

Critical Analysis of Evacuee Property Laws and their Legal Administration in India

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Abstract

Evacuee Properties and their administration was one of the most fought over issue between India and Pakistan on diplomatic and legal lines. The aim on either side was their useful appropriation as can be reflected from the statements made by each party at the New Delhi Conferences held to reach a consensus. The problem was solved by unilateral legal actions taken by either nation but the result was hardships for the evacuees and subsequently the displaced persons whose fates got intertwined with the evacuee properties. These accounts of hardships have been well documented by numerous sociologists and historians all throughout. However, what this line of research misses out is a legal analysis of these evacuee property laws.

This paper wishes to fill that research gap that's existing. It harps on the singular important concept of ownership rights and portrays the blatant difference in legal and practical approach taken by the Custodians of evacuee properties. It also reviews the Jammu and Kashmir Evacuee Property law to pinpoint the shortcomings being talked of. The paper concludes that it was conscious legislative drafting which left the evacuees bereft of their very properties even when they were considered restorees under the law.

Introduction

Evacuee property was legally one of the most conflicted concepts in the post-Independence era between India and Pakistan² and later Bangladesh included wherein different administrative approaches were followed to handle the vast amount of evacuee property left behind post-partition. However, the concept of evacuee property as dealt with under the Administration of Evacuee Property Act, 1950 (**Evacuee Property Act**) is broader than that and also includes such individuals who have deserted Indian residence due to social or civil disturbances and settled outside India.³ Irrespective of the nature in which the Indian government declares a person to be an evacuee from a point of view of property transfer laws, the Indian stance has been that there would be an acquisition by the government of all such evacuee property and administer it

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² Joseph B. Schetchtman, 'Evacuee Property in India and Pakistan, Pacific Affairs'(Dec., 1951) 24(4) Pacific Affairs 406-413, 406-408

³ Administration of Evacuee Property Act 1950, s 2(d)(i)

thereafter.⁴ While this can be distinguished against Pakistan's standpoint of giving freedom to the evacuee to determine the fate of their property without governmental intervention⁵, that is outside the scope of discussion of this paper.

But the next logical phase which followed this administration of evacuee property was their requisition to provide shelter to displaced persons, refugees, and immigrants.⁶ While, both Dominions handled it legislatively⁷ without reaching a consensus for a smooth transition⁸, in India it raised queries regarding property rights and modes of transfer that were at play, some of which are to date debated in the Apex Court of India⁹.

It is this mesh of modes of transfer and vesting of interests in the evacuee property that is the objective of this paper. Post the review of literature there seems to much less appreciation of the working of the Evacuee Property Act in general over the past 50 years and the Custodian of Evacuee Property in specific which is the theme of this paper. Therefore, the highlight shifts from the international and diplomatic essence of the topic to the legal manner in which the evacuee properties were handled in India. The three major statutes under study include the Administration of Evacuee Property Act, 1950; the Evacuee Interest (Separation) Act 1951; and the Displaced Persons (Compensation and Rehabilitation) Act 1954. However, before defining the research problem and the hypothesis, resort to the literature review will be made.

Literature Review

The paper titled “**Evacuee property in India and Pakistan**”¹⁰ written by columnist Joseph B. Schechtman in the Pacific Affairs highlights the legal considerations that were at play when settling the immovable and agricultural property of evacuees between India and Pakistan which was never conclusively settled. While, from a historical perspective, the paper contains immense value by projecting the figures and the diplomacy at play in settling this international law affair which arises in almost all succession of states, it sheds little light on the legislative stand present in individual dominions. However, the relevance of this literature is in bringing out the legal

⁴ Ministry of Information and Broadcasting, Concerning Evacuee Property, (New Delhi, 1950) para 20.

⁵ Ministry of Refugees and Rehabilitation, The Evacuee Property Problem-Pakistan's Case, (Karachi, 1950) para 17

⁶ Joseph B. Schechtman (n 1) 410

⁷ The Displaced Persons (Compensation and Rehabilitation) Act 1954

⁸ Delhi Agreement Dated 14th September 1948; Minutes of the Inter-Dominion Conference, (Karachi, 10-13 January 1949)p. 72; Indian Minister of Rehabilitation, India News Bulletin, (Washington D.C., 15 August 1951)

⁹ *Shankara Coop. Housing Society Ltd. v M. Prabhakar* (2011) 5 SCC 607

¹⁰ Joseph B. Schechtman (n 1)

principles relied upon by New Delhi back at the 1950 negotiations on immovable property and agricultural land which later formulated in establishing the Indian legal regime under the Custodian of Evacuee Property. These negotiations and the fact that India sought governmental intervention against the free-market approach taken by Pakistan help in explaining the various sections within the Evacuee Property Act through which a temporary transfer happened, only to be later solidified by the Displaced Persons Act 1954.

The paper titled “**Evacuee Property in India and Pakistan**”¹¹ authored by Mohammed Ahsen Chaudhuri published in the Pakistan Horizon is a rather greater contribution in this field of transfer of property laws and evacuee property. Like the former publication, it indeed highlights the diplomatic shenanigans that were at play at the government-to-government approach of India versus the free-market approach of Pakistan fight at the Inter-Dominion Conference. However, in the latter half of the paper, it highlights the entire legislative history of evacuees and “intending evacuees” which was used as a tool by the then Indian Parliament to mass acquire properties and even attempts to transfer them before they evacuated were quashed. While, this may be seen as the violation of the then right to property under Article 31 of the Indian Constitution, but the same debate ended when by a repeal the concept of evacuee property was repealed.

The next important point, against which Pakistan highly protested was the bureaucratic interference by India in terms of acquisition of evacuee property and auctioning them off to refugees with the concern that these properties should not be wasted. Citing unavailability of resources and requirement of value attainment for the evacuee property, the Custodian was allowed to acquire all such property by operation of law, which is the case to date.

