

**IN THE SUPREME COURT OF BANGLADESH**  
HIGH COURT DIVISION  
(SPECIAL ORIGINAL JURISDICTION)

**WRIT PETITION NO.8932 OF 2011**

**IN THE MATTER OF:**

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

**AND**

**IN THE MATTER:**

Md. Abdul Hye, son of late Abdur Rashid,  
2/404, Eastern Rokeya Tower 98 Boro  
Moghbazar, Dhaka. ....**Petitioner**

**-Versus-**

Government of Bangladesh, represented by  
the Secretary, Ministry of Land, Bangladesh  
Secretariat, Dhaka and others

.....**Respondents**

**Mr. Mohammad Imtiaz Farooq**, Advocate  
with **Mr. M. Syed Ahmed**, Advocate  
.....For the petitioner

**Mr. Mahbubey Alam**, Attorney General with  
**Mr. Md. Jahangir Alam**, Deputy Attorney  
General, **Mr. Samarendra Nath Biswas**,  
Assistant Attorney General, **Mr. Md. Jashim**  
**Uddin**, Assistant Attorney General, **Mr. Md.**  
**Shafquat Hussain**, Assistant Attorney General  
.....For the State

**Mr. Manzil Murshid**, Advocate  
.....For the respondent No.1

**Mr. Abdul Wadud Bhuiyan**, Senior advocate  
with **Mr. Fida M. Kamal**, Senior advocate, **Mr.**  
**Qumrul Haque Siddique**, Senior advocate,  
**Mr. Probir Neogi**, Senior advocate & **Mr. A.M.**  
**Amin Uddin**, Senior advocate

.....Amicus Curiae

**Mr. Subrata Chowdhury**, Senior advocate  
.....For the respondent No.6

Present:  
*Mr. Justice Obaidul Hassan*  
*And*  
*Justice Krishna Debnath*

**Heard on** 02.05.2016, 18.05.2016,  
16.08.2016,23.08.2016, 11.04.2017,  
18.05.2017, 29.05.2017, 30.05.2017,  
01.06.2017, 04.06.2017, 08.06.2017,  
12.07.2017 & 20.07.2017

**Judgment on 23.11.2017**

**Obaidul Hassan, J.**

1. Two Rules were issued on an application filed under Article  
102 of the Constitution of the People's Republic of Bangladesh.

1<sup>st</sup> Rule Nisi was issued calling upon the respondents to show cause as to why promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance NO. XCII of 1976), and all actions taken pursuant to the said Ordinance; and actions taken pursuant to the 1976 Ordinance; and inclusion of new properties as enemy property subsequent to enactment of 1974 Act; and section 6(Ga) and (Gha) of the 2001 should not be declared to have been enacted without lawful authority and is of no legal effect, and or why such other or further order or orders as to this court may deem fit and proper should not be passed.

2. After issuance of the Rule, this Court by an order dated 19.05.2016 appointed 5(five) learned senior Advocates namely Mr. Abdul Wadud Bhuiyan, Mr. Fida M. Kamal, Mr. Quamrul Huq Siddique, Mr. Probir Neogi and Mr. A.M. Amin Uddin, as Amicus Curiae to assist the Court in resolving the issues involved. Since the question raised in this Rule has historical backdrop and evaluation of law and its interpretation is needed, on 09.06.2016 upon an application filed by the petitioner we asked the respondent No.1 to submit a comprehensive report of the list of properties as have been listed as Enemy Property subsequent to the 1976 Ordinance and to give further report as to how such properties were disposed of. The respondent No.1 was also directed to take immediate steps asking the Deputy

Commissioners of the Country to provide a comprehensive report from each District for placing the same before this Court for its perusal. The respondent No.1, after collecting the reports from 46 Deputy Commissioners submitted those before this Court by way of filing supplementary affidavits.

