

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.93/2009**

% **22nd July, 2016**

MUNICIPAL CORPORATION OF DELHI

....Appellant

Through: Mr. Nalin Tripathi, Advocate with Mr. Anil Pathak, Advocate.

versus

ABDUL KABEER (DECEASED) THROUGH LRS & ORS. Respondents

Through: Mr. S.D. Ansari, Advocate with Mr. I. Ahmad, Advocate for respondent no.1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.2 in the suit against the Judgment of the First Appellate Court dated 19.3.2007 allowing the appeal of the plaintiff in the suit, and who is the respondent no.1 in the present second appeal. Trial Court by its Judgment dated 17.8.1991 had dismissed the suit filed by the respondent no.1 herein and the first appellate court by its judgment has decreed the suit of the plaintiff/respondent no.1 herein filed for possession and partition of half share of the suit property bearing property no.704 old/1315 new and 705

old/1316-18 New Ward no.III Phatak Habash Khan, Delhi. Municipal Corporation of Delhi (MCD)/defendant no.2/appellant by this second appeal prays for setting aside the Judgment of First Appellate Court dated 19.3.2007 and for restoring the judgment of the trial court which dismissed the suit of the respondent no.1 herein for possession and partition.

2. At the outset, it is required to be noted that the respondent no.1 herein (original plaintiff) died during the pendency of the second appeal. The legal heirs of late respondent no.1 filed an application being C.M. No.22489/2010 under Order XXII Rule 3 CPC for being substituted as legal heirs of the respondent no.1. This application was allowed vide Order dated 15.2.2011 and the legal heirs of respondent no.1 were brought on record. Amended memo of parties was directed to be filed by the appellant, however, the amended memo of parties already stood filed with C.M. No.22489/2010. This Order dated 15.2.2011 reads as under:-

“+CM APPL. No.22489/2010 (u/O 22 R3 r/w S 151 CPC) in RSA No.93/2009

Notices of this application issued to the non-applicants respondents 2, 3 and the appellant have been served.

Counsel for the appellant as also for respondents 2 and 3 do not oppose this application.

In the absence of any opposition, this application is allowed. LRs of deceased respondent No.1-Sh Abdul Kabir as mentioned in para 2 of this application are allowed to be brought on record.

Amended memo of parties be filed by the appellant within two weeks.

Re-notify on 28.04.2011.

+CM APPL. No.10187/09 (for condonation of delay) in RSA No.93/2009

Reply on behalf of respondent No.1 to the application for Condonation of delay is already on record.

Counsel for respondent No.2 does not oppose this application for Condonation of delay. Learned counsel for respondent No.3 seeks and is allowed two weeks time to file the reply. Let the rejoinder to the replies on behalf of respondents 1 and 3 be filed within two weeks thereafter.

List this matter again on 28.04.2011.”

3. The wife of late respondent no.1, and who was one of the legal heirs of respondent no.1 brought on record vide Order dated 15.2.2011, died *pendente lite*, and since her legal heirs were already on record, only amended memo of parties was directed to be filed by the appellant vide Order dated 4.12.2014. The Order dated 4.12.2014 reads as under:-

“C.M. No.10186/2009 (for stay)

Upon hearing, it is directed that status quo as of today in respect of suit property be maintained by the parties.

Application is disposed of.

RSA 93/2009

Counsel for first respondent informs that wife of deceased respondent i.e. legal heir No.1 has expired in August, 2014 and he will place on record copy of death certificate and also submits on instructions that all the legal heirs of deceased are already on record.

Let appellant file Amended Memo of Parties within a week.

Learned counsel for the parties seek time to inspect the record and argue the appeals.

Renotify on 10th March, 2015.”

4. In view of the aforesaid Orders dated 15.2.2011 and 4.12.2014, I reject the argument urged on behalf of the legal heirs of the respondent no.1 that the appeal stands abated.