In a second paper authored by Joseph B. Schechtman titled “**Evacuee Property in India and Pakistan**”¹² published in the India Quarterly, he extends upon the argumentation presented in his first paper which is also cross-cited here. However, for this paper, the highlight can be shifted to Section VII of the paper where the Administration of Evacuee Property Act, 1950 and its preceding ordinance was studied thoroughly. The study established that the aim of the act was two-fold- (i) to prevent the migrants to gain benefit from both Indian and Pakistani evacuee properties and (ii) to utilize the acres of abandoned evacuee property left both in urban areas and

¹¹Mohammed Ahsen Choudhary, ‘Evacuee Property in India and Pakistan’ (June, 1957) 10(2) Pakistan Horizon 96-109

¹²Joseph B. Schechtman, ‘Evacuee Property in India and Pakistan’ (January-March 1953) 9(1) India Quarterly 3-35

the agricultural lands in light of the failure of the Inter-Dominion Evacuee Property and Refugee Commission.

However, besides this, an important analysis based on the modes of transfer operated by law that has been highlighted in the paper is of special importance. The fact that the Custodians were not vested with the rights and the property rights stayed with the evacuees and that even though the property was sold on forward there was no certainty as to immediate possession and therefore was only a future sale. The other hanging question was compensation against this acquisition which was never settled because of the principle-based deadlock and the diplomatic deadlock between the nations and the failure of the Joint Valuation Committee thereby leaving substantial queries as to legal transfers of property.

The short column “**Evacuee Property Law and the Constitution**”¹³ written by Kailash Nath Goyal focuses on the then pressing issue of intending evacuees and their constitutionality. However, the same is redundant because of the 1953 Amendment made to the Evacuee Property Act. However, still the question remains that whether the acquisition of property by Custodians without compensation is constitutionally valid or not in eyes of Art. 31A and whether such a takeover is valid in eyes of transfer of property laws?

Lastly, the paper titled “**Tales of Restoration: A Study of Evacuee Property Laws**”¹⁴ authored by Shikhar Goel based upon case files from the National Archives and Proceedings of the Custodian’s quasi-judicial office and newspaper reports is the single biggest aid to this present paper. However, a point to note, the author hailing from a background of history has made a socio-legal analysis whereas this paper would focus on the legal analysis solely.

The paper in its first paper heavily criticizes the Indian approach taken towards evacuee property and how while deviating from all basic forms and modes of transfer of property or acquisition principles, the government tried to gather acclaims for its efforts. However, the interesting part is the first part, where the author analyses the evacuee property laws and the indiscriminate way in which innocent immigrants and migrants were declared evacuees to usurp their properties.

More interestingly, the review of the Evacuee Property (Interest) Act of 1951 shows the draconian measures taken by the Custodians to usurp property rights and lead to the division of joint properties. The Custodian was made the de-facto owner of all such property with wide

¹³Kailash Nath Goyal, 'Evacuee Property Law and the Constitution' (1950) 48 Allahabad LJ 143

¹⁴Shikhar Goel, 'Tales of Restoration: A study of Evacuee Property Laws' (August, 2020) 36(2) Studies in History 251-279

discretionary powers and little oversight over the evacuee properties. Though the Custodian was never the owner, with an unclear legal position it also leased out such properties to displaced persons, which became perpetual by default and by discriminate operation of law, as described by the author. The author then goes on to explain the procedural inefficiencies, the menace of the then Art. 31(5) for making compensation conditional and finally the rhetoric of restoration under section 16 of the Administration of Evacuee Property Act. The author brings out 10 real cases before the Custodian's office and the Custodian General's office and subsequently the High Courts which showed how the restoration was made next to impossible thereby creating a situation of a perpetual lease for the migrants staying in such property and the status of de-facto owner enjoyed by the Custodian's Office in the states.

It is based on this critical review of literature that this paper focuses on the present-day situation of the impending statutes and their legal correlation with other legal principles and addresses the legal questions left behind by these historians in their articles. Besides, the situation of evacuee properties will also be studied qua the union territories of Jammu and Kashmir and Ladakh which is presently under the Jammu and Kashmir State Evacuees (Administration of Property) Act, 2006 which has also been extended to Ladakh¹⁵, and the central evacuee property laws haven't been extended to the union territories by operation of law.¹⁶

Research Problem

The paper focuses on the legal administration of evacuee properties under Indian law and the judicial developments that have followed thereafter to uphold the cause of the evacuees. The paper will be divided into the following legal topics:

1. Application of transfer property principles concerning evacuee properties;
2. Use and misuse of the powers and rights of the Custodian of evacuee property;
3. Joint interests in evacuee properties
4. Third-party interest in evacuee properties-especially displaced persons;
5. The situation post the 2005 Repeal of the statutes;
6. Status of evacuee properties in Jammu and Kashmir and Ladakh.

Research Methodology

¹⁵Mohinder Verma, 'More Central, J&K Laws with many amendments adopted in the Ladakh UT' *Daily Excelsior* (Jammu, 28 October 2020) <<https://www.dailyexcelsior.com/more-central-jk-laws-with-many-amendments-adapted-in-ladakh-ut/>>

¹⁶ Ministry of Home Affairs (Department of Jammu, Kashmir and Ladakh Affairs) Order (March 18, 2020) S.O. 1123(E) (India)

The paper follows a descriptive and analytical approach wherein the legal queries will be studied based on the judicial development and the track of case laws to study the status of evacuee properties in India holistically. Since it is a descriptive paper, it will not have a hypothesis and an open-ended approach will be taken in the process by relying on secondary literature and primary literature wherever available.

Contribution of the Paper- Objective and Limitations

The objective of the paper is to do a legal analysis of the evacuee properties and their administration, which to date has been studied from a historical and a diplomatic or international approach only. In this paper, the international negotiations as a factor will not be considered but rather the basic legal principles in operation concerning property administration and transfer will be a focus. In this fashion, the paper will be an addition to the already existing historical literature on evacuee properties wherein like Shikhar Goel, a critical approach will be taken towards the Indian approach of administering evacuee properties post-independence. Therefore, it will be one of the few pieces of literature doing an internal legal analysis of the evacuee property laws.

However, the review and critical analysis will be limited to the laws as they stand post-1953-54 after the major amendment concerning intending evacuees and therefore will skip the constitutional law angle of the topic. Rather, the focus will be on the common law principles of transfer of property and property administration and how they were followed (or not) in case of evacuee properties.

The study in the end will therefore answer the *query* that whether the evacuee property laws align with the common law property principles and were the property rights of evacuees and displaced persons safeguarded by India in the best possible manner?

Application of transfer property principles concerning evacuee properties

In this section, the transfer of property between the evacuee and the Custodian and the transfers made concerning such property before and after the vesting with the Custodian as separate topics.