3. At the midst of hearing of the case, the petitioner filed an application seeking issuance of supplementary Rule challenging section 3 of the Enemy Property (Continuance of Emergency Provision) (Repeal) Act, 1974. This Court on 12.04.2017 issued a supplementary Rule (2<sup>nd</sup> Rule) in the following term:

“Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why section 3 of the enemy property (continuance of Emergency Provision) (Repeal) Act, 1974 in its present form should not be declared to have been enacted without lawful authority and is of no legal effect and or such other or further order or orders passed as to this court may seem fit and proper.”

4. The petitioner impleaded the People's Republic of Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Dhaka as respondent No.1, the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Dhaka as respondent No.2; the Secretary, Ministry of Home Affairs, Bangladesh Secretariat,

Dhaka as respondent No.3; Land Appeal Board represented by its Chairman, Segun Bagicha, Dhaka as respondent No.4 and Land Reform Board represented by its Chairman, Segun Bagicha, Dhaka as respondent No.5. Thereafter, on 16.07.2017 considering an application initiated Mr. Rana Das Gupta, the Secretary of Hindu Buddhist Christian Unity Council was allowed to be added as respondent No.6.

5.The petitioner has challenged promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) and all actions taken pursuant to the said Ordinance and also challenged inclusion of the properties in the list of 'Enemy Property' after enactment of 1974 Act, the petitioner also challenged section 6 of the অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ being violative of the core spirit of the Constitution of the People's Republic of Bangladesh.

6. The petitioner's case in short is that in the pretext of the powers under the 1965 Rules, the Government of Pakistan indiscriminately took over the properties of Hindu minorities as being 'enemies' or 'enemy subjects' or [anyone who] appear to the Pakistan Government to be associated with enemies in the then East Pakistan, present Bangladesh. East Pakistan government also made an order in 1966 under Rule 161 titled the East Pakistan Enemy Property (Lands and Building) Administration and Disposal Order of 1966. In 1968, the Supreme

Court of Pakistan asked the Government of Pakistan to explain its view point on the said Act, as the Supreme Court considered it as a political question to be answered by the Government of Pakistan (M.M. Monsur Ali Vs. Arodbendu Shekhar Chatterjee and others (21 DLR (Sc) Page-20). However, the Government of Pakistan did not formulate its view point on this crucial question till the independence of Bangladesh. Although the armed conflict between India and Pakistan ended in 1965, the state of Emergency continued until 16 February 1969, on which date the Government of Pakistan Promulgated Enemy Property (Continuance Emergency Provision) Ordinance 1969 by operation of which the provisions relating to vesting of enemy property contained in the 1965 Rules continued to be in force, and until the glorious liberation war of 1971, the act of arbitrary and discriminate confiscation of properties belonged to the Hindus , the civilians of the then East Pakistan/ the present Bangladesh remained continued by the Government of Pakistan.

7. The Liberation War of 1971 was ensued on the basis of denial of the two-nation theory by the Bengali nation and thus the fundamental ethos of the liberation war of 1971 was compatible with the notion of equal rights of citizens irrespective of religion, including the Hindu religion. The proclamation of independence and formation of the provisional Government of Bangladesh happened at

Mujibnagar on April 10, 1971. By the proclamation of Independence, the elected representatives of the People's Republic of Bangladesh, "in order to ensure for the people of Bangladesh equality, human dignity and social justice" declared and constituted Bangladesh as a sovereign Republic. On the same day, i.e. 10 April 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistani laws which were in force in the then East Pakistan on or before March 25, 1971, which were not in conflict with the Proclamation of Independence.

8. That is to say, in other words, Ordinance No.1 of 1969, which did not fit with the spirit of the proclamation of independence of Bangladesh, automatically remained ineffective in the new State. Bangladesh was not a successor state of Pakistan. On the contrary, Bangladesh was established itself by waging a war of liberation against Pakistan. Immediately after liberation, the Bangladesh Vesting of Property and Assets Order, 1972 (Order 29 of 1972) was enforced on March 26, 1972 by the Government of Bangladesh. By this order, all properties situated in East Pakistan that belonged to Pakistan government became vested in the People's Republic of Bangladesh. Thus, all government properties, including but not limited to khas land, river and enemy Properties listed under the 1965 and 1969 Ordinances etc became vested in Bangladesh. However, each

category of land continued to be of government by specific laws relating to each category.