5. The facts of the case are that the plaintiff/Sh. Abdul Kabeer filed the suit claiming possession and partition with respect to his half share of property no.704 old/1315 new and 705 old/1316-18 New Ward no.III Phatak Habash Khan, Delhi. Plaintiff claimed that his father Abdul Jabbar was the owner of the half share in the suit property but this property was wrongly notified as evacuee property by Gazette Notification dated 15.7.1949 inasmuch as Abdul Jabbar was not an evacuee and hence his half share in the suit property being declared as evacuee property by the said notification was illegal. It was further the case of the plaintiff that during his lifetime Abdul Jabbar made an application under Section 16 of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as '1950 Act') for restoration of the property and competent authority passed an Order on 23.5.1969 declaring the half share of Abdul Jabbar as a non evacuee property and that the possession of the half share of the property of Abdul Jabbar be restored to him. At this stage itself I note that it is the language of this Order dated 23.5.1969 which will have to be examined, and which would be done so during the course of discussion of the present appeal. The entire subject property had been handed over to the appellant/defendant no.2 for building a school and

the appellant/defendant no.2 had purchased this property from the Custodian at a sale price of Rs.24,000/- vide cheque no.866981 dated 31.3.1960 drawn on State Bank of India. Possession of the property, it is pleaded that the same was forcibly taken by the appellant on 6.7.1960 though it is found that possession may have been taken in the year 1970. In sum and substance, the case of the plaintiff was that the half share of his father Abdul Jabbar was wrongly declared as evacuee property and by the Order of the competent authority dated 23.5.1969, the half share of Abdul Jabbar should be restored back to the plaintiff/respondent no.1 herein because Abdul Jabbar was forcibly dispossessed by the appellant/defendant no.2 from the suit property.

6. The appellant/defendant no.2 contested the suit by filing the written statement and pleaded that the civil court had no jurisdiction to try the suit. Though the provision was not stated, this objection was raised because of Section 46 of the 1950 Act which provides that with respect to any right or interest in the property that it is not an evacuee property or for questioning any action taken by the Custodian General or the Custodian under the 1950 Act or which the Custodian General or Custodian is empowered under the 1950 Act to determine, no civil suit will lie to question such actions. The appellant/defendant no.2 also pleaded that it is the owner of the suit property by means of registered Sale Deed dated 28.11.1960 vide sale deed registered no.4920 in additional book volume

no.561 on pages 357 to 360. The suit was therefore prayed to be dismissed. Defendant no.1 in the suit was Union of India and defendant no.3 in the suit was Regional Settlement Commissioner, both of which defendants failed to appear, and hence were proceeded *ex parte*.

7. Trial court vide Order dated 10.12.1986 framed the following issues:-

- “1. Whether the plaintiff has cause of action? OPP
2. Whether civil court has no jurisdiction? OPD
3. Whether suit is not maintainable? OPD
4. Whether the plaintiff is entitled to the relief prayed for? OPD”

8. Trial court held issue no.1 in favour of the appellant/defendant no.2 that since the appellant/defendant no.2 had become the owner of the suit property, no cause of action arises for the plaintiff to file the suit. Issue no.2 of jurisdiction was decided against the appellant/defendant no.2 as the written statement was vague not specifying how the civil court had no jurisdiction. Issue no.3 was as to whether the suit being not maintainable was decided in favour of the appellant/defendant no.2 as per paras 10 and 11 of the judgment and which paras 10 and 11 read as under:-

“ISSUE NO.3

10. The plaintiff has filed this suit for possession and separation by partition of one half share of property no.1315, 1316 to 1318. The case of the defendant M.C.D. is that the property has already been purchased by M.C.D. in the year 1960. The plaintiff has made M.C.D., Union of India and Settlement

Commissioner as parties to the suit and has prayed that a decree with costs for possession by partition and separation of the one half share owned by plaintiff per site plan be passed in favour of the Plaintiff and against the defendant. As per my finding to defendant no.1 above, the plaintiff never became the owner of the suit property and he was never in possession of the suit property. The ownership of the property vested in D.M.C. by registered sale deed and the plaintiff cannot claim possession from the M.C.D. unless and until he proves that he is the owner of the property. The documents filed on record prove otherwise. The plaintiff has produced for examination P.W.1 Jagbir Singh. According to him this property was declared evacuee property and custodian became owner of one half share whereas Abdul Jabbar moved an application on 23.05.69 that the property is not an evacuee property and prayed for release of half share and on his application an order was passed on 23.05.69. This witness had not brought the notification and the order dated 23.05.69. He was directed to bring the same but he was not produced for examination thereafter rather P.W. 1 Udey Singh was summoned by the plaintiff and this witness brought record pertaining to property No.704/705 Old and 1315-1318. New and stated that this property was declared as evacuee property and Abdul Jabbar filed an application for restoration of half share of the property claiming that it is non-evacuee and on his application order Ex.PW2/1 was passed. The copy of the order dated 23.05.69 of Sh. A.G. Waswani, Settlement Commissioner is to the effect that the applicant is entitled to the restoration of the evacuee property described in schedule and ordered that the applicant be given alternative property as agreed to by him before the Assistant Custodian, Delhi on 30.12.68 subject to the condition that the amount due to the custodian in respect of the properties for the management thereof shall be paid by the applicant to the custodian. This P.W. also stated that the property No.704 Old and 1315 New had been transferred to the M.C.D. on 03.07.70 by a conveyance deed. He admitted that Abdul Jabbar was not given possessor of this property.

