Central Government in this case ought to have appreciated that the vesting of the property in the Custodian is not absolute. The powers in the Custodian and as vested by the said Act do not divest the enemy of his right, title and interest in the property. In the present case, the order fails to note that a certificate said to be issued under section 12 of the said Act could never have been issued inasmuch as on the date on which the same has been issued, the property in question had ceased to be enemy property.

21) Mr. Dwarkadas, therefore, submits that none of these relevant and germane aspects have been noticed leave alone considered

in the impugned order. It is therefore vitiated by an error of law apparent on the face of the record. It can also be termed as perverse. Now, an attempt has been made to supply certain reasons and to fill up the lacuna in the impugned order by producing documents. Mr.Dwarkadas therefore makes a comment on the affidavit in reply and submits that the attempt is to push in some documents and to justify the conclusions of the Central Government. That exercise is not permissible in law. Further, Mr. Dwarkadas submitted that in the present case, the transactions are concluded and by execution of deeds of conveyance. The Respondents are now disputing that MYT acquired British Citizenship in 1967. Now, they are trying to project that MYT died in Dhaka and that the Petitioner has been unable to prove or provide any direct or documentary evidence of her citizenship. In this regard, the Central Government fails to note that the Petitioner came into picture in 1983. They could not have any direct evidence of her citizenship save and except an application made by MYT to the Reserve Bank of India seeking its permission to sell her half share in the said property to the Petitioner. There is an order dated 19th February, 1981 passed by the Reserve Bank of India granting such permission to MYT. Both these documents have been produced and are on record of the Central Government for a long time. Therefore, such documents could not have been questioned nor any doubt or suspicion raised about their contents.

Assuming without admitting that MYT was a Pakistani citizen and as alleged this fact will not validate the impugned order or the action. In that regard, Mr. Dwarkadas submits that the Custodian really came into picture when AYT acquired Pakistani citizenship in April, 1970. Prior to the passing of the impugned order, the status of MYT was never questioned, leave alone probed by the Respondents nor any inquiry or investigation held into the genuineness of the documents including the Reserve Bank of India permission. After 1971 war with Pakistan, the amendment was brought in the said Act so as to indicate as to how notwithstanding the expiration of the Defence of India Rules, 1971 any property vesting in the Custodian prior to the commencement of this amendment Act, the same continued to vest in him. Therefore, AYT's share continued to vest in the Custodian. However, when the property was sold, neither MYT nor AYT were residing in India. The property was completely unprotected and unattended. There were encroachments on the same. Mr. Dwarkadas therefore relies upon the Reserve Bank of India's permission and other documents to support the stand that MYT was a British citizen. As far as AYT is concerned, Mr. Dwarkadas invites our attention to the application made by AYT to Respondent No. 1 for sale of his undivided share in the said property and the valuation report. Mr. Dwarkadas then relies upon a declaration which was made by abundant caution on 14th March, 1983 by AYT. Mr.

Dwarkadas submits that though MYT may have died in Dhaka that has nothing to do with her citizenship and which is that of Great Britain. Mr. Dwarkadas then relies upon the No-objection Certificate (NOC) granted by Respondent No. 1 on 27th June, 1994 and which, according to him, supports all that has been urged through out. He submits that the transfer cannot be void on either grounds once this NOC of 1994 was not questioned even after the death of AYT on 19th May, 1997. Having deposited the entire consideration and the parties/their heirs having received it that a conveyance was executed and duly registered, as noted above. Mr. Dwarkadas therefore submits that the Respondents should not be permitted to improve upon their case by raising irrelevant issues such as the legality and validity of the Power of Attorney on the basis of which MYT and AYT conveyed the property to the Petitioner. Such issues were never raised while granting the NOC by Respondent No. 1 or at the time of execution and registration of the conveyance. Respondent No. 1 also signed the conveyance as a confirming party and attended the office of the Sub-Registrar for execution. No attempt has been made to question the Power of Attorney while issuing the show cause notice. That is also not a conclusion reached in the impugned order. Therefore, the impugned order cannot be supported by the Respondents by raising fresh issues and belatedly.

22) The thrust of the submissions of Mr. Dwarkadas is therefore on the property ceasing to be an enemy property and requirement of passing a valid and legal order under section 6 of the said Act. Mr. Dwarkadas also questions the contents of the certificate dated 17th February, 2005 issued under section 12 of the said Act and submits that the property on that date did not belong to AYT and in the teeth of the conveyance deed in favour of the Petitioners.

23) Mr. Dwarkadas therefore submits that once the show cause notice itself could not have been issued because the property has lost its status as enemy property, then, all further steps are also bad in law and must fall to the ground.

24) The Petitioner is complaining that the respondents are shifting the stand and are trying to allege fraud. The letter of the Ministry of Law and Justice addressed to Respondent No. 1 dated 21st June, 2006 cannot therefore be the basis as the Petitioner has no connection nor has it been responsible for issuance of such letters or opinions. Mr. Dwarkadas submits that once the show cause notice and the certificate dated 17th February, 2005 have been withdrawn, then, the property cannot be said to have re-vested in the Custodian. There is no such provision in the said Act or otherwise. The title of the Petitioner in the property is therefore absolute.

25) In the circumstances and after these orders, and six and a half years from the final communication dated 13th June, 2007, the subject show cause notice has been issued and served on the Petitioner. The second show cause notice on the same set of allegations could not have been issued and after the first was dropped. In the circumstances, there is absolutely no material to conclude that the conveyances were executed with an intent to defeat the vesting of the property in the Custodian.

26) For all these reasons, Mr. Dwarkadas submits that the impugned order be quashed and set aside and the Writ Petition be allowed.

27) Mr. Dwarkadas has placed reliance on the following decisions in support of his submissions:-

(i) Judgment passed by a Division Bench of Bombay High Court in the case of *Union of India and Anr. vs. Hamida Begum @ Kishori Shaikh Alladatta and Ors.* **Appeal No. 108 of 1975 and 124 of 1975** decided on 16th, 17th and 19th February, 1979.

(ii) *Union of India and Anr. vs. Raja Mohammed Amir Mohammad Khan* reported in **(2005) 8 SCC 696**.

(iii) *Property and Finance Private Limited vs. Union of India* reported in **(2007) 15 SCC 725**.

(iv) *Central Inland Water Transport Corporation Limited and Ors. vs. Brojo Nath Ganguly and Ors.* reported in **(1986) 3 SCC 156**.

28) On the other hand, Mr. Sharma appearing on behalf of the Respondents submitted that this Writ Petition be dismissed. The Petitioner has absolutely no locus to file this Writ Petition. The Petitioner together with others is found to have indulged in a blatant fraud. The Writ Petition itself is a product of fraud. Mr. Sharma invited our attention to the affidavit in reply filed to this Writ Petition and submitted that the affidavit does not make any attempt to supply additional reasons to support the impugned order. It does not seek to justify the impugned order and the conclusions therein by relying on documents which are not brought to the notice of the Petitioner or the contents of which were not to its knowledge. The documents which the Petitioners relied upon themselves indicate as to how MYT was not a British national. If she was a British national there would have been a proof of some address in United Kingdom and it is surprising that no such details are available or placed on record. This lady died, according to the Petitioner, in Bangladesh. Therefore, how an allegedly British national travelled to Bangladesh, for what reason and she expired there has not been clarified at all. Our attention has been invited to a Power of Attorney, copy of which is annexed as Annexure 'D' to the affidavit in reply. This Power of Attorney, details of which are set out in para 14, running page 170, is dated 12th September, 1987. However, this Power of Attorney is supposed to have been signed by MYT. It is indicated at

page 252 that the said MYT was not a British national. Thus the Power of Attorney is also forged. It is dated 12th September, 1987. However, there is no Constituted Attorney. Pertinently, the Power of Attorney would come to an end upon death of the donor. In the present case, this Power of Attorney is utilised even after the death of MYT which occurred on 20th April, 1991. Further, MYT is supposed to have died intestate. How the heirs of MYT surfaced and they are of which nationality has not been indicated at all. Admittedly, AYT was a Pakistani national. Our attention is invited to page 516 of the sur-rejoinder and it is submitted that the Reserve Bank of India has clarified that there is no record of the permission and sought from it. The Reserve Bank of India's letter, copy of which is at page 521 of the paper book is not a permission. Such a permission was never sought. Mr.Sharma has submitted that the conveyance deed is also suspicious and bogus. The donor having died, the Constituted Attorney had no authority to execute any document or sign the same on behalf of the donor. In the circumstances, every act on the part of the Petitioner is fishy, the documents are suspicious and not genuine. The Petitioner's conduct is such that it does not deserve any discretionary and equitable relief.