Vesting of Ownership to the Custodian (?)

Historically, the Evacuee Property Act replaced the Administration of Evacuee Property Ordinance 1949¹⁷. Therein through section 8 of the Act by operation of law, any property which was declared evacuee property under section 7 was deemed to be vested in the Custodian. However, the concept of ownership was not clarified in the Evacuee Property Act and since it has been clarified that the Custodian was the one in whom the property vested and not the Government¹⁸, the question arises that will Custodian be the owner or the evacuee?

The case of *Commission of Income-Tax v Nandanam Constructions*¹⁹ traced the history of judicial development that followed to answer the query. Whereby the legal position based on the Transfer of Property Act, 1882 was that since it was a transfer of property, the ownership can only be done through a sale or by a gift by a registered deed.²⁰ There has to be a voluntary act of transfer for the ownership to transfer²¹. However, an equity-based interpretation was made by the apex court in the case of *R.B. Jodha Mal Kuthiala v. CIT*²², wherein under the Income Tax Act, the Custodian was held to be the owner as if the evacuee was to be made the owner then it would be an injustice to the evacuee who would have to pay income tax even though he did not receive any income from the same. The case also reasoned out it was done keeping with the principle that the person who is in beneficial possession of the property like in cases of transfers under s. 53A of Transfer of Property Act²³ can also be held as owners. The court also relied on the concept of the possessory owner who was held to be the rightful owner to hold that the Custodian should be held as the real owner of the evacuee property.²⁴

Though the court acted based on equity but in reality, though the concept of beneficial ownership works out the concept of the possessory owner does not. This is because though the Custodian had the power to take possession of the property²⁵ and had all the rights²⁶ and liabilities²⁷ of an owner but the rights were never transferred to the Custodian by the evacuee. The only option can be under the concept of possessory owner, which cannot work because even restoration of evacuee property to the evacuee or his heir was subject to judicial

¹⁷Administration of Evacuee Property Ordinance 1949

¹⁸*R.B. Jodha Mal Kuthiala v CIT*[1971] 82 ITR 570

¹⁹ 1996 SCC OnLine AP 1238

²⁰*CIT v Nawab Mir Barkat Ali Khan* [1974] Tax LR 90

²¹ Transfer of Property Act 1882, s 5

²² [1971] 82 ITR 570

²³Transfer of Property Act 1882, s 53A

²⁴*Perry v Clissold* [1907] AC 73 (PC)cited in *Nair Service Society Ltd. v K.C. Alexander* AIR 1968 SC 1165

²⁵Administration of Evacuee Property Act 1950, s 9

²⁶*ibid* s 10

²⁷*ibid* s 10A

determination.²⁸The restoration itself was made a legal and practical battle where even people declared as “non-evacuees” not granted the restoration.²⁹ Nor the death of the evacuee or the evacuee turning into an Indian citizen was enough to overturn the vesting of the Custodian³⁰, hence there was a legal transfer of ownership which was made. Therefore, while none of the rationales quite fit in, the only rationale that stands to date was that it was done by operation of law.

A question may then arise as to why the transfer of property was or is being debated as a method for acquisition of ownership by the courts, the answer is two-fold-

- a. Otherwise, it would be an acquisition of property that would require adequate compensation and rehabilitation under the Constitution³¹. Compensation would have been mandatory as the evacuees were citizens of India and therefore entitled to the same, only after evacuation did, they forfeit their citizenship.
- b. It cannot be called a Constitutional acquisition of property, as it had to be made by the state making it government property. However, after the notification under section 12 of the Displaced Persons Act³² was passed, it was clarified that the Custodian as a quasi-judicial authority owned the property and not the Government.

Therefore, there was a host of legal uncertainty around the vesting of property to the Custodians and the rationale behind declaring them as owners. While, for Income Tax Act, the Custodians could have been declared as owners by legal fiction, there is no rationale, why they were declared perpetual owners. This was topped by the fact that the exchange of considerations for such evacuee properties between the countries never actually happened.³³ Therefore, all was left with the statement- “by operation of law”.

Transfers of the evacuee property made before the Custodian took possession

This vesting of interest takes operation from the day of 15th August 1947 or when the evacuee left India to reside anywhere outside India, or when the notice was issued. Therefore, there is a retrospective operation of this vesting of interest, which according to the Karnataka High

²⁸ibid s 16

²⁹ Shikar Goel (n 13) 21; RotemGeva, ‘The Scramble for Houses: Violence, a factionalized state, and informal economy in post-partition Delhi’ (May 2017) 51(3) Modern Asian Studies 769-824, 811

³⁰Administration of Evacuee Property Act 1950, s 43

³¹India Constitution 1950, unamended art31(5),present Art. 31A

³²Displaced Persons (Rehabilitation and Compensation) Act 1954, s 12

³³Joseph B. Schechtman (n 11) 12

Court³⁴ would vitiate any transfer of rights or title related to such property made before the Custodian acquired title to the property. This case is an example wherein even though transfer after the issue of notice by the Custodian is to be held void³⁵, but by the broad ambit of section 8, the mere fact that a property is an evacuee property is enough to vest the interest in the Custodian. Hence, there is no legal notice to the transferee about the vitiation of rights of the transferor and even though the presumption is that the buyer will have the rights of the seller³⁶, then also by a legal operation such transfer of right is vitiated.

This is the exact dilemma that has been highlighted by the Karnataka High Court to say that the deeming provisions of the Evacuee Property Act under section 40³⁷ do not even require a legal notice, thereby leaving the transferee at a complete loss.³⁸ Thereby, the next question arises if such wronged transferee can claim damages from the transferor under the claim for fraudulent transfer.

Fraudulent transfer as defined under the Transfer of Property Act, 1882³⁹ requires an intention to defraud which can only arise when the transferor itself was aware of the usurpation of his title. As in the present case, since the transfer was made way back in 1947, when neither the ordinance of 1949 nor the Act of 1950 was operational, the transferor cannot be said to have been in the notice of the fact, i.e., the law. Therefore, the only remedy is under the doctrine of frustration wherein the remedy is restitutory.⁴⁰ No other remedy under the Transfer of Property Act, 1882 is available⁴¹ as such a transfer is opposed to the nature of interest and such interest being absent.⁴²

The importance of these two cases can be seen through the case itself as due to the deeming provisions of the Evacuee Property Act, transfers of property otherwise valid and worth hundreds of rupees were rendered invalid without any remedy to receive back the property but is just provided with the consideration paid.