11. From the statements made by this witness it becomes clear that in lieu of the property sought to be possessed by the plaintiff in the present suit his father was allotted alternative property subject to the condition that he has to clear all the dues against this property in favour of the custodian. It is not proved that the father of the plaintiff cleared the dues of the said property. However, from the statement of this witness it becomes clear that the suit for possession of this property by the plaintiff is not maintainable because orders passed on 23.06.69 clearly disentitled the father of the plaintiff from the property in suit and when the father of the plaintiff was not entitled to the possession of the suit property then the plaintiff is also not entitled for the possession of the said property and the suit of the plaintiff is not maintainable. Issue is decided accordingly.”

(underlining added)

9. The first appellate court by the impugned judgment has held that by virtue of the Order dated 23.5.1969 (Ex.PW2/1), the Department of Rehabilitation itself had passed an order that the suit property was not an evacuee property and hence according to the first appellate court the suit property was to be restored to the plaintiff. The first appellate court also held that what is stated in the Order dated 23.5.1969 is also confirmed by the subsequent Letter of the Regional Settlement Commissioner dated 26.11.1969, Ex.PW-7/B. The first appellate court held that there was no bar to the jurisdiction of the civil court as per its interpretation of Section 46 of the 1950 Act and which is that once the property is non evacuee property, Section 46 does not apply. The first appellate court has given the following reasons for holding that the findings of the trial court are misplaced:

“On assessment of evidence on record in the light of statutory provisions of law, the findings returned by the Trial Court is misplaced for the following reasons:-

- (i) there were objections filed in 1951 immediately after the issuance of notifications;
- (ii) order dated 23.05.1969 (Ex. PW-2/1) is decisive and makes the applicant Shri Abdul Jabbar entitled for restoration of the property described in the schedule of order dated 23.05.1969;
- (iii) Rule 37 of the Act, 1950 is regarding restitution of the property and after order dated 23.05.1969, the claimant or the present appellant is entitled for restoration of the property;
- (iv) it would not deprive the claimant or the appellant from the property merely for the reason that the conveyance deed was executed by the Custodian in favour of the respondent no. 2, particularly when they are two wings of the Government. Letters dated 11.08.1969 and 26.11.1969 reflect about the cancellation of transfer of the property as well as refund of the amount.

Witness PW-6 Shri Prakash Chauhan, UDC Land & Estate Department, Town Hall, Delhi had deposed about the purchase of the property No. III/1315 to 1318. 1324 to 1325 situated at Phatak Rangmahal, Delhi by MCD from the Custodian for a sale price of Rs. 24,000/- vide cheque No. OC-4/866981 dated 31.03.1960 drawn on State Bank of India and had taken possession on 06.07.1960. When the decision was taken on the objections of the claimant Shri Abdul Jabbar, that he is entitled for restoration of the property described in the schedule of order dated 23.05.1969 followed by further instructions to the respondent no. 2/MCD for cancellation of transfer of the property as well as refund of the amount, it would not deprive the appellant merely for the reason that the respondent no. 2 had paid the consideration of Rs. 24,000/- in respect of the property in question as well as for other property and there was conveyance deed in its favour;

(v) Section 12 of the Displaced Persons (Compensation of Rehabilitation) Act, 1954 described the object of public purposes to acquire the evacuee property for rehabilitation of the displaced persons. It is an admitted feature of the case that the respondent no. 2 had to develop a school at the property in question but the school has not been raised till date;

(vi) the appellant cannot be deprived of his rights to the property merely for the reason that the decision was given on 23.05.1969 in favour of the claimant under section 16 of the Act, 1950 and prior to its restoration to the claimant, the conveyance deed was executed in favour of the respondent no. 2 in respect of the property described in the schedule of order dated 23.05.1969;