29) Our attention has been invited to the provisions of the said Act to urge that no private alienation of the property is permissible by

the enemy. The definitions which have been relied upon and particularly sections 2(b) and 2(c) of the word 'enemy' or 'enemy subject and 'enemy property', according to Mr. Sharma are comprehensive. In the present case, as far as AYT's share is concerned, he is supposed to be a co-owner. All Co-owners are residing at Pakistan. Everything that they have allegedly contracted and transacted is behind the back of Union of India. In the circumstances, there is no substance in the contention of Mr. Dwarkadas that the impugned order is vitiated by delay, non application of mind or error of law apparent on the face of the record. As soon as the fraud was detected, the Central Government proceeded against all. That fraud came to the knowledge of the Union of India and the Central Government in 2013. This is a fit case where section 6 of the said Act applies inasmuch as the alienation is both, injurious to public interest and defeats the vesting of the property in the Custodian. Mr. Sharma invites our attention to section 7(3), 8, 18 and 22 of the said Act to submit that the powers thereunder are vested in the Central Government. The powers in the Custodian are only of management and administration of the property of the enemy. The Custodian could not have been a party to any sale deed. Therefore, the same does not bind the Central government.

30) As far as the decisions relied upon by Mr. Dwarkadas are concerned, Mr. Sharma submits that they are clearly distinguishable.

These decisions will have no application to the facts of the present case. They are therefore distinguishable. In addition, Mr. Sharma relies upon the Tashkent Declaration and a particular para therein, wherein, the Prime Minister of India and the President of Pakistan have agreed that the sides will continue the discussion on questions relating to the problems of refugees and evictions/ illegal immigrations. They also agreed that both sides will create conditions which will prevent the exodus of people. They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict. Mr. Sharma relied upon a Judgment of the Hon'ble Supreme Court of India in the case of *Sewa Ram and Ors. vs. Union of India and Ord.* Reported in **JT 1997 (4) S.C. 692**. He also relied upon another order passed by the Hon'ble Supreme Court of India in the case of *Saida Fatma and Ors. vs. Union of India* in **Civil Appeal No. 11468 of 1995**, decided on 28th November, 2002.

31) In view of the rival contentions, the only question that falls for our consideration and determination is whether the order impugned in this Writ Petition and passed by the Central Government is in accordance with law or is vitiated as contended by the Petitioner. For a decision on this question, it would be worthwhile and necessary as well to refer to the said Act. The Enemy Property Act, 1968 (Act 34 of 1968)

came in to effect on 20th August, 1968. It is an Act to provide for continued vesting of enemy property vested in the Custodian of enemy property for India under the Defence of India Rules, 1962 and the Defence of India Rules, 1971 and for matters connected therewith. Section 1 of this Act is a short title, extent, application and commencement. Section 2 contains definitions and for our purpose following three definitions are relevant:-

“(a) “Custodian” means the Custodian of Enemy Property for India appointed or deemed to have been appointed under section 3 and includes a Deputy Custodian and an Assistant Custodian of Enemy Property appointed or deemed to have been appointed under that section;

(b) “enemy” or “enemy subject” or “enemy firm” means a person or country who or which was an enemy, an enemy subject or an enemy firm, as the case may be, under Defence of India Act, 1962 and the Defence of India Rules, 1962 or to the Defence of India Act, 1971 and the Defence of India Rules, 1971, but does not include a citizen of India;

(c) “enemy property” means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm.”

32) By section 3, appointment of Custodian of enemy property for India and Deputy Custodian etc. is provided for. By section 4 the appointments can be made by the Central Government of Inspectors of enemy property. By section 5, the Act provides that even if the Defence of India Act, 1962 and Defence of India Rules, 1962 have expired, all enemy properties vested before such expiration in the Custodian shall continue to vest in him. By sub section (2) of section 5 it is clarified

that the Custodian in whom the property of the enemy vested by virtue of Defence of India Act, 1971 and Defence of India Rules, 1971 shall continue to vest in him immediately in terms of the enemy Property (Amendment) Act, 1977. Section 6 of the Act reads as under:-

“6. Transfer of property vested in Custodian by enemy or enemy subject or enemy firm – Where any property vested in the Custodian under this Act has been transferred, whether before or after the commencement of this Act, by an enemy or an enemy subject of an enemy firm and where it appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, then, the Central Government may, after giving a reasonable opportunity to the transferee to be heard in the matter, by order, declare such transfer to be void and on the making of such order, the property shall continue to vest or be deemed to vest in the Custodian.”

33) Section 7 of the said Act deals with payment of Custodian of money otherwise payable to an enemy, enemy subject or enemy firm. By the subsections of this section, it is stated that any sum payable by way of dividend, interest, share profits or otherwise to or for the benefit of an enemy or an enemy subject or an enemy firm shall, unless otherwise ordered by the Central Government, be paid by the person by whom such sum would have been payable but for the prohibition under the Defence of India Rules, 1962 or the Defence of India Rules, 1971, to the Custodian or such person as may be authorised by him. By sub section (2) the case of money which is payable in foreign currency is dealt with. By sub section (3) the Custodian shall, subject to the

provisions of section 8, deal with any money paid to him under the Defence of India Rules, 1962 or the Defence of India Rules, 1971 or under this Act and any property vested in him under this Act in such manner as the Central Government may direct.

34) Section 8 of the said Act reads as under:-

“8. Power of Custodian in respect of enemy property vested in him. - (1) with respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property and where such property belongs to an individual enemy subject, may incur such expenditure out of the property as he considers necessary or expedient for the maintenance of that individual or of his family in India.

(2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as may be specifically authorised by him in this behalf, may, for the said purpose, -

- (i) carry on the business of the enemy;
- (ii) take action for recovering any money due to the enemy;
- (iii) make any contract and execute any document in the name and on behalf of the enemy;
- (iv) institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities;
- (v) raise on the security of the property such loans as may be necessary;
- (vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and of any wages, salaries, pensions, provident fund, contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;
- (vii) transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties;
- (viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose;

- (ix) make payments to the enemy and his dependants;
- (x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on the 25th October, 1962 or on the 3rd December, 1971; and
- (xi) make such other payments out of the funds of the enemy as may be directed by the Central Government.

Explanation. - In this sub-section and in sections 10 and 17, “enemy” includes an enemy subject and an enemy firm.”

35) A bare perusal of section 8 reveals that whatever is necessary or expedient for preserving the enemy property and when the property belongs to individual enemy subject, the Custodian may incur such expenditure out of the property as he considers necessary for the maintenance of that individual or his family in India. That could be done by the Custodian. He has to take measures in that behalf. For the purpose of such measures, the Custodian has been given a discretion to carry on the business of the enemy, to take action for recovery of any money due to the enemy, make any contract and execute any document in the name and on behalf of the enemy, institute, defend or continue any Suit or other legal proceeding etc. The Custodian therefore has been conferred with a power to transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties.

36) By section 9 of the said Act, there is an exemption to the enemy property vesting in the Custodian from attachment, seizure or sale in execution of a Decree of a Civil Court or order of any authority. By section 10, transfer of securities belonging to an enemy is dealt with.

By section 11, there is a power conferred in the Custodian to summon persons and call for documents. There is a certain protection given for complying with orders of Custodian by section 12. Then, validity of action taken in pursuance of orders of Custodian is an aspect dealt with by section 13. By sections 14, 15 and 16, the Act provides for proceedings against companies whose assets vest in Custodian, returns as to enemy property, Registers of returns and by section 17 the Custodian can levy fees. By section 18, the Central government is empowered to make a general or special order divesting the enemy property vested in the Custodian and remaining with him and it being returned in such manner as may be prescribed to the owner thereof or to such other person as may be specified in the direction. Section 18 has been heavily relied upon and therefore is reproduced. It reads as under:-

“18. Divesting of enemy property vested in the Custodian. - The Central Government may, by general or special order, direct that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall revest in such owner or other person.”

37) By sections 19 to 22, protection of action taken under the Act is given so also penalty and offences are set out. By section 22, it is clarified that the provisions of the said Act have effect notwithstanding anything inconsistent therewith contained in any other law for the time

being in force. Section 23 confers powers to make rules and by section 24 and 25, certain orders made under the Defence of India Act, 1962 to continue in force and repeal of the Enemy Property Ordinance, 1968 is provided.