³⁴*Haji D. Hussain v Vijayaraj* 1999 SCC OnLine Kar 321, para 6

³⁵Administration of Evacuee Property Act 1950, s 7(3)

³⁶Transfer of Property Act 1882, s 55(2)

³⁷Administration of Evacuee Property Act 1950, s 60

³⁸*Haji D. Hussain v Vijayaraj* 1999 SCC OnLine Kar 321

³⁹Transfer of Property Act 1882, s 53

⁴⁰Indian Contract Act 1872, s 56 ICA; Varun Singh, 'Frustration of Contracts: The Indian Perspective' Legal Service India <<http://www.legalserviceindia.com/legal/article-626-frustration-of-contracts-the-indian-perspective.html>> accessed 1 May 2021

⁴¹*Ram Gopal Reddy v Additional Custodian Evacuee Property* (1966) 3 SCR 214

⁴²Transfer of Property Act 1882, s 6(h)

The only remedy is available under the Evacuee Property Act itself⁴³ wherein the Custodian, who is the owner of the evacuee property had the discretionary power to approve such transfers made after the property became an evacuee property.⁴⁴ The Custodian under s. 40(4)(c) is entitled to even invalidate the transaction for any reason on his part⁴⁵ or even when the consideration paid is not enough⁴⁶. The Custodian itself was given the power of a court with barring of jurisdiction of the civil court⁴⁷ to value the property and claim for the difference or divide the property based on such valuation⁴⁸. But even such remedies were available to the transferee if the custodian gets such direction from the Custodian-General post rejection of the transfer made. Therefore, making it a difficult process for the transferee itself.

Transactions concerning the evacuee property

The Evacuee Property Act, 1950 gave absolute power to the Custodian and vested a higher interest over the evacuee property in the Custodian over any other form of property right which might have already been in existence in the property.

The best example is section 12, where even where the Custodian was a lessee, it was allowed to alter or cancel the terms of the contract concerning the evacuee property, irrespective of whether the agreement was entered before⁴⁹ or after the Act commenced. In case the agreement was entered after the Act commenced, the exercise of the power was absolute⁵⁰ with no subjective satisfaction of any considerations.⁵¹ Even restoration was made legally impossible for an evacuee who was a lessor, as by operation of law he was absolved of all responsibilities, and it was deemed that the Custodian was the new lessor.⁵² Though a saving of the rights clause was made concerning the lessor and the lessee.⁵³ Therefore, the effect of the Act of 1950 was to leave the transferees of the property with no option at all, as can be seen, while interpreting section 41 of the Act. In a Calcutta High Court case, while dealing with the validity of an exchange deed

⁴³*Ram Gopal Reddy v Additional Custodian Evacuee Property* (1966) 3 SCR 214

⁴⁴Administration of Evacuee Property Act 1950, s 40(1)

⁴⁵ *ibid*, s 40(4)(c)

⁴⁶ *ibid*, s 40(5)(b)(i)

⁴⁷*ibid*, s 46

⁴⁸*ibid*, s 40 (5)(b) (ii)- (iii)

⁴⁹*Moola v Financial Commissioner, Revenue, Chandigarh* 1980 Supp SCC 608, para 4 [Leases entered into before the commencement of the act is not automatically invalidated, but there is subjective satisfaction of the rights of the existing lessee on the evacuee property by the Custodian]

⁵⁰*R. Kanwar Raj Nath v Pramod C. Bhatt, Custodian of Evacuee Property* (1955) 2 SCR 977 [By operative part of section 12, the Custodian has absolute power to cancel leases entered after the commencement of the 1950 Act]

⁵¹Administration of Evacuee Property Act 1950, s 12(1)

⁵²*ibid*, s 12A (1)

⁵³*ibid*, s 12A (3)

between a Calcutta property and a Bihar evacuee property, it was held that such a transfer is void, illegal and without a remedy as the prior approval of the Custodian was not taken.⁵⁴ However, the striking part is the fact that even properties that are deemed to be evacuee properties were included as a part of section 41. This in turn again left the transferees with no option for a remedy against such transactions which were randomly invalidated by the Custodian and the courts.

In the backdrop of these fates of the transactions, and especially concerning deemed evacuee properties, it relates to the query as to who is the owner of the evacuee property, not for the matters of Income Tax Act only. While the holding in *R.B. Jodha Mal Kuthiala*⁵⁵ case has been uniformly followed for all income tax matters, the question remains as to beyond the purview of section 9 of Income Tax Act 1961, who is the owner of the evacuee property. Besides the infirmities of the cited judgment already pointed out, it also suffers from an infirmity while deciding who is the legal owner of the evacuee property. As, the case dealt with the Pakistan Administration of Evacuee Property Act, 1947, and limited itself to the concept of ownership as under Income Tax Act only.

While the case of *Ebrahim Aboobaker v Tek Chand Dolwan*⁵⁶ brings home the concept under Indian law. Whereby, it clarifies that by a co-joint reading of sections 7 and 8 of the 1950 Act, no vesting of interest can take place until and unless notification was issued by the Custodian declaring a property to be an evacuee property. This negates the concept of deemed evacuee property which appears in section 43. Furthermore, here the apex court for the first time negated the time that “once an evacuee always an evacuee” or that an evacuee suffers a civil death⁵⁷. It re-establishes the fact that the aim of declaring evacuee properties was to allow the Custodian to administer and manage it as a trustee and then the government could reallocate them to refugees from Pakistan and such other displaced persons. Therefore, while the Custodian could take possession⁵⁸ after vesting, it never meant that for all rights over the property the Custodian becomes the original owner of the property. An argument in support of this interpretation is the fact that the Custodian is not empowered to gain possession or eject or recover profits or rent from someone who has been in unlawful possession of evacuee property,

⁵⁴*Murray and Co. Pvt Ltd v Board of Wakfs* 1989 SCC OnLine Cal 175

⁵⁵*R.B. Jodha Mal Kuthiala v CIT*[1971] 82 ITR 570

⁵⁶ AIR 1953 SC 298

⁵⁷*ibid* 24, 29

⁵⁸Administration of Evacuee Property Act 1950, s 9

a power which rests in an owner always.⁵⁹ This legal position was finally reiterated by the Apex Court in 1957 that the ultimate ownership always vests with the evacuee and the Custodian by operation of law only obtains a right to obtain and use the property which was later extended to the right of possession.⁶⁰ Even indirectly the apex court held that the 1954 Displaced Persons Act was established so that the permanent interest of evacuees in the evacuee property could be removed, indicating that the Evacuee Property Act never actually took away the absolute interest of the evacuee.⁶¹ However, the legal powers which are provided under the Act, especially those of alteration and cancellation of transactions and usurpation of tenancy rights show that the powers of the Custodian are above and beyond that of a possessory owner.