(vii) in terms of Rule 37 of the Administration of Evacuee Property (Central) Rules, 1950, the possession ought to have been restored to the claimant but restitution has not been dealt. The appellant cannot be denied restitution merely for the reasons that the orders were passed on 23.05.1969 and prior to that the property was conveyed to the respondent no. 2/MCD on 06.07.1960; and

(viii) the respondent no. 2/MCD purchased the properties III/704/1315 (new) and III/705/1316-18 (new) situated in Phatak Habas Khan/Rangmahal, Delhi by way of conveyance deeds registered on 28.11.1960. The claimant Shri Abdul Jabbar was held entitled for restoration of the property-as described in the schedule (i.e. III/704/1315 (new) and III/705/1316/18 (new) situated in Phatak Habas Khan, Delhi) of order dated 23.05.1969 (Ex. PW-2/1). To say, if the properties III/704/1315 (new) and III/705/1316-18 (new) situated in phatak Habas Khan, Delhi was notified, then the Evacuee Interest (Separation) Act, 1951 makes of competent to partition the property according to the share of the claimant, Custodian, etc.”

10. When this appeal was admitted for hearing on 10.3.2015, the following substantial question of law was framed:-

“Whether the finding returned by the first appellate court suffers from any perversity in the light of the evidence adduced by the parties? If so, to what effect?”

11. Learned counsel for the appellant/defendant no.2 has very vehemently argued the following aspects:-

(i) The first appellate court has totally misconstrued the Order of the Department of Rehabilitation dated 23.5.1969 inasmuch as this order in no way holds that the property of Abdul Jabbar be restored back to him although the order did hold that the property was of Abdul Jabbbar and hence was not an evacuee property, and that this order clearly/categorically states that Abdul Jabbar be given an alternative property and not the suit property, and which was in fact agreed to by Abdul Jabbar as shown from the content of the Order dated 23.5.1969.

(ii) The civil court has no jurisdiction because of Section 46 of the 1950 Act and the first appellate court has in a most perverse manner held Section 46 not to be applicable allegedly on the ground that the property is not an evacuee property whereas Section 46 is very clear that any issue as to whether the property is or is not an evacuee property cannot be decided by the civil court once that property is the subject matter of any decision or notification under the 1950 Act.

12. Learned counsel for the legal heirs of the plaintiff/respondent no.1 herein has very vehemently supported the reasoning in the judgment of the first appellate court by placing reliance upon the language of the Order of the Department of Rehabilitation dated 23.5.1969. It is also argued on behalf of the counsel for the legal heirs of the deceased plaintiff that the Order dated 23.5.1969 was reiterated by the Letter of the Regional Settlement Commissioner on 26.11.1969 (Ex.PW-7/B). Counsel for the legal heirs of the deceased plaintiff places reliance upon the conclusions of the first appellate court which I have already reproduced hereinabove. On behalf of the legal heirs of the deceased plaintiff it is thus prayed that the second appeal be dismissed.

13. Before turning to the arguments of the counsels for the parties, it will be necessary to refer to the relevant provisions of the 1950 Act as also the Orders dated 23.5.1969 (Ex.PW-2/1), Letter dated 11.8.1969 (Ex.PW-7/A) of appellant and the Letter of the Regional Settlement Commissioner dated 26.11.1969 (Ex.PW-7/B) and these provisions, order and letters read as under:-

“Section 7. Notification of evacuee property.”-(1) Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property.

[(1A) Where during the pendency of any proceeding under sub-section (1) for declaring any property to be evacuee property any person interested in the property

dies, the proceeding shall, unless the Custodian otherwise, directs, be continued and disposed of as if such person were alive.]

(2)Where a notice has been issued under sub-section (1) in respect of any property, such property shall, pending the determination of the question whether it is evacuee property or otherwise, be incapable of being transferred or charged in any way, except with the leave of the Custodian, and no person shall be capable of taking any benefit from such transfer or charge except with such leave.

(3)The Custodian shall, from time to time, notify, either by publication in the Official Gazette or in such other manner as may be prescribed, all properties declared by him to be evacuee properties under sub-section (1).

Section 8. Vesting of evacuee property in the Custodian.-(1) Any property declared to be evacuee property under Section 7 shall be deemed to have vested in the Custodian for the State,-

(a) in the case of the property of an evacuee as defined in sub-clause (i) of clause (d) of section 2, from the date on which he leaves or left any place in a State for any place outside the territories now forming part of India;

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

(c) in the case of any other property, from the date of the notice given under sub-section (1) of section 7 in respect thereof.