38) Consequent on Chinese aggression in 1962, immovable properties, cash balances and firms belonging to the Chinese nationals in India valued approximately at Rs.28.85 lakhs were vested in the Custodian. This was the Custodian appointed under the Defence of India Rules, 1962. similarly, consequent on the aggression by Pakistan in 1965, immovable and some specified movable pakistani properties in India, the total value of which has been approximately estimated at Rs.27 crores, were vested in the Custodian of enemy property and the vesting thus continued. The properties were being administered by the Custodian. Consequent upon revocation of the proclamation of emergency w.e.f. 10th January, 1968 and the powers under the Defence of India Act, 1962 that it became necessary to have fresh legislation. That was to confer legal authority in the Custodian for vesting of the properties or their continued vesting. That was to facilitate management of the properties by Custodian of enemy property. That is how the act came to be enacted. After the enactment of the said Act, there was one more aggression by Pakistan in 1971 and the

proclamation of emergency on 3rd December, 1971, the enactment of Defence of India Act, 1971 with similar consequences as above. After these Acts ceased to operate, there was an Ordinance issued proposing amendments to the said Act entitled the Enemy Property (Amendment) Ordinance, 1977. The Bill replaced the said Ordinance. That is how the Amendment Act has been enacted.

39) The provisions of the Act therefore must be interpreted in the above backdrop. The provisions of the Act must receive such interpretation as would uphold the object and purpose of the said Act and not defeat it. It is common ground that the citizens of a enemy country are not enemies as the country itself. If those residing in a enemy country are entitled to hold their properties in India that a provision had to be made for effectively and properly administering, managing and preserving their properties. That it is for their benefit but equally the said Act recognises the fetter or restriction placed on the enemy inasmuch as it cannot deal with the properties as freely as is permitted in his own country. He would have to abide by the mandate of the said Act. It is common ground that Articles 5 to 11 of the Constitution of India inserted in part II deal with citizenship. By Article 5, it is clarified that every person who has his domicile in the territory of India and who was born in the territory of India or either of whose

parents was born in the territory of India or who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. By Article 6, rights of citizenship of certain persons who have migrated to India from Pakistan have been dealt with. Any such person migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of the Constitution of India if the conditions stipulated therein are satisfied.

Article 7 reads as under:-

“ARTICLE 7. Rights of citizenship of certain migrants to Pakistan. - Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.”

40) A bare perusal of this Article would indicate that it opens with a non obstante clause. Notwithstanding anything contained in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India, but the proviso clarifies that nothing in this Article shall apply to a person who after having so migrated to the territory now included in Pakistan has

returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948. A larger Bench of the Hon'ble Supreme Court of India in the case of *Kulathil Mammu vs. State of Kerala and Ors.* reported in **AIR 1966 SC 1614** held that the word migration appearing in this Article should be given a wider meaning. In the wider sense, it simply means going from one place to another whether or not with any intention of permanent residence in the later place. In the unfortunate scenario when two countries, namely, India and Pakistan have fought wars and Pakistan has been declared by us as the aggressor that it became necessary to enact the said Act. The Act itself defines the word 'enemy' to mean a person or country which was an enemy as the case may be under the 1962 or 1971 Defence of India Rules but does not include the citizens of India. Once that label is attached to that person and he is not a citizen of India, then, he is termed as an enemy. Any property in the time being belonging to or held or managed on behalf of an enemy is styled as enemy property. The custodian in whom the property vests for management and preservation therefore has these powers. While it is true that a transfer of property vesting in the Custodian by enemy or enemy subject of enemy firm is contemplated by section 6, a power

equally is given to the Central Government to declare such transfer to be void if such transfer by an enemy or enemy subject or enemy firm is injurious to the public interest or so made with a view to evade or defeat the vesting of the property in the Custodian. Thus, being an enemy, the right to transfer the property could be exercised subject to this provision. This provision gives a power to the Central Government to declare the transfer to be void and thereupon it shall continue to vest or deemed to be vested in the Custodian. In the present case, it is this power which is exercised by the Central Government.

41) The power of the Custodian under section 8 is therefore not such as would enable the Custodian to override the said Act. It is a discretion given to the Custodian to take or authorise to take all such measures for preserving such property and where the property belongs to an individual enemy subject, the Custodian may incur expenditure out of the property as is necessary or expedient for the maintenance of that individual or his family in India. This would also reinforce our conclusion that the enemy is not to be deprived of his right, title and interest in the property. If the enemy subject is an individual, he may also be in a position to provide for his family members in India through such measures as are devised by the Custodian. Therefore, vesting of the property in the Custodian is limited to the extent of possession, management and control over the property. It is towards that end that

he has been conferred with such powers as would enable him to take suitable actions including transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties of the enemy subject. This would apply in the case of the enemy subject holding more than one property. We do not see any conflict therefore in section 7(3) and section 8 of the said Act. By sub section (3) of section 7, the Custodian is mandated to deal with any money paid to him under the Defence of India Rules, 1962 or the Defence of India Rules, 1971 or under this Act or any property vested in him under this Act in such manner as the Central Government may direct. Therefore, the power is conferred in the Central Government and it is empowered to direct the Custodian to deal with the money and any property of the enemy subject in such manner as the Central Government deems fit and proper. When such direction is issued, then, the Custodian is bound to comply with it. That power under sub section (3) of section 7 is in the Central Government and it can direct the Custodian to act in terms thereof. Else, the Custodian is free to exercise his powers in respect of enemy property vested in him vide section 8. However, the powers of the Custodian under section 8 are to be exercised keeping in mind the intent of preserving the same. In a decision reported in **AIR 1976 Calcutta 267** (*Sudhendu Nath Banerjee and Ors. vs. Bhupati Charan Chakraborty and Ors.*) a learned Single Judge of the Calcutta High Court held as under:-

“5. Mr. Banerjee started his argument with the submission that as soon as Pakistani nationals were declared to be enemies during the Emergency period, the suit should have been deemed as abated, as the enemy had no right to claim any property in India. There is of course no dispute that when the suit was filed, the plaintiff was in East Pakistan and that at that time he was a Pakistani national. There is no dispute, and there cannot be any, that when the suit was filed, the plaintiff had his right to start the legal action. Mr. Banerjee referred to several foreign decisions and treaties on International Law and Jurisprudence to show that during war, the enemy can have no right to bring any action or continue any legal prosecution so long as the hostility continues. Mr. Banerjee also relied upon the provisions of Enemy Property Act, 1968 and the Defence of India Rules, 1962. When Mr. Banerjee relies on the law of our country, it would be no useful purpose to deal with the problems of abstract law. Mr. Banerjee, however, ultimately agrees that he wants to rely upon the provisions of the enemy Property Act, 1968 and the Orders of the Central Government declaring that the properties of the citizens of the enemy country should vest in the Custodian of enemy properties. When there is an enactment in the country, there is no necessity to rely on foreign decision based upon foreign laws or on abstract theories of law. The simple and clear argument of Mr. Banerjee is that when the suit property of the plaintiff who is a man of East Pakistan had already vested in the Custodian of enemy properties with the declaration of Emergency in India, the suit abated along with the vesting. Mr. Banerjee wants to say that with the vesting of the suit property in the Custodian, the Plaintiff had no right to prosecute the suit and the suit abated automatically and in any case, the appellate Court below ought to have found that the suit was not maintainable and that it came to an end. I am afraid, I cannot accept the contention of Mr. Banerjee. Admittedly, when the suit was filed, the plaintiff had every right to start the action. During the pendency of the suit, the Emergency was declared and according to the order of the Central Government, the property of a Pak national must vest in the Custodian of the enemy properties appointed by the Central Government. The simple question, therefore, is whether due to this vesting of the suit property in the Custodian, the suit automatically abated or whether the trial Court was right to hold that the suit was liable to be dismissed as not maintainable. From the argument advanced by Mr. Banerjee it appears to me that he wants to say that by virtue of the vesting of the suit property in the Custodian, the plaintiff lost all his interest and right in the suit property and

that the Custodian became the owner of the suit property. This proposition is clearly unacceptable. First of all, I wanted Mr. Banerjee to show any provision either in any Order of the Government or in the Enemy Property Ordinance or in the Enemy Property Act, 1968 which may suggest even that all the right, title and interest would devolve upon the Custodian or that the enemy owner of the property becomes divested of all his right, title and interest therein. Mr. Banerjee could not show any such provision. I have gone through the relevant Notification as mentioned earlier as also the Ordinance and the Act of 1968. First of all, I must say that there is no provision not even any indication that the enemy owner of the property shall be stripped of all his rights, and interests and that he would lose all his interest or right therein. Next, I find no indication or provision which may even tend to say that if any enemy or citizen of an enemy territory continues any suit in respect of his property in India after the date of vesting as declared by the Central Government during the pendency of the suit, the continuance of such suit by such person would be illegal and that the proceeding will be a nullity if it is not continued by the Custodian. On the contrary, from the provisions appearing both in the Ordinance and in the Act of 1968, I find that the enemy-owner of the property is not divested of all his interest and title to the property, but the Custodian for a limited purpose gets the property vested in him particularly relating to possession, management and control of the property. Virtually speaking, the Enemy Property Act is a repetition of the Enemy Property Ordinance, 1968. Section 5 of the Act says that notwithstanding the expiration of the Defence of India Act, 1962 and the Defence of India Rules, 1962, all enemy properties vested before such expiration in the Custodian of enemy property for India appointed under the said Rules and continuing to vest in them immediately before the commencement of the Ordinance shall from such commencement vest in the Custodian.