Therefore, while there is still no judicial clarity as to who has the ownership rights over an evacuee property, and whether deeming provisions like s. 8(2A) of the Act are valid or not, the Act creates a legal fiction to make the Custodian acquire all the interests in the property. It was exercised by the Custodians as the owner, whereby even previous transactions entered into by the evacuee before the commencement of the Act is not upheld, an attribute which is uncommon for a trustee⁶². Hence while the courts never clarify as to what would vesting of interest mean, they have loosely used terms like trustee and possessory owner. It is this unbridled area of power⁶³ that was exploited by the Custodians in the absolute exploitation of the evacuee properties.⁶⁴ Even, these powers became the point of distinction between the Indian law and the British Trading with the Enemy Act which was the precursor of the Evacuee Property Act.⁶⁵ While the British act allowed only for vesting of interest, the Indian act also empowered the Custodian to further transact with the property as a de facto owner but not a de jure one. Hence though the intention was to keep the ownership of the Custodian temporary, it was made permanent using that same legal fiction.⁶⁶

Joint Interests in Evacuee Properties

The trouble of joint interests in properties with one being an evacuee and another non-evacuee or such combinations was dealt with in the Evacuee Interest (Separation) Act 1951. The Act

⁵⁹*Bharoo Mal v. Custodian General, Evacuee Property* (1962) 1 SCR 246, para 7; Administration of Evacuee Property Rules 1950, r 10(2)

⁶⁰*Amar Singh v Custodian, Evacuee Property* 1957 SCR 801, para 13

⁶¹*Hoshnak Singh v Union of India* (1979) 3 SCC 135, para 19

⁶²*R.B. Jodha Mal Kuthiala v CIT*[1971] 82 ITR 570

⁶³ Joya Chatterji, 'South Asian Histories of Citizenship 1946-1970' (December 2012) 55(4) *The Historical Journal* 1049-1071, 1066

⁶⁴Shikhar Goel (n 13) 15

⁶⁵ Shikhar Goel (n 13) 5

⁶⁶Joseph B. Schechtman (n 11) 27 citing Richard Symonds, *The Making of Pakistan*(London, 1949) 130

provided for the filing of claims by interest holders in evacuee properties⁶⁷ which were then subject to scrutiny by the authorized officer. The officer then directed the Custodian to either pay the co-sharer or sell or transfer it and distribute the profits or the rights.⁶⁸ While the same was directed there was no provision made for the consent of the co-sharer who was made to abide by the decision made. Therefore, the co-owners were not given any freedom to decide their interests in the property. Even the Custodian could be directed to partition the property⁶⁹ irrespective of the religion or nature of the family arrangement of the co-shareholders in the property. These directions were made enforceable irrespective of any contract which may exist contrary to such directions.⁷⁰ Hence the contracts were invalidated by operation of law.

The other form of arrangement dealt with in the 1951 Act is that of a mortgage where compensations were made to the mortgagee and if the evacuee was the mortgagee, then payments were made to the Custodian itself.⁷¹ Lastly, if the person who had interests or charges in the evacuee interest of the property, did not file such claims within a year then the same interest was taken away by the Custodian and vested in the Custodian. It was thereafter deemed that such charge had extinguished.⁷² It was on this point that though the transfer could be made by the Competent officer to the Custodian directly or sold to an outsider and then the proceeds paid to the Competent officer, s. 11 created a distinction between the duo. While the transfer to the Custodian was made free of all encumbrances, the same wasn't true in the case of the outsider, an interpretation which was reluctantly made by the courts to secure the object of the Act.⁷³ Therefore, in the process, third-party interests attached with the evacuee property were harmed as were also the interests of co-sharers. The power to partition/sell without the agreement of co-sharers took away the truly owned property of many individuals with no remedy but compensation, leading to an acquisition of a property-like scenario except that it wasn't a constitutional one bounded with fairness.

⁶⁷Evacuee Interest (Separation) Act 1951, s 7

⁶⁸*ibid*, s 10(a)(ii)-(iii).

⁶⁹*ibid*, s 10(a)(iv)

⁷⁰*ibid*, s 10(a)

⁷¹*ibid*, s 10(b)

⁷²*ibid*, s 11

⁷³*Mahomed Ebrahim Mahomedi v Essak Haji Alimahomed Haji Sumar* 1960 SCC OnLine Bom 170 para 11

But such vesting was limited to only the evacuee's interest in the property.⁷⁴ And where there was a separation of interest envisaged by the competent officer then until and unless such separation was done, the Custodian could not acquire the interest-free of all encumbrance.⁷⁵

The irony arose wherein an order passed under sections 8 and 11 of the 1951 Act was made not subject to any revision.⁷⁶ Once the scheme for division of interest was made by the competent authority, the authority shifted to the Custodian and there was no provision for revaluation. The only remedy then was through restoration for non-evacuees. This in turn affected third parties who had connected interests whose claims were not properly evaluated by the competent authority.

Third-Party Interests in the Evacuee Properties

The third-party interests which accrued from transactions entered by the evacuee have already been discussed above, wherein a blanket cover was given under section 40(1) to say that all such third-party interests will be invalid if not approved by the Custodian. However, in the case of tenancy rights, the landlord was made to suffer, as no default of the Custodian as a successor tenant was made actionable by the landlord and did not give a right to eject to the landlord.⁷⁷

In this section, we will deal with the interests of the displaced persons that were acquired in the evacuee properties through the Displaced Persons (Compensation and Rehabilitation) Act 1954. The section of most interest in section 12 of the 1954 Act, which allows the Central Government to acquire any evacuee property for the relief and rehabilitation of displaced persons.⁷⁸ The issuance of this notification under section 12(1) has been held to create a transfer of ownership over the property to the Central Government⁷⁹, and the property thereafter loses the status of the evacuee property. However, more interesting is section 12(2) which establishes the effect of the notification. It effectuates that by such notification the evacuee will lose all interest, right, or title in the evacuee property. Therefore, it leads to two conclusions:

- a. The mere fact of the property being that of an evacuee does not transfer the ownership to the Custodian- no effect of the deeming provisions.