XXXXX

XXXXX

XXXXX

Section 16:-Restoration of evacuee property-(1) Subject to such rules as may be made in this behalf, any evacuee or any person claiming to be a heir of an evacuee may apply to the Central Government or to any person authorized by the Central Government in this behalf (hereinafter in this section referred to as, 'the authorized person') that any evacuee property which has vested in the Custodian and to which the applicant would have been entitled if this Act were not in force, may be restored to him.]

XXXXX

XXXXX

XXXXX

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

(a) If satisfied-

(i) that the conditions prescribed by rules made in this behalf have been satisfied;

- (ii) that the evacuee property is the property of the applicant; and
- (iii) that it is just or proper that the evacuee property should be restored to him;
- make an order restoring the property to the applicant; or

XXXXX

XXXXX

XXXXX

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

Section 46:- Jurisdiction of Civil Courts barred in certain matters- Save as otherwise expressly provided in this Act, no civil or revenue Court shall have jurisdiction-

(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or

(c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or

(d) in respect of any manner which the Custodian-General or the Custodian is empowered by or under this Act to determine.

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

Letter dated 23.5.1969 (Ex.PW2/1)

“Ex. PW-2/1

(In Supersession of the Ministry of
Rehabilitation order No. 5(369)/
Rest/57/5119 dated 19.6.57).

Registered A.D.

No. 5(369)/57-Pro/4979

Government of India
Ministry of Labour, Employment &
Rehabilitation
(Department of Rehabilitation)
New Delhi – 11 the **23 May, 1969.**

ORDER.

(Section 16 of the Administration of Evacuee Property Act, 1950)

WHEREAS Abdul Jabbar son of Abdul Razak has made an application to the Central Government that the evacuee properties which have vested in the Custodian and to which the applicant would have been entitled if the Administration of Evacuee Property Act, 1950, were not in force, may be restored to him;

AND WHEREAS the Central Government is satisfied :-

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

NOW, THEREFORE, in exercise of the powers conferred by Section 16 of the Administration of Evacuee Property, Act, 1950, the Central Government hereby declares the applicant to be entitled to the restoration of the evacuee property described in Schedule and directs that the applicant may be given alternative property as agreed to by him before the Asstt. Custodian, Delhi on 30.12.1968 by the person authorised in this behalf subject to the condition that the amount due to the Custodian in respect of the properties or the management thereof shall be paid by the applicant to the Custodian.

SCHEDULE. ½ share in property No.
 III/704/135 (new) and III/705/
 1316-18 (new) situated in phatak
 Habas Khan, Delhi.

(A.G. Vaswani)
Settlement Commissioner & Ex. Officer
Under Secretary to the Govt. of India.

To

Shri Adbul Jabbar s/o Abdul Razak,
C/o Habib 2307, Gali Mir Madari,
Khirki Farashkhana, Delhi.

He is requested to contact the Custodian of Evacuee Property, Delhi,”

“Letter dated 11.8.1969 (Ex.PW-7/A)”

Municipal Corporation of Delhi
(Lands & Estate Department)

No. 1539/Bhu. & Sa. Vi.

Dated: 11.08.1969

The Chief Settlement Commissioner,
Ministry of Rehabilitation,
New Delhi,

Subject : Transfer of H.No. III/1315 to 1318 and 1324-25 at Phatak Habash Kjan, Delhi.

Sir,

Kindly refer to this office letter No. 751/E/L&E dated 3-6-69 on the subject noted above to which no reply has been received so far. I may further state that the applicant Shri Abdul Jabbar has supplied a copy of order dated 23-5-39 in this respect wherein the Settlement Commissioner has restored property No. III/704/1315 (new & III/705/1316- 148(new) in favour of the applicant and he may be given alternative property on the condition that the amount due to the Custodian in respect of the properties or the management thereof shall be paid by the application to the Custodian.

It is, therefore, requested that the above contents may kindly be confirmed and this office may be advised about the action required to be taken in this case by this office. Since the applicant is representing regularly it may kindly be got expected as early as possible.

Yours faithfully,

-Sd-

(O.P. Maggon)
Manager, Lands & Estates

Copy forwarded to Shri Abdul Jabbar S/o Shri Abdul Razak C/o Habib 2307, Gali Mir Maderi Khirki Farashkhana, Delhi for information with reference to his representation dated 12-6-69.