6. Section 6 of the Enemy Property Act, 1968 is to be noted. According to this Section, if any property vested in the Custodian has been transferred either before or after the commencement of the Act by an enemy or an enemy subject and where it appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, then the Central Government may, after giving a reasonable opportunity to the transferee to be heard, declare such transfer to be void and on making such declaration or order, the property shall continue to vest or to be deemed to

vest in the Custodian. This provision indicates that after the vesting of the enemy property in the Custodian, an enemy may have the right to transfer the said property, but it is the Central Government which is to consider whether it will declare such transfer to be void or not. It is, therefore, clear that with the vesting of the property in the Custodian, the enemy does not lose all his interest or title to the property vested in the Custodian: Nowhere in the Act has it been stated that after the vesting, the transfer made by the enemy-owner of the property, already vested, becomes void.

7. In connexion with Section 6 mentioned above, we may consider the provisions of Section 8 of the Act. This relates to the powers of Custodian relating to the enemy property vested in him. Sub-section (1) of Section 8 says that if the property belongs to an individual enemy subject, the Custodian may incur such expenses out of the property as he considers expedient for the maintenance of that individual or of his family in India. Clause (iii) of sub-section (2) of Section 8 authorises the Custodian to make any contract and execute any document in the name and on behalf of the enemy, the owner of the property. Clause (x) of the same sub-section also authorises the Custodian to make payments on behalf of the enemy to person other than those who are enemies. The provisions in Section 8 without any ambiguity indicates that after the vesting of the property in the Custodian, the enemy whose property has vested still remains the owner of the property and not only does he get benefit out of the property in certain circumstances, but the Custodian acts on behalf of the enemy in the matter of contract and relating to documents in connexion with the property. There can be no doubt, therefore, that the enemy, due to this vesting in the Custodian, is not divested of all his right, title and interest in the suit property, but the vesting in the Custodian is limited to the extent of possession, management and control over the suit property and it is also temporary because Section 18 of the Act says that the Central Government may by general or special order divest the Custodian and the property be returned to the owner thereof. In view of my discussions, I, therefore, hold that due to the vesting of the suit property in the Custodian of enemy property for India, the plaintiff did not lose his right, title and interest in the suit property and that it cannot be said that the suit automatically abated or that the title of the suit property was lost to the plaintiff.”

42) In the present case, the Central Government had before it the notice issued under section 6 of the Act issued to the partner of the Petitioner. That called upon him to explain why the alleged sale of immovable property at Bandra be not declared void and an order be not passed by the Central Government for re-vesting of the said property in the Custodian of the enemy property. The impugned order proceeds on the basis that the property under dispute is a piece of land/plot at Bandra, Mumbai. That plot of land is an enemy property jointly held by brother and sister AYT and MYT, both of whom are not Indian citizens admittedly. The Petitioner is claiming ownership of the said land/plot on the strength of the sale deeds. They have started construction of a multi stored building on the plot/property. The show cause notice alleged that it is surprising that the process of agreement and conveyance deed/sale deed including realisation of consideration amount, obtaining NOC from the Custodian took about two decades. The process started in 1980 and culminated in 1999, when the conveyance deeds were registered with the Sub-Registrar, Mumbai, after which the Petitioner started the work. In the year 2004, the Custodian got to know of this construction and he stopped the work.

43) The first contention of Mr. Dwarkadas need not detain us any longer. If the conveyance deed is executed in the year 1999 and is said to have conferred right, title and interest in the property in favour

of the Petitioner, then, the events taking place from the execution and registration of the sale deed till the impugned order cannot be ignored. On the own showing of the Petitioner, the agreement for sale in favour of Chandrakant Shah and MYT and AYT is of October, 1980. On their own showing, on 10th December, 1980 MYT applied for permission of the Reserve Bank of India to sell her half share in the said property for a consideration of Rs.2,25,000/-. This permission was allegedly granted on 19th February, 1981. Thereafter, AYT made an application to the Custodian for sale of his undivided share in the said property. AYT made a declaration on 14th March, 1983. On 23rd March, 1983, the Petitioner agreed to purchase the property of enemy through Mr.Chandrakant Shah and deposited the consideration towards the half undivided share of MYT with her Solicitors. MYT is supposed to have died intestate at Dhaka in Bangladesh in 1991. Thereafter, nothing happened till March/April, 1994 when the Petitioner approached AYT for sale of AYT's undivided share in the said property. Then reliance is placed upon the NOC given by Respondent No. 1 on 27th June, 1994 and deposit of the share of the AYT by the Petitioner with Respondent No. 1 on 4th July, 1994. Nothing happened thereafter and in the meanwhile, AYT died intestate in Karachi. The deed of conveyances are thereafter executed and one is of 8th April, 1999 and the other is of 29th June, 1999.

44) On 2nd January, 2004, the first Respondent addressed a letter Annexure 'I' (page 92 of the paper book) to the Petitioner. Thus, from 1999 till 2004, we do not think the time taken for noticing the construction work at site and thereafter perusing the old records and issuing a letter dated 2nd January, 2004 is such as would vitiate the whole inquiry. It is the Petitioner who is relying on these events and developments and they replied to the letter of the Custodian on 29th March, 2004. Thereafter, the correspondence continued until a certificate was issued on 17th February, 2005 by the Custodian. A notice under section 6 of the Act was issued on 29th November, 2005 and which was replied to and eventually on the own showing of the Petitioner, the proceedings in pursuance thereof ended on 13th June, 2007.

45) Thus, the Petitioner's grievance about delay in passing of the impugned order must be seen in the light of the pendency of the proceedings from the year 2004 till 2007. Though the show cause notice based on which the impugned order has been passed is dated 20th December, 2013 and 31st December, 2013, what we find is that the records being old and required to be traced from several departments, period for issuance of show cause notice and stated to be of six years by itself cannot vitiate the impugned order. The delay in issuing the show

cause notice does not appear to be deliberate and intentional. In the affidavit in reply as also in the impugned order it has been pointed out that an inquiry had been launched into the acts of the then Custodian of enemy property Mr. Kolamkar. The acts of Mr. Kolamkar came to the notice of another Custodian who replaced him. She issued a certificate of vesting dated 17th February, 2005, but after she demitted office, one Dinesh Singh joined and he issued a show cause notice to the Petitioner dated 29th November, 2005 Annexure 'L' at page 100 of the paper book. The Central Government in the impugned order asserted that this show cause notice was not required because the property stood vested in the Custodian in February, 2005 itself. In any event, this show cause notice was issued but not pursued and this also was an act contrary to public interest. These acts became fully known to the Central Government in September, 2013 after it held a thorough inquiry. Once the inquiry was held as set out in the impugned order in September, 2013, then, the show cause notice issued in December, 2013 cannot be said to be belated. The notice is not barred by delay and laches for the simple reason that the act does not envisage any outer limit for issuance of a notice of this nature. Even if one applies the general principle of delay and laches, we do not think that the time taken of six years for issuance of the show cause notice would vitiate the impugned order. Once there is an explanation given about the delay of an inquiry and the outcome

thereof revealing gross illegalities, then, we cannot invoke the principles of laches and set aside the impugned order either. The events from June, 2007 till the issuance of the subject show cause notice have been referred by us hereinabove. It is only when an inquiry was held in September, 2013 that the acts of omission and commission of the Custodian came to light. The Central Government has proceeded against the Custodians under general law as well. There are departmental proceedings initiated against them. There are numerous documents and records which had to be looked into in order to the Central Government to be satisfied while issuing the notice under section 6 of the said Act. Therefore, the first contention of Mr. Dwarkadas fails to impress us.

46) Equally, untenable is his second contention that the show cause notice on which the impugned order is based is second in line and that could not have been issued once the proceedings in pursuance of the earlier show cause notice came to be dropped. The argument proceeds on the footing that the first show cause notice contained identical allegations. Once the first one is not pursued and taken to its logical end, then, on the same set of allegations, the second cannot be issued and proceeded with.