⁷⁴*Abdul Hakim Khan v Regional Settlement Commr.-cum-Custodian of Evacuee Property* (1962) 1 SCR 531, para 12.

⁷⁵*Bhanwarlal v Regional Settlement Commissioner* (1966) 1 SCR 163; *Baddan v Union of India* 1970 SCC OnLine P&H 156

⁷⁶*Major Chandra Bhan Singh v Latafat Ullah Khan* (1979) 1 SCC 321, para 12-14

⁷⁷Administration of Evacuee Property Act 1950, s18

⁷⁸Displaced Persons (Compensation and Rehabilitation) Act 1954, s 12

⁷⁹*Shankara Coop. Housing Society Ltd. v M. Prabhakar* (2011) 5 SCC 607, para 131

- b. Even when a notification under section 7 of the Evacuee Property Act has been issued, the Custodian is never the owner and the ownership stays with the evacuee who is then compensated for the acquisition under the 1954 Act.⁸⁰

The vesting of ownership rights to the Central Government was further clarified by Explanation to S. 20A of 1954. It was interpreted to say that even if an evacuee has been declared as a non-evacuee under s. 16 of the Evacuee Property Act and given a certificate to that extent, it would not entitle the evacuee to restoration but mere compensation.⁸¹ Another power given to the Central Government was under s. 20B of the 1954 Act⁸² which was to decide if it was expedited to restore the property to a non-evacuee. But the Apex Court subsequently struck such an arbitrary section down as unconstitutional and violative of art. 31(2).⁸³ Though Art. 31 was later repealed the section was never re-enacted and hence the power was extinguished.⁸⁴ Hence as highlighted above, this is also one of the examples which assert the fact that the owner never vested with the Custodian for the evacuee properties.

However, an important note is the definition of evacuee property under section 2(c) of the 1954 Act which also includes such property which is deemed to be evacuee property. Here also it contradicts the Supreme Court opinion that notification of a property as an evacuee property is an essential pre-requisite towards declaring a property as evacuee property.⁸⁵ Though in this case since it is a matter of governmental acquisition of property under constitutional means the rights of the evacuee are not harmed who are adequately compensated for, thereby establishing a proper sale-like arrangement. It has been contended that to avoid the interest of the evacuees the scheme of 1954 Act was enacted to provide encumbrance free ownership to such property to the government, a contention which was later affirmed by the apex court.⁸⁶

However here also an exception was carved whereby if the evacuee property was acquired for public purposes, then the compensation was paid to the Custodian and not the evacuee.⁸⁷ This is backed by the fact that the evacuee property which after acquisition forms a part of the compensation pool and the displaced persons who are given property as compensation enters

⁸⁰Displaced Persons (Compensation and Rehabilitation) Act 1954, s 13

⁸¹*Abdul Qadir (Since deceased) through LRs v Managing Officer-cum-Assistant Custodian of Evacuee Property, Jaipur* (1980) 1 SCC 146

⁸²Displaced Persons (Compensation and Rehabilitation) Act 1954, s 20B

⁸³*Lachman Dass v Municipal Committee, Jalalabad* (1969) 1 SCC 653

⁸⁴*Abu Khan and Ors v Union of India* (1984) 1 SCC 88 para 2

⁸⁵*Ebrahim Aboobaker v Tek Chand Dolwani* AIR 1953 SC 298

⁸⁶*Hoshnak Singh v Union of India* (1979) 3 SCC 135, para 19

⁸⁷*Delhi Administration and Others v Madan Lal Nangia and Ors* (2003) 10 SCC 321, para 17, 18 citing Land Acquisition Act 1894, ss 4, 6, 23

into property transfer agreements with the government⁸⁸. By this method properties worth crore of rupees were transferred from the evacuees to the displaced persons.

The essence and connection between the evacuees and displaced persons can be established by even executive actions. For every restoration application under s. 16 of the 1950 Act the Custodian had to fill out a pro forma to send to the Ministry of Rehabilitation.⁸⁹ Entry 6 of the pro forma asked the “*extent to which physical restoration of the property is likely to affect the rehabilitation plans*”.⁹⁰ Therefore in numerous restoration cases, the Custodian used their vague reasons to deny restoration thereby deviating from the position of trusteeship that the Custodian was supposed to be in. The situation got further complicated wherein the applicants who have restored the property were denied the right to use, as the refugees who had been allotted the property therein, their right prevailed.⁹¹ Therefore an encumbrance was created by de facto owners and possessors of the property without any benefit accruing to the actual owner himself or without his consent.

These critical evaluations of the laws only give the background to the gruesome situation faced by the evacuees, restorees, and the displaced persons affected by these legislations and authorities in real life. The stories reflected by authors like Rohit De⁹², Ruatem Gave⁹³, Joya Chatterjee⁹⁴ show the shocking state of affairs, where concepts like equity and justice found no place, and an invasive approach was adopted for all evacuee property alike. While many adjudications continue to date, the official records give a picture of the ill-management of evacuee properties with substantially low rates of restoration and pending cases before the evacuee property cells.⁹⁵

Situation post-2005

In 2005, the Displaced Person Claims and Other Laws Repeal Act, 2005 was passed which repealed all the three major statutes that have been discussed herein.⁹⁶ While the statutes have been repealed but the essence of this paper remains as adjudications that arose way before 2005

⁸⁸Displaced Persons (Compensation and Rehabilitation) Act 1954, s 8(1)(c)- (d)

⁸⁹Request for Grant of Certificate/s 16 of Admn of E.P. Act 1950 by M/s. Risal and Allahdin s/o Mouzum Khan (Delhi), File no2(374)/54-269-prop-I (1954), National Archives of India

⁹⁰ibid

⁹¹Restoration Application of Shri Sardar Mohd s/o Malang Gurjar, File No. 12(552) Rest. 157, National Archives of India