-Sd-

(O.P. Maggon)
Manager, Lands & Estates

Letter dated 26.11.1969 (Ex.PW-7/B)

No.MO/I-X/III/1315-18(new)etc/D/4163

Office of the
Regional Settlement Commissioner,
Jamnagar House, New Delhi-11.

Dated the 26th Nov., 1969

To,

The Manager,
Lands & Estate Department,
Municipal Corporation of Delhi,
Town Hall, Delhi-6.

Subject: Transfer of H. No.III/1315-1318 & 1324-25 at Phatak Habash Khan, Delhi.

Sir,

I am directed to refer to your letter No.1539 dated 11.08.1969 addressed to the Chief Settlement Commissioner, New Delhi, and a copy of which has been enclosed by the applicant with his application dated 29.08.1969 and to enclose a copy of the order dated 23.05.1969 by way of confirmation, as desired in your letter referred to above. The party has got to be compensated for the restored properties and this may be done by restoring the original properties to him, which has already known to you, stands transferred to you and requisite transfer documents have since been sent to you. This is possible if the Corporation agreed to the cancellation of the above transfer and in that even the payment made by the Corporation will be refunded as usual.

Yours faithfully,
-sd-
(M. L. Sharma)
Manager Officer (I-X)

Copy to:

1. Shri R.C. Vasirani, Section Officer, Deptt. of Rehabilitation, Jaisalmer House, New Delhi, for information with reference to his letter No.5(369)/57-Pro dated 23rd July, 1969. A further report in the matter will be sent on receipt of a reply from the Corporation.
2. Shri Abdul Jabbar S/o Shri Abdul Razak C/o Habib 2307, Gali Mir Maderi Khirki Farashkhana, Delhi for information with reference to his application dated 29.08.1969.

-Sd-
Manager Officer (I-X)" (emphasis is mine)

14. The first aspect is the interpretation of the language contained in the Order dated 23.5.1969 passed by competent authority under Section 16 of the 1950 Act read with Rule 37 thereof. In my opinion, there cannot be two interpretations of the clear language of this Order dated 23.5.1969 because this order in so many words states that no doubt the property of Abdul Jabbar was not an evacuee property and he was entitled to restoration of the evacuee property but it was directed that Abdul Jabbar be given an alternative property as was agreed to by him before the Assistant Custodian, Delhi on 30.12.1968. Once the language of the Order dated 23.5.1969 is so clear, I fail to understand as to how the original plaintiff and now his legal heirs can at all argue that the Order dated 23.5.1969 in any manner directs restoration of possession of the suit property to Abdul Jabbar. The subsequent Letter of Regional Settlement Commissioner dated 26.11.1969 cannot change the contents of the Order dated 23.5.1969 which is passed under the statutory provisions of Section 16 of the 1950 Act read with Rule 37 thereof and which had achieved finality. The Letter of the appellant dated 11.8.1969 does not contain any statement that appellant/defendant no.2 is not the owner of the suit property. I therefore, hold that the first appellate court has committed gross perversity and gross illegality in misleading the clear cut language of the Order of the Department of Rehabilitation dated 23.5.1969 passed under Section 16 of the 1950 Act read with Rule 37 thereof. I must observe that this Court is indeed

surprised at the interpretation given by the first appellate court to the Order of the Department of Rehabilitation dated 23.5.1969 in spite of the categorical language in the same that Abdul Jabbar was only to be given an alternative property and possession of the suit property was not to be restored back to Abdul Jabbar. It also bears note that pursuant to the Order dated 23.5.1969 of Department of Rehabilitation, Abdul Jabbar never pursued for the grant of alternative accommodation or paid administration charges as required by the Order dated 23.5.1969.

15. In view of the aforesaid conclusions, I hold as totally perverse the conclusions of the first appellate court which are reproduced above and which hold that Abdul Jabbar was to be restored possession of the suit property allegedly in terms of Order of the Department of Rehabilitation dated 23.5.1969.

16. Once as per Sections 7 and 8 of the 1950 Act the Custodian or the Custodian General becomes owner of the property and it is deemed to be vested in such authority, then the only way in which such a vesting can be set aside is by an application under Section 16 of the 1950 Act read with Rule 37 thereof, and when that was done by Abdul Jabbar it resulted in the Order dated 23.5.1969 whereby for the claim of Abdul Jabbar he was given an allotment of an alternative property

and that too in terms of his own stand before the Assistant Custodian, Delhi on 30.12.1968.