47) In the affidavit in reply, it is explained that the Central Bureau of Investigation is conducting the criminal investigation against M/s. Jay Construction Company, a partnership firm registered under the Indian Partnership Act, 1932 having its office at D-10, Everest, Tardeo, Mumbai 400 034. The investigations are on also against the Custodian of enemy property and such other persons involved in the alleged fraudulent transactions. In para 13 of the affidavit in reply onwards, it has been set out as to how several documents and deeds came to light during the course of investigation held departmentally. The further affidavit filed by Respondents would show as to how from several Court records it was revealed that the then Custodian and in charge of the properties colluded with the Petitioner. The involvement of the Custodian was a matter of grave concern and that is how the show cause notice proceeds to allege that Smt. Ruby Srivastava, the then Custodian issued the order of re-vesting of the 50% share of AYT on 17th May, 2015. She also issued a show cause notice to the Vendee Builder (the Petitioner) but her successor Mr. Dinesh Singh (the then Custodian) not only cancelled the order of re-vesting issued by his predecessor but disposed of the show cause notice in favour of the Petitioner on the basis of some opinion received from the Department of Legal Affairs, Branch Secretariat, Bombay. The present show cause notice alleges that the basis on which the earlier show cause notice

came to be withdrawn or not pressed is in conflict with the settled legal position. The present show cause notice relies upon the legal position as emerging from the Judgment of a Division Bench of this Court. The order of the Hon'ble Supreme Court confirming this Judgment of the Division Bench also was relied upon. The legal position was otherwise and the said acts of the Custodian do not conform with it. The Custodian could not have issued a NOC of 27th June, 1994 nor could he sign the documents as a confirming party. That resulted in alienation of the property through the Custodian. In the circumstances, his show cause notice came to be issued. We do not find that the show cause notice issued earlier was pursued inasmuch it did not culminate or end in any final order. The Petitioner placed reliance upon the communications post 5th January, 2006. However, prior thereto not only did the Petitioner received the show cause notice dated 29th November, 2005 but replied it in extenso. There was a personal hearing in the office of Respondent No. 1, the then Custodian. Then, the Petitioner handed over another letter dated 5th January, 2006. There were certain queries raised on 21st February, 2006 by Respondent No. 1 and the Petitioner dealt with them and tendered written submissions on 13th March, 2006. The Petitioner relied upon a Judgment in the case of *Kishori Shaikh Alladatta and Ors.* (supra) and *Raja Mohammed Amir Mohammad Khan* (supra). It is thereafter that a

legal opinion came to be given by the Ministry of Law and Justice Government of India on 21st June, 2006, based on which, the order at page 125 of the paper book came to be passed on 28th June, 2006. The Custodian withdrew the certificate dated 17th February, 2005.

48) The entire matter was not examined in the light of anything save and except the opinion given by the Ministry of Law and Justice. This opinion is that in view of the provisions of sections 6 and 18 of the said Act and the decisions referred above the transfer of property is in accordance with law. Therefore, the property appears to be not re-vested in the Custodian post the transfer. Accordingly, the second part of the certificate dated 17th May, 2005 issued by the Custodian appears to have no effect so far as contention of vesting of the property in him. However, the legal opinion is that in the event it appears to the Central Government that the transfer is injurious to the public interest, then, its power under section 6 of the said Act could have been exercised by it. Thus, it is only on the opinion of the Ministry of Law and Justice which also is not absolute but conditional that the show cause notice came to be withdrawn. Thus, the certificate dated 17th February, 2005 is not held to be invalid or illegal. That certificate re-vested the property in the Custodian. Whether the issuance of such a certificate was necessary at all or issuance of such a certificate would mean the Central

Government's overriding powers under section 6 of the said Act cannot be exercised are matters which have not been examined by the Central Government or by the Custodian at any time. The opinion of the Ministry of Law and Justice is that the second part of the certificate appears to have no effect. In any event, when it appears to the Central Government that such transfer is injurious to the public interest or is made with a view to evade or defeat the vesting of the property in the Custodian, it can pass an order declaring such transfer as void. Therefore, the power of the Central Government under section 6 of the said Act remains is the legal opinion. If that power can be exercised and that aspect of the matter not being concluded, we do not see how the Petitioner can take any assistance of a technical objection. We do not find that the principle of finality of proceedings or orders or res-judicata or analogous thereto can have any application to such facts and circumstances. We do not find anything being decided leave alone concluded for such principles to apply. If the proceedings have not been concluded in a final order touching and deciding all issues, then, we do not see how we can accept the submission of Mr. Dwarkadas that the second show cause notice is bad in law. All that we find is that the Ministry of Commerce and Industry, Government of India referring to its letter dated 6th July, 2006. The opinion that is relied upon is given by the Ministry of Law and Justice. After the order dated 28th June, 2006

withdrawing the certificate dated 17th February, 2005, the stay order dated 2nd January, 2004 and the show cause notice dated 29th November, 2005, we do not see why the letter dated 6th July, 2006 was addressed by Custodian Dinesh Singh to the Ministry of Commerce and Industry, Department of Commerce, Government of India. We do not see why in the letter dated 7th June, 2007 this Ministry informed Mr. Dinesh Singh that the matter has been examined by it in consultation with the Department of Legal Affairs. If an order was already made by the Custodian on 28th June, 2006, then, we do not see warrant for this communication dated 7th June, 2007 at page 128 of the paper book saying that no further action is called for under section 6 of the said Act. All this presupposes that the overriding power of the Central Government under section 6 of the said Act can still be exercised by the Central Government. That can be exercised irrespective of any order being made by the Custodian. The Custodian's actions cannot bind the Government for the power is vested in the Central Government alone. The show cause notice dated 29th November, 2005 does not refer to section 6 of the said Act. It is notice issued by the Custodian, it being not traceable to section 6 of the said Act, it was always open to the Central Government to issue a notice under section 6 of the Enemy Property Act, 1968. That notice, copy of which is at Annexure 'E' dated 19/20th December, 2013 is issued by the Government of India, Ministry

of Home Affairs under section 6 of the Enemy Property Act, 1968. Once that overriding power of the Central Government is always available in issuing the subject notice, then, all the more the objection raised by the Petitioner and reiterated by Mr. Dwarkadas must fail.

49) Now, coming to the main contention of Mr. Dwarkadas, the show cause notice issued by the Central Government alleges that all immovable and movable properties belonging to or held by or managed on behalf of Pakistani nationals vested in the Custodian of enemy property. The property at Bandra, Mumbai (the subject plot) was purchased by AYT and MYT each having half undivided share in the year 1956. The share of AYT vested in the Custodian by virtue of Notification dated 10th September, 1965 issued by the Government of India. AYT died at Karachi in 1997 and his share was sought to be disposed of in terms of the conveyance deed in the year 1999. This conveyance deed is reported to be signed by the Custodian as a confirming party. He did not bother to explain the price knowing fully well that other half portion was also sold at Rs.2.25 lacs way back in the year 1981.

50) Insofar as the share of MYT is concerned, that was sold in the year 1981 with due permission of Reserve Bank of India. There is no evidence on record to suggest that MYT was a British national. She

died in Dhaka in 1991. Dhaka was part of Pakistan till 1971. In the circumstances, the transfer of the properties, namely the shares of both are contrary to law. The sale/transfer is an outcome of criminal conspiracy amongst officers/persons in whom the property vests under the said Act. The show cause notice specifically alleges that the Custodian of enemy property has no power of sale of enemy property. He has no power to divest enemy of his right, title, interest in the enemy property. Such a power is conferred only in the Central Government by section 18 of the said Act. Thus, the foundation of the show cause notice is that the transfer is injurious to public interest and also defeats the vesting of the property in the custodian. Therefore, it should be declared as void. This show cause notice is issued to both, Jayantilal Mistri and Jay Construction Limited. The Petitioner replied to this show cause notice and relied upon all the evidence leading up to the order of the Custodian dropping proceedings. The reply then narrates as to how the said MYT migrated to England sometime in July 1962 and thereafter acquired British citizenship on 29th August, 1967. AYT migrated to Pakistan in the year 1969 and acquired Pakistani citizenship in April, 1970. How the property came to be encroached by unauthorised persons and what efforts the Petitioner took to safeguard it and save it are then set out. It is then claimed that MYT and AYT decided to sell the property and entered into an agreement not with the

Petitioner but with one Chandrakant Shah to sell to him or his nominees the property subject to necessary permission of the Reserve Bank of India. Then reliance is placed upon the application made to the Reserve Bank of India and the permission stated to have been given by the said Bank. Thereafter, reliance is placed on declaration of AYT and the events up to his death. It is claimed that MYT died intestate in Dhaka on or about April, 1991 and AYT died intestate at Karachi on 19th May, 1997, leaving behind his legal heirs and representatives Mrs. Zeboonisa Tabani, Tarun Tabani and Yasmin Patafi. It is stated that heirs of both AYT and MYT, through their Constituted Attorney, executed the deeds of conveyance upon which the Petitioner became absolute owner of the property. How it has obtained all approvals and constructed the 10 storey building on the property is then narrated. Consistent with this, the allegations in the show cause notice have been denied and it is reiterated that the conveyance deeds are valid and legal. We also find from a reading of the reply to the show cause notice that in paragraph 9(f) thereof a specific stand is taken that MYT was a British national and that the letter dated 19th February, 1981 addressed by the Reserve Bank of India while granting permission to sell the half undivided share of MYT records that she was a British national. That the issue regarding her nationality is being raised after a period of 30 years from the date of receipt of the Reserve Bank of India's letter. The further stand is that in

any event, MYT had herself agreed to sell, her heirs have thereafter completed the sale, the Reserve Bank of India has also given its approval to the same and the Custodian has granted an NOC in respect thereof. Thereafter, there was a hearing held on 11th February, 2014, at which, the minutes note that an application for adjournment was made so as to comply with the request of the Joint Secretary (FFR). The Petitioner was requested to produce the evidence of nationality in respect of MYT, the copy of Power of Attorney, through which MYT and AYT authorised the execution of the sale deeds and other documents. We find that on 25th March, 2014, the Petitioner replied to the authority in-charge of hearing that the request was made to provide with copies of Power of Attorneys executed by AYT and MYT and that is how the copies of the Power of Attorneys were enclosed with this letter and forwarded.