⁹²Rohit De, ‘Evacuee Property and the Management of Economic Life in Postcolonial India’, in *The Postcolonial Moment in South and Southeast Asia*(London: Bloomsbury, 2018) 87–106

⁹³Rotem Gave (n 28)

⁹⁴Joya Chhatterjee (n 62)

⁹⁵Report of the Auditor and Comptroller General India, *Land and Building Department* (31 March 2010) https://cag.gov.in/uploads/download_audit_report/2010/Delhi_Civil_2010_chapter_3.pdf, para 14

⁹⁶Displaced Persons Claims and Other Laws Repeal Act, 2005

continued. However, an abrupt stop to all these proceedings was made by an explanatory note of the Ministry of Law and Justice which cited s. 6 of the General Clauses Act as the reason.⁹⁷ It defined that all the rights under study in these statutes were mere hope/expectations and the Act did not vest or lead to the acquisition of rights by anyone and therefore the proceedings had no reason to be continued.⁹⁸ It brings us back to the question as to the nature of ownership that was transferred to the Custodian by operation of law. While the Explanatory note doesn't specify the same, it also establishes that all the rights acquired under the Acts were temporary and specifically the Claimants cannot have any cause of action, not even the non-evacuees whose cases may have been pending as of 2005. Therefore, it is true to say that the evacuees and restorees both were equally harmed by both the inception and the repeal of the acts.

It is important to now look into the steps taken for the management of these evacuee properties-

As of 1989, the rights and vesting of interest of the Custodian for properties in Delhi were transferred to the Department of Land and Building Department under the Delhi Administration.⁹⁹ Later after the 2005 repeal and 2010 notification for disposing of pending proceedings, the department has been put in a tough spot whereby they do not have the power to dispose of the properties or initiate any legal action against the unauthorized occupants of the evacuee properties.¹⁰⁰ As the evacuee property act being repealed, the Department only has management rights with no de facto ownership. As a result, all such evacuee property is left in a hung suspension¹⁰¹ with no absolute ownership being vested in anyone and multiple displaced persons with pending cases of rehabilitation with no remedy.¹⁰²

For the other states, who have pending residual work as of 70's the residual work along with all the powers were transferred to the State Governments¹⁰³, and post the 2005 Repeal, they are empowered to either settle the pending claims or not by using the argument of General Clauses

⁹⁷General Clauses Act 1897, s 6

⁹⁸ Ministry of Home Affairs, Government of India to the Chief Secretaries of All States/Union Territories, Memorandum No MHA/RD/SW/CC/99 (21 September 2005)<http://bor.up.nic.in/PDF_Anubhag/Sec-8/4.pdf>

⁹⁹ Ministry of Home Affairs (Department of Internal Security- Rehabilitation Division), Government of India to the Chief Secretary, Delhi Administration, Memorandum No. 4/32/85-SS.II(20 April 1989) <https://www.mha.gov.in/sites/default/files/FFR_Delhi_15022019.pdf>

¹⁰⁰Report of the Auditor and Comptroller General India (n 94) 15

¹⁰¹Ministry of Home Affairs (FFR Division) Government of India to the Chief Secretaries of all States/Union Territories, Memorandum No. MHA/RD/SW/CC/99 (November 2016) https://www.mha.gov.in/sites/default/files/FFR_ANNEXURE_B_17092019.pdf> para 37

¹⁰²*Mange Ram and Anr. v Union of India* 2018 SCC OnLine Del 11990

¹⁰³Ministry of Home Affairs (FFR Division) Government of India to the Chief Secretaries of all States/Union Territories, Memorandum No. MHA/RD/SW/CC/99 (November 2016) https://www.mha.gov.in/sites/default/files/FFR_ANNEXURE_B_17092019.pdf>Documents in Public Domain SR. Title No. 14-26.

Act of no acquisition of rights.¹⁰⁴ Hence, even though the Freedom Fighters and Rehabilitation Division of the Union Ministry of Home Affairs were destined to handle the residual work of the evacuee properties the same have been handed over to the states.¹⁰⁵ However, this status as of late 2008, has been changed to mean that only “unsatisfied verified claims” and other verified claims awaiting in stages of revision are to be disposed of by the State Governments and not such proceedings where the rights have not been acquired.¹⁰⁶ While this notification stands true for the displaced persons, it has left with cases of restoration, and cases under the Evacuee of Interest (Separation) Act 1951 with no remedy at all. Moreover, even clubbing of such pending cases again hints at the contrary idea that the rights were acquired by the Custodian and the proven non-evacuees have to establish their claim to accrue the interest and that they will not be vested back with the right by just proving themselves to be non-evacuees.

Therefore, this final nail in the coffin helps us to understand that there has been always been a contradiction between judicial and governmental interpretation regarding vesting of interest and ownership of the evacuee properties. It was a dispute which was never solved and it only leads to undue hardships for the evacuees and the displaced persons claiming from the Compensation Pool.

Status of Evacuee Properties in Jammu and Kashmir and Ladakh

Given the study of the evacuee property laws in India, it is essential to study the Jammu and Kashmir State Evacuees’ (Administration of Property) Act 2006¹⁰⁷, which is now extended to the newly formed union territories of Jammu and Kashmir, and Ladakh.¹⁰⁸ The necessity of study arises from the different nature of the transfer of interests that is guaranteed under the Act.

At the outset, the Act declares evacuees as both people who had left the state to either reside outside India or in Pakistan or the Pakistan-occupied area of the state.¹⁰⁹ This corresponds to the special nature of the property laws and their exclusivity in the state. However, in the case of

¹⁰⁴ Ministry of Home Affairs, Freedom Fighters and Rehabilitation Division, Government of India <https://www.mha.gov.in/division_of_mha/freedom-fighters-rehabilitation-division>; Ministry of Home Affairs (FFR Division) Government of India to the Chief Secretaries of all States/Union Territories, Memorandum No. MHA/RD/SW/CC/99 (November 2016) https://www.mha.gov.in/sites/default/files/FFR_ANNEXURE_B_17092019.pdf

¹⁰⁵ *ibid*

¹⁰⁶ Ministry of Home Affairs (FFR Division) Government of India to the Chief Secretaries of all States/Union Territories, Memorandum No. MHA/RD/SW/CC/99 (22 September, 2008) <https://www.mha.gov.in/sites/default/files/Annexure-X_02052017.PDF> Annexure 21