17. In my opinion, the first appellate court has also committed a gross perversity and complete illegality in holding that the suit is not barred by Section 46 of the 1950 Act. I have already reproduced Section 46 of the 1950 Act above and the language of the said section leaves no manner of doubt whatsoever as to the bar of the civil court with respect to deciding an issue which is the subject matter of the decision of the competent authority under the 1950 Act including as to whether a property continues or does not continue to be an evacuee property while exercising powers under Section 16 of the 1950 Act read with Rule 37 thereof. In order to appreciate the perversity and total lack of application of mind by the first appellate court on this issue of bar of the civil court, I would simply reproduce the discussion of the first appellate court in para 6 of the impugned judgment and which para 6 reads as under:

“6. While going through the record, various documents (i.e. Ex.PW-2/1, Ex.PW-7/A and Ex.PW-7/B, reproduced herein above) are proved and undisputed documents of the parties. Letter dated 23.05.1969 (Ex.PW-2/1) is the order under section 16 of the Administration of Evacuee Property Act, 1950.

The respondent no.2/MCD had raised an objection in respect of the jurisdiction of the Civil Court, which was decided against MCD/respondent no.2 while returning the finding on issue no.2 by the Trial Court. Now, in the present appeal, the other respondents no.1 and 3 have also raised an objection while relying upon the Section 46 of the Act, 1950 (which has also been reproduced herein above). On assessment, the appellant never sought declaration or to adjudicate upon the question of status of the property as an evacuee or non-evacuee property, except submitting that the appellant's father Shri Abdul Jabbar was non-evacuee person

and his property was non-evacuee property. Order dated 23.05.1969 (Ex.PW-2/1) describes the property in the schedule (i.e. ½ share in the property No.III/704/135 (new) and III/705/1316-18 (new) situated in phatak Habas Khan, Delhi) and this order also opined restoration of the scheduled property to Shri Abdul Jabbar. To say, it was already ordered and held that the ½ share in the suit property was required to be restored to the claimant. Hence, there was no question for determination or adjudication about the status of the property as an evacuee property or non-evacuee property, which was not a subject matter of jurisdiction of the Civil Court. Therefore, Section 46 of the Act, 1950 does not apply, for these reasons and the reasons already returned by the Trial Court, I do not find any substance in the submissions of the respondents no.1 and 3 about the bar of jurisdiction of the Civil Court. In addition, this objection of jurisdiction has been taken first time in appeal by the respondents no.1 and 3, which is barred by Section 21(1) of Code of Civil Procedure.”

18. I am afraid that para 6 of the impugned judgment of the first appellate court really is an apology for a discussion on the bar contained in Section 46 of the 1950 Act because it is not understood as to how the appellate court can hold that Section 46 does not apply inasmuch as it is Abdul Jabbar himself who applied under the provision of Section 16 of the 1950 Act read with Rule 37 thereof which resulted in the Order dated 23.5.1969 of the Department of Rehabilitation, and which is surely an order under the 1950 Act and consequently there remains no doubt that the bar under Section 46 immediately came into play. Clearly therefore the civil court has no jurisdiction to try the suit and it was barred.

19. In fact, the need to hold that the jurisdiction of the civil court is barred by Section 46 of the 1950 Act is in a way infructuous because the effect of bar of jurisdiction of the civil court would be to allow the competent authority to

pass appropriate orders under Section 16 of the 1950 Act read with Rule 37 thereof, however, this jurisdiction has already been exercised by the competent authority under the 1950 Act which has resulted in the Order dated 23.5.1969. Therefore, the only issue remains is not of bar of jurisdiction of civil court but the fact that the issue stands conclusively determined in terms of the Order dated 23.5.1969 and which will operate as *res judicata* between the parties on the general principles of *res judicata* vide ***Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, (1982) 1 SCC 71 : AIR 1981 SC 2198*** because the Order dated 23.5.1969 has become final. Thus the issue only boils down to determine the meaning and effect of the Order dated 23.5.1969 and which has already been done above.

20. In view of the aforesaid discussions, this second appeal is allowed by answering the substantial question of law framed on 10.3.2015 in favour of the appellant and against the respondents thereby setting aside the judgment of the first appellate court and restoring the judgment of the trial court dismissing the suit for possession and partition filed by the erstwhile plaintiff, now represented by his legal heirs. Parties are left to bear their own costs.

JULY 22, 2016
ib/Ne

VALMIKI J. MEHTA, J