51) With regard to the Petitioner's claim that MYT was a British national, the following was stated:-

“.....

3. Further, over the course of the hearing a query was also raised as regards Ms. Mariam Tabani's citizenship. In that regard we state that pursuant to an application made in that regard the Reserve Bank of India by its letter dated 19th February 1981 (Annexure 12 to the reply) recognised her as a British national and granted her permission to sell the property. Needless to state that the said permission would have been granted after thoroughly verifying the citizenship/nationality of Ms. Mariam Tabani. Furthermore, the question of Ms. Tabani's citizenship/nationality has

already been duly examined by the Custodian of Enemy Property.
.....”

52) After having perused all the documents including the so called permission from the Reserve Bank of India, we are astonished that the same is being relied upon as proof of MYT's British citizenship. The Reserve Bank of India is no authority to certify citizenship. Further, we do not see any reason for both AYT and MYT executing certain documents including Power of Attorneys before a Notary Public at Karachi. At the same time, MYT's application to the Reserve Bank of India is through her Constituted Attorney Yusufbhai Ismailji Vadiwala, a Indian National residing in Mumbai. In 1987, however she and Ayt executed Power of Attorneys before a Notary Public at Karachi in Pakistan. All this shows that the enemy subjects and/or persons claiming through them including the Petitioner's partners, prima facie, colluded and connived with the then Custodian and certain officials to usurp the enemy property and to appropriate it unto themselves. Their acts defeats the mandate of a Parliamentary statute and further prima facie inflict a fraud on the public whose interests have to be subserved at any cost. The fraud underlying all the acts therefore vitiates all the transactions and from inception.

53) In the impugned order, the Government of India referred to all the facts as emerging from the records including the contents of the

show cause notice and the response/reply thereto of the Petitioner. The Government of India concluded that the alienation of the property took two decades. The Petitioner was unable to explain the delay as to why the transaction commenced in October, 1980 was finalised only in the year 1999. Secondly, if MYT was a British national and the Act need not apply to her, then, why a separate agreement with her was signed in the year 1980, consideration amount paid thereunder way back in 1983 but the conveyance deed was not immediately executed. Meaning thereby there was no impediment at least in her case according to the Petitioner itself in finalising and concluding the sale. Therefore, there is no explanation as to why a conveyance deed with her was not signed till 1999. The Government of India observes in the order that the Petitioner wanted the entire plot for development. They were desirous of obtaining AYT's share and hence decided to wait till the same was handed over.

54) Pertinently, we find that the Government has held in para 17(d) of the impugned order that the then Custodian of enemy property Mr. Kolamkar played a dubious role. There is an inquiry against him, which has been initiated, the Ministry held that Mr. Kolamkar went beyond his powers in granting the NOC. Mr. Kolamkar could not have granted it in the teeth of the law laid down by this Court. The act of

Kolamkar led to the alienation of the enemy property completely and not only he allowed it but went ahead and became a confirming party to the sale deed under which AYT's share was obtained by the Petitioner. The Government of India has observed that when the new Custodian joined office, she retook the property and issued a vesting certificate dated 17th February, 2005. The Custodian following her, issued a show cause notice to the Petitioner. The show cause notice was not required as the property vested in the Custodian. The Government also then questions the role and stand of Dinesh Singh, the Custodian and successor in office. Not only did he issue a show cause notice knowing fully well that he was not the competent authority to invoke section 6 of the said Act but on receipt of the reply of the Petitioner, he proceeded to withdraw this show cause notice. He also went ahead and withdrew the vesting certificate dated 17th February, 2005. That is how he handed over the said property to the Petitioner. In such circumstances, the Government concluded that in collusion with its own officers, the enemy property was alienated. There are departmental proceedings as also criminal investigation in progress against these officials. That is how the Government proceeds to hold the Petitioner responsible for not verifying the status of the property. The delay in execution of the conveyance deeds and thereafter the inability of the Petitioner to submit the proof of nationality of MYT suggests that they have no such

evidence. The Government has doubted this version of the Petitioner. There are several loopholes in the version of the Petitioner is the conclusion of the Government but it is cautious when it holds that the Petitioner is not only to be blamed for the officers in the Department assisted them. The Government is therefore of the view that there is a grave suspicion with regard to the nationality of MYT but it has not expressed any firm opinion as the CBI inquiry on the same is in progress. In para 22 of the impugned order, the Government has dealt with the contention of the Petitioner that the letter dated 7th June, 2007 concludes the issue in the Petitioner's favour. The Government found no substance in this contention and for the reasons which it has set out in para 22. The Government therefore concluded that not only the NOC issued by Mr. Kolamkar is illegal but his subsequent endorsement on the sale deed as the confirming party is an act of conspiracy and which was continued by one of the succeeding Custodian Mr. Dinesh Singh. It is the categorical conclusion of the Government that the sale/conveyance deeds executed between the representatives of AYT and MYT with the Petitioner are acts committed with intention of defeating the vesting of the property in the Custodian and therefore are void. That is why the operative orders in para 24 have been issued.

55) We are not impressed by the contention of Mr. Dwarkadas that the Petitioner is taken by surprise, as the affidavit in reply of the

Respondents purports to support the impugned order with the aid of further documents. We find that annexing of copies of these documents to the affidavit in reply does not take the Petitioner by surprise at all. It is the Petitioner who has relied upon these documents. In para 13 of the reply affidavit, the Respondents have alleged that the Power of Attorney holders of both MYT and AYT could not have relied upon the Power of Attorneys executed in their favour. They purport to rely on them not only while executing the sale deed but while filing legal proceedings. The legal proceedings have been filed in the City Civil Court at Mumbai (S. C. Suit No. 6087 of 1998) after the death of MYT and AYT. The pleadings have been verified and affirmed by these Power of Attorney holders though the Petitioner has asserted that MYT died intestate at Dhaka in Bangladesh on 20th April, 1991 and AYT died intestate at Karachi on 19th May, 1997. If the two persons who have executed the Power Attorneys are dead, their Constituted Attorneys cannot rely on the Power of Attorneys after their deaths. Thus, these very Power of Attorneys were utilised to execute the sale deeds. If the Power of Attorney is executed and registered on 12th September, 1987 before Mr. Zafar Masood-Advocate Notary Public, Karachi, Pakistan by MYT, then, there is a grave and serious doubt about the Petitioner's version that MYT was a British national and died not as a Pakistani citizen but a resident of Dhaka in Bangladesh. The Power of Attorney in

any event would not be of any assistance on her death. Similarly, in AYT's case, the Power of Attorney of the same date will not survive after his death at Karachi in Pakistan on 19th May, 1997. If the conveyance deeds are of 1999, then as per the Petition itself (see page 49) the heirs of both vendors MYT and AYT have signed the same. However, there is no identification of these persons with specific reference to their passport. There is no document evidencing their nationality. There is no identification as to where this document is signed by them. There is no identification of their signatures either.

56) Then, the Respondents rely upon the fact that the Petitioner's predecessor in title Mr. Chandrakant Shah, his firm M/s. Jay Construction executed an agreement at Bombay on 11th May, 1982. That time MYT was shown as vendor and the said Chandrakant Shah was shown as purchaser. There was no question of any Constituted Attorney acting on behalf of MYT in 1982, if she is alive and supposed to have executed a Power of Attorney for the first time on 12th September, 1987. The Petitioner has also been faulted for not being able to produce any proof of the heirship of the persons who are styled as heirs and legal representatives of AYT and MYT. From para 16 onwards, the Respondents have pointed out as to how the conclusion reached by the Central Government is correct because nowhere in 1982

document (agreement dated 11th May, 1982) it is said that MYT is a British national. Even in the Power of Attorney dated 12th May, 1987, there is nothing about the nationality of MYT. We are not interested in then referring to any further document. All that we wish to emphasise is that there is a serious allegation of fraud and which is alleged to have been perpetrated on enemy property, the public at large and particularly the Central Government in transactions involving enemy properties.