¹⁰⁷ Jammu and Kashmir State Evacuees’ (Administration of Property) Act 2006

¹⁰⁸ Ministry of Home Affairs (Department of Jammu, Kashmir and Ladakh Affairs) Order (March 18, 2020) S.O. 1123(E) (India)

¹⁰⁹ Jammu and Kashmir State Evacuees’ (Administration of Property) Act 1949, s 2(c)

Jammu and Kashmir, the rights vested in the Custodian were not only the superintendence of the Custodian General but also that they were for administering, managing, and preserving the properties.¹¹⁰ The Custodian is not allowed to transfer the evacuee properties not without the previous approval of the Custodian General.¹¹¹

Besides, also for purposes of restoration, the only consideration before the Custodian was that the person was a non-evacuee and the infirmity of the property has been extinguished.¹¹² Not only were the restoration applications streamlined and not subject to the subjective satisfaction of the Custodian but also were there provisions for adequate compensation for the restorees.¹¹³ The restorees, were either given properties in exchange or compensated by reacquisition by the Government and then vesting of interest in the restorees.¹¹⁴ No remedy for any such compensation can be visible under Indian law.

Now let's resort to the question of ownership of the Custodian of the evacuee properties. It is important to point out that neither transfer nor allotment of the property allowed by the Custodian's sole discretion and the Government was sought for approval, followed by the fact that the Government acquired such property when needed for the public interest.¹¹⁵ Also, the Government only got ownership absolutely over the evacuee properties when the exchange of properties was completed with the restorees or with the heirs having an interest in the property.¹¹⁶ As of in India, no separation of interest by partition was sought among heirs and the heirs were allowed to claim an interest in the property.¹¹⁷

The claim for restoration was not limited to non-evacuees only, even evacuees could ask for restorations, which was granted with sufficient restrictions.¹¹⁸ The claim for restoration by non-evacuees is under section 8 which has been interpreted to be different from the right provided under section 14.¹¹⁹ The court interpreted that the very purpose of section 14 was to encourage evacuees who had left the state of Jammu and Kashmir to come back and settle in the state.¹²⁰

¹¹⁰ibid, s 9(1)

¹¹¹ibid, s 9(2) (l) proviso

¹¹²ibid, s 14.

¹¹³ibid, s 14A

¹¹⁴ibid, s 14A(1)(a)- (b)

¹¹⁵ibid, s 14A(1)(C)

¹¹⁶ibid, s 14A(2)

¹¹⁷ibid, s 14.

¹¹⁸ibid, s 14(1)

¹¹⁹*Ghulam Qadir v Special Tribunal* (2002) 1 SCC 33, para 65

¹²⁰ibid

This showed that the nature of right vested with the Custodian was a temporary one and in the true sense the evacuee remained to be the absolute owner of the evacuee property.

In this regard, the Jammu and Kashmir Law triumphs the concept of controlling and managing evacuee property as existed in the British Trading with Enemy Act, which was the source of inspiration for the laws of India, Pakistan and Jammu, and Kashmir.

As of the present status, the Jammu and Kashmir Custodian's Office is still functional which administers the evacuee properties of Jammu and Kashmir, though much of such property is held by Army, or Defence Personnel, or Government Department, etc.¹²¹ However, the Office has taken up the work of setting up residential plots and letting out leases to these unclaimed evacuee properties.¹²² However, with the internalization of the state of Jammu and Kashmir, more evacuees who had moved out of the state will have the right and ease to claim the evacuee properties under section 14. With the existence of concepts like an improvement on pending construction of evacuee lands,¹²³ the Custodian has been able to make extensive progress in rehabilitation and realization of evacuee properties.¹²⁴

Conclusion and Contribution

The following research paper was set out with the aim of studying and critically analyzing the status of evacuee properties in India through the lens of the evacuee property laws in India. It has highlighted the seriously conflicting position that existed concerning the vesting of interest and nature of interest and manner of transfer of evacuee properties. There was no heed paid to the transfer of property principles, which allowed for gross violation of third-party interests in private property, which were not even given the status of government properties to claim for compensation constitutionally.

While a loose constitutional exception carved out in art. 31(5) but even with the repeal of Art. 31 and persisting of the evacuee property laws till 2005 no effort was made to remedy the wrong. Post-2005, the General Clauses Act was utilized to leave the rights and expectations of restorees and evacuees in hanging suspension. The legislature through various red flags continuously

¹²¹Evacuee Property Land in Jammu, J&K Custodian Department (10 March 2021) <<https://jkcustodian.in/evacuee-property-land-in-jammu/>>

¹²²Evacuee Property Land in Kashmir, J&K Custodian Department (10 March 2021) <<https://jkcustodian.in/kashmir/>>;Construction of Residential Flats (G+3) on the evacuee land of K.B Abdul Qayoom at Rawalpora Srinagar, J&K Custodian Department (10 March 2021) <<https://jkcustodian.in/construction-of-residential-flats-g3-on-the-evacuee-land-of-k-b-abdul-qayoom-at-rawalpora-srinagar/>>

¹²³Jammu and Kashmir State Evacuees' (Administration of Property) Act 1949, s 9(2)(ee)

¹²⁴Progress and Achievements, J&K Custodian Department <<https://jkcustodian.in/progress-and-achievements/>>

countered the Judicial position that the absolute ownership of evacuee property was always vested in the evacuees and the Custodian was for a temporary basis. The study of the Jammu and Kashmir State Act has been done to highlight this exact distinction and to counter the Indian Government's position that evacuee properties couldn't have been handled better. As highlighted by courts themselves, the Displaced Persons (Rehabilitation and Compensation) Act 1954 was enacted with the entire aim to devoid the restorees and evacuees of their property rights and vest the property in the Governments. This placed both the displaced persons and evacuees as well as restorees at crossroads. As historians put it, the effect was all these unfortunate people standing in long never-ending queues to settle their property rights. Even civil courts were replete with cases by third parties regarding their property rights acquired through mortgage/lease/allotment, etc. all of which were changed and amended at the discretion of the Government and the Custodian. This situation can be well contradicted with the Jammu and Kashmir position where even the Government acquired properties to transfer them back to evacuees.

It can truly be said that there was complete disharmony in name of vesting of interests in the Custodian, an office which enjoyed the protection of the law which paid no heed to property rights or transfer of property rights, leading to total disarray of rights.

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