57) The assertions in the affidavit in reply apart, it is the Petitioner who has produced, during the course of its stiff opposition to the show cause notice, the conveyance deeds. The copy of the conveyance deed is annexed to the Writ Petition also. The Petitioner has heavily relied upon the recitals in the said conveyance deed. Those recitals would indicate that the entire stand of the Petitioner is based on the same. The recitals and the further pages of this conveyance deed would indicate that Mr. Jayantilal Lalji Mistri acted on behalf of both vendors and purchasers. Jayantilal Mistri has been described as an Indian inhabitant residing at Mumbai. His full name is Jayantilal Lalji Mistri. The Power of Attorney in his favour is not forthcoming. Further, reliance is placed on the Reserve Bank of India's letter dated 19th February, 1981. That is a communication addressed to the Advocates and Solicitors M/s. Dadhich and Company informing them as under:-

“Dear sir,

Section 31(1) of the Foreign Exchange Regulation Act, 1973 –
Permission for disposing of an immovable property in India
A/C Mrs. Mariam Yacoob Tabani.

With reference to your letter No. D/769 dated 17th October, 1989 and letter No. 76/81 dated 9th February, 1981, we are pleased to advise that we are agreeable to your client Smt. Mariam Yacoob Tabani, a British National, to sell her half share of the land admeasuring 3371 sq. yards, Survey No. 276, Hissa No.4(part), situated as H Ward No. 1068 (2) Street No.260, Chapel Road, Bandra, Bombay for Rs.2,25,000/- (Rupees two lakhs and twenty five thousand only) subject to the following conditions:-

- 1) Neither the sale proceeds of the property nor any income that may accrue on investment to be made out of such funds will be allowed to be repatriated outside India.
- 2) Certified copy of the final sale deed should be submitted to us in due course

Please note that the sale price of the property as approved by the Reserve Bank of India should not be construed as consideration of theof property for the purpose of section(and of Income Tax Act, 1961 Section Income Tax Act and Section of Wealth Tax Act.

- 4) to be check

Yours faithfully”

58) On 27th June, 1994, Mr. Kolamkar, the Custodian of enemy property in India gave his no-objection for the transfer of the rights, but what we find further is that on 8th April, 1999, there is a conveyance executed by the heirs of AYT through their Constituted Attorney Mr. Shashikant Lalji Mistri at Mumbai, who is stated to be a vendor, Mr. Kolamkar in his capacity as Custodian and styled as confirming party

and Jay Construction Company as purchaser. The recitals in this conveyance deed are also heavily relied upon. This conveyance deed recites that the parties are Sunni Muslim and they are the only heirs and representatives, according to Mohammedan law, of AYT and the property vests in them. How they could authorise an Indian citizen to act as their Constituted Attorney and by which document, executed in which country has not been clarified in the Petition. Therefore, it is not as if there is no material at all to conclude that the deal and transaction is not genuine but suspicious. This conclusion of the Central Government in the impugned order is based on the contents of the documents relied upon by the Petitioner itself. There is therefore no basis at all for the complaint that any additional documents or material is relied upon and now to support the conclusions in the impugned order. That the conclusion is based on the material relied upon by the Petitioner is apparent from the reading of the impugned order. It is the Petitioner's Writ Petition and Annexures thereto which reinforce the above conclusion. We are also therefore satisfied that this is not a case of the authorities taking the Petitioner by surprise. Further, the order does not omit from consideration any relevant and germane material. It cannot be termed as perverse.

59) The only aspect now remains for consideration is whether the impugned order is vitiated by error of law apparent on the face of

the record. In that regard, the submission of Mr. Dwarkadas is that section 6 recognises the right of the enemy subject to transfer the property even though it may be vesting in the Custodian. He submits that in this case the Central Government ought to have noted that the right of the enemy subject to transfer the property is not taken away by the supervening power under section 6 of the said Act. The supervening right or power is vested in the Central Government. It is only when the power of transfer is exercised and the transfer declared as void that the property shall continue to vest in or to be deemed to be vested in the Custodian. Mr.Dwarkadas submits that in the present case, the Central Government has not held that the transfer is injurious to public interest. It is also not clearly held that the transfer is to defeat or evade the vesting of the property in the Custodian. Though the order refers to this part of section 6 according to Mr. Dwarkadas, it is the Custodian himself who has granted the NOC, confirmed the sale deed and thereafter placed his seal of approval by withdrawing the re-vesting order and the show cause notice. Therefore, this is not a case where the vesting of the property in the Custodian can be said to be defeated or an attempt is made to evade the vesting of the property in the Custodian.

60) We are unable to accept these contentions of Mr.Dwarkadas. Equally there is no merit in the plea that in the present

case the Central Government had no material before it to hold that the transfer defeats the vesting of the property in the Custodian. We have already adverted to the materials and which were noted in the impugned order extensively by the Central Government. We have also perused all the Annexures to the Writ Petition and we find that the documents on which heavy reliance was placed by the Petitioner were executed in order to defeat the vesting of the property in the Custodian. We are not required to once again refer to each and every document or materials which were before the Central Government. Suffice it to hold that the words in section 6 “with a view to evade or defeat the vesting of the property in the Custodian” would have to be given their plain and natural meaning. The first part talks of evading the vesting of the property in the Custodian and the second deals with defeating the vesting of the property in the Custodian. Therefore, any transfer to avoid the vesting of property in the Custodian and if the property has already been vested in the Custodian, then, committing such acts as would defeat it can be visited with the consequence of the transfer being declared void. The transfer being intended in the present case to defeat the vesting of the property in the Custodian that we are unable to subscribe to the argument of Mr. Dwarkadas that if and only if the Central Government is able to conclude that the transfer to an Indian citizen is a sham and benami transfer then alone the power to declare

the transfer void on this ground can be exercised. The said act will have to be read as a whole. The sections have to be read together and harmoniously so as to subserve and uphold the legislative intent. The legislative intent being clear, the words appearing in the section will have to be given their plain and natural meaning as held above. There is nothing vague in the expression and words appearing in section 6 of the Act. It is therefore transfer of property vesting in the Custodian by enemy or enemy subject or enemy firm may be permissible. He holds all rights, title and interest in the enemy property. The transfer can be declared to be void if it is injurious to public interest or made with a view as in this case. Such a provision has been inserted advisedly. The “enemy” is defined to mean a person or country who or which was an enemy, enemy subject or enemy firm as the case may be under the Defence of India Act but does not include a citizen of India. Once the person therefore is termed as an enemy, then, his property in India cannot be freely dealt with by him on par with an Indian citizen. The Indian citizen is excluded from the term “enemy” or “enemy subject”. Once the definition of the terms “enemy” or “enemy subject” or “enemy firm” are read in their proper perspective, it would be clear that the property for the time being belonging to or held or managed on behalf of an enemy vests in the Custodian. The property continues to be termed as an enemy property even when an individual enemy subject

dies in the territory to which the Enemy Property Act extends. Therefore, the placement of section 6 of the said Act and reading it along with other sections which follow the same would throw light on the intention of the legislature. The powers of the Custodian in respect of the enemy property vested in him are to be exercised for taking such measures as he considers necessary or expedient for preserving such property and when such property belongs to an individual enemy, the Custodian may incur expenditure out of the property as he considers expedient for the maintenance of that individual or of his family in India. Thus, these powers are also to be exercised consistent with the aim and object that the Act seeks to achieve. The Act does not wish to deprive the enemy or enemy subject of his right, title and interest in the properties and therefore assists him by vesting the property in the Custodian to be appointed under the Act. The Custodian holds the property upon its vesting in him for preservation. He also is permitted to incur certain expenditure, if the property is held by an individual enemy subject, from such property for the maintenance of the individual enemy subject or his family members in India. The provisions like section 8 enable the Custodian to take measures as he considers necessary or expedient for preserving the property. It is therefore that he is conferred with several powers. Thus, the intent is to manage and administer the property by taking the afore-contemplated

measures. By section 9 to 15, it would be apparent as to how when the property vests in the Custodian it is exempt from attachment etc. When persons are dealing with the Custodian while he exercises the powers conferred by section 8, those persons also have certain protection and that is apparent from the above referred sections. The Custodian is thus not free to dispose of the property as per his whims and fancies. He must deal with the property of the enemy subject consistent with the powers of preservation conferred in him. The legislature while using the words “preserving such property” is conscious that nothing should be done by which the enemy subject deals with the property situated in India as if he is an Indian citizen. His right and freedom to hold the property even if it is in India is intact but subject to the Custodian's intervention. It is to ensure that the enemy's rights qua his property are not jeopardised nor the enemy is deprived of the same. Equally, the Custodian should not allow the enemy subject to deal with his property in any manner and contrary to the Act itself. In the circumstances, when all these provisions do not allow the Custodian as well to do anything save and except what is permitted by the said Act, then, we cannot agree with Mr. Dwarkadas. Pertinently, Mr. Dwarkadas's argument overlooks the supervening or overriding powers vested in the Central Government by the Act itself. It is the Central Government, which is the highest executive functionary whose

satisfaction with regard to the ingredients of section 6 of the said Act, is contemplated. Further, it is the Central Government alone which is conferred with the power to divest the enemy property vested in the Custodian. By section 18, it is the Central Government which is empowered to direct that any enemy property vesting in the Custodian under this Act and remaining with him shall be divested from him and to return in such manner as may be prescribed to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall re-vest in the owner or other person. This provision as contended by Mr. Dwarkadas recognises the right, title and interest of the enemy subject in the enemy property and protects it, but, surely the Custodian is not vested with any powers of the nature exercised by him in this case. Section 18 of the said Act confers power only in the Central Government and that has to be exercised by the Central Government only in the manner indicated in the said provision. This provision reinforces our above conclusion that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him only by the Central Government and none else. The Central Government can divest the Custodian of the enemy property and vest it in such manner as may be prescribed by the Rules to the owner thereof or such other person as may be specified in the direction and it is such

direction which is binding on the Custodian and everybody concerned must act accordingly. Pertinently, such a direction has not been issued by the Central Government. Therefore, the enemy property vesting in the Custodian continues to vest in him. By becoming a signatory or confirming party to the conveyance deed, the Custodian has acted in contravention of the statutory mandate. He has contravened section 18 and other provisions of the Act. To our mind, the trust and faith reposed in the Custodian by the Central Government and the public at large has been betrayed by him, as is held in the impugned order by the Central Government. The Central Government was therefore left with no choice but to intervene and exercise its power under section 6 of the said Act. If the Act itself is contravened, then, there is a penalty provided for the same. It is also an offence if any person contravenes the provisions of the Act. The Act has an overriding effect as is apparent from section 22 of the said Act. Therefore, no deed or document in the present case to which the Custodian is a party and for transfer of the enemy property either by the owners or his legal heirs and representatives can have any legal effect. That document or deed and which is vitiated by fraud perpetrated on the public at large cannot confer any right, title and interest in favour of any person as well as the purchaser. Such an act can have no legal effect nor does it bind the Central Government. In other words, a patently illegal and fraudulent

act of the Custodian and which has the effect of defeating the vesting of the property in him cannot bind the Central Government. The Central Government can declare the transfer itself to be void. Therefore, no certificate of re-vesting of the property was necessary in this case, as the property continues to vest in the Custodian. The property could not have been taken away from his custody by any person nor could the property or any right therein be surrendered by the Custodian contrary to the provisions of the Act. In the circumstances, the Central Government rightly concluded that the acts of commission and omission on the part of the Custodian resulted in the property being transferred in order to defeat the vesting in him. The documents evidencing transfer were found to be tainted, highly suspicious so also bogus. They did not evidence any genuine act. These documents were an outcome of clear collusion and connivance of interested parties like the Petitioner and the Custodians of the enemy property. The Central Government therefore and in our opinion rightly held that its own officials being party to such dubious deals, the transfer will have to be declared as void.

61) Once the above view is taken, then, we are not required to deal with the contentions raised by Mr. Dwarkadas, particularly on the ambit and scope of the words “injurious to public interest”. These

words appear in section 6 of the said Act and it is apparent from a reading of these words and the section together with other provisions of the said Act harmoniously that the same are not in any manner vague or ambiguous. They have a specific legal connotation.

62) Mr. Dwarkadas places reliance upon a Judgment of the Hon'ble Supreme Court of India in the case of *Central Inland Water Transport* (supra) and invites our attention to paragraph 92 and 93 thereof. Once the Hon'ble Supreme Court has held that the terms “public interest” and “public policy” can be construed and interpreted with the guidance of the preamble to the Constitution of India and the principles underlying the fundamental rights and directive principles enshrined therein, then, all the more we do not think that the power under section 6 of the said Act will be exercised without any guidance or arbitrarily. There are inbuilt checks and safeguards in the Act. The satisfaction is of the Central Government and it must be indicating that the transfer is injurious to public interest. Therefore injurious or harmful to the public good or the public interest is a term which can be interpreted as held by the Hon'ble Supreme Court of India in the above decision. In para 93 of this above decision itself, the Hon'ble Supreme Court has clarified that if any transaction/transfer is illegal and alleged to be so, then, the illegality must go to the root of the matter. The

illegality must be such so as to outrage the conscience of the Court. Therefore, even on this count, we do not feel that the impugned order can be interfered with.

63) Finally, what remains is the reliance placed by Mr.Dwarkadas on the two decisions, one of this Court and one of the Hon'ble Supreme Court of India. Paragraphs in the case of *Kishori Shaikh's* case (supra) on which Mr. Dwarkadas places reliance themselves show that the powers of the Custodian are for management, administration and preservation of the enemy property. The Division Bench has only emphasised the legal position at page 15 of the Judgment and we do not find that our observations and conclusions are in any way contrary or run counter thereto. This decision was delivered when the Custodian in whom the enemy property was vested faced an attachment of the immovable property belonging to the enemy subject. This Court held that the transaction of attachment and the sale was *void-ab-initio* and there was no question of rectifying which was void. In these circumstances that decision came to be upheld by the Division Bench.

64) In the case of *Raja Mohammed Amir Mohammad Khan* (supra), relied upon by Mr. Dwarkadas the facts speak for themselves. Raja Mohammed Amir Mohammad Khan brought a Suit in the Court of

Civil Judge, Lucknow seeking a declaration that he was a sole heir and successor of the deceased Raja of Mohmudabad. This Suit was dismissed for non joinder of the Custodian of the enemy property. Thereafter, he filed a second Suit in the same Court contending that by virtue of taking over the property the title of the property did not vest in the Custodian. The vesting was limited for the purposes of taking over of the possession, management and control of the enemy property till such time the property remained enemy property. The Suit was for a declaration that he be declared as the sole heir and successor of his father and therefore entitled to 25% of the property and to such other percentage or the whole of the said properties. This stand was contested by the second Appellant and he urged that the vesting was absolute. It is in that backdrop in paras 2, 5 and 7, concluding that the properties were no longer enemy properties as the title of the same is now vested in the Indian Citizen that the High Court Judgment was upheld by the Hon'ble Supreme Court. The High Court Judgment was also taking note of the concession of the Advocate of the Union of India that the Respondent is an Indian citizen and the sole heir and successor of his late father Raja Mohammed Amir Mohammad Khan, who migrated to Pakistan. None of the observations of the Hon'ble Supreme Court of India and from paras 9 onwards have been ignored or brushed aside by us. Rather we have followed the same. Therefore, the

interpretation of the Act by the Hon'ble Supreme Court of India binds us. The object of the Enemy Property Act is to preserve the enemy properties. Therefore, temporary vesting of the property takes place in the Custodian. Precisely, we have applied this very principle to the facts and circumstances of this case. We have found that the Central Government's directions in the impugned order do not in any manner run contrary to this Judgment of the Hon'ble Supreme Court of India. All the observations including in paras 22 to 25 far from assisting Mr. Dwarkadas, militate against his contentions noted above.

65) A faint attempt is made to show that the Respondents have purported to take possession of all the adjoining lands and beyond the notice to show cause dated 20th December, 2013. In other words, it is stated that the order travels much beyond this notice.

66) It is not possible to accept this contention because the notice clearly mentions the immovable property situated at Survey No.276, Hissa No. 4(part) at H-Ward No. 1068(2), Street No. 760, CTS No. B/973/4, Chapel Road, Bandra (West), Mumbai. Throughout, it is this property which is referred in the notice and particularly in paras 2 and 10 thereof. The impugned order therefore must be seen as confirming this notice and subsequent actions are based thereon.

67) We therefore find no substance in the contentions to this effect. Equally, we are not impressed by the argument that only AYT's share can be said to be enemy property and not that of MYT. After having held that there is no proof that MYT was British national and the Petitioner having failed to establish the same, both shares, namely of MYT and AYT would have to be determined as enemy property and covered by the show cause notice and the subject action.

68) As a result of the above discussion, we do not find any merit in the Writ Petition. It is accordingly dismissed. Rule is discharged but without any order as to costs.

(G.S.KULKARNI, J.)

(S.C.DHARMADHIKARI, J.)