9. Although, by operation of the Proclamation of Independence and the Laws of Continuance Enforcement Order, 1971, the 1969 Ordinance lost its applicability in the People's Republic of Bangladesh, in 1974 the Government of Bangladesh, for ensuring further equality of all the citizens of Bangladesh, passed the Enemy Property (Continuance of) Emergency Provisions (Repeal) Act, Act XLV of 1974, expressly repealing Ordinance I of 1969. However, the 1974 Act stopped short of return of the 'enemy property' to the original owners or their heirs who became citizens of Bangladesh and in fact the 1974 Act left all enemy properties and firms which were vested with the custodian of enemy property in the then East Pakistan, vested in the Government of Bangladesh. Pursuant to section 3 of the 1974 Act, such properties remained as vested on the government of Bangladesh. However, the Act did not state any wide power in respect of management or disposing of such properties by the Government. On 20 January 1975, the Ministry of Law, by its circular no.51, issued an order to immediately 'delist' any property remained included in the enemy property list, after enactment of the 1974 Act. Subsequently, on 26 July 1975, the Ministry of Law by its Circular No. VNR 29/75 issued a direction to stop any listing of property as enemy property and also to submit a detailed report on any such listing.

10. After the assassination of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, the then President, promulgated the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976 ) by which section 3 of the 1974 Act was amended to give further power to the government with regards the 'enemy properties'. Section 2 of the Ordinance added the following sentence to section 3 of the 1974 Act, *"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the government or by such office or authority as the Government may direct"*. By the aforesaid amendment through the 1974 Ordinance, the Government, with ill motivation and following discriminatory practice, continued to include new properties belonging to the Hindus in the enemy property list and also started to dispose of such properties in favour of interested quarters, often anti liberation forces. The practice of inclusion of new properties purported to belong to enemies of state of Pakistan continued until 21 June 1984, and by Notification dated 23 November 1984, the Ministry of Land ordered that any decision to list a property after 21 June 1984 shall be null and void. Up until 11<sup>th</sup> anniversary of War of Liberation, the Government of Bangladesh continued to include properties belonging to Hindu minorities on the pretext of being 'enemies of Pakistan' which is not only a violation of fundamental rights guaranteed

under the Constitution of the People's Republic of Bangladesh, but also against the spirit of the Proclamation of Independence, the preamble of the 1972 Constitution and the ethos of the struggle for liberation by the Bengali Nation.

11. In 1999, the parliamentary standing committee prepared a draft law with a view to return possession of the properties listed as enemy property since 1969 to their original owners who are citizens of Bangladesh or his of their heirs under applicable personal law. The title of the draft law was Vested Property (Return of Possession) Bill 1999. Pursuant to the draft law, it was expected that upon enactment, subject to the provision of determination claim provided in the draft Act, any property which was not listed prior to 16 February 1969 would cease to be treated as vested on the Government as 'enemy property' and the title and possession of the original owner who is a citizen of Bangladesh or his lawful heir or heirs would be restored. In the said draft of 1999, it was expressly provided upon enactment of the draft Act, any lease created by the Government on such properties would be deemed to be cancelled.

12. Subsequently, to the utter surprise, in the name of examining the draft in the Ministry of Land, for further improvement it has been transformed into অর্পিত সম্পত্তি প্রত্যর্পন বিল (2000 Bill) the main features of the draft proposed by the parliamentary Committee, has been abruptly changed by the Bureaucratic

Process, headed by the Secretary of the Ministry of Land. The word “প্রত্যর্পন” does not commensurate with the Indo Pak subcontinent Land Laws and equity from Nababi Amal to present time “প্রত্যর্পন” is used for moveable property. Subsequently, the Parliament enacted the অর্পিত সম্পত্তি প্রত্যর্পন আইন ২০০১ (the 2001 Act) clearly deviating from the initial scheme of reinstating title and possession of the original owners of the properties listed as enemy property, the 2001 Act, excluded a large number of properties from the list by operation of section 6 of the 2001 Act, which reads as follows:

“৬। প্রত্যর্পনযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না, যথাঃ (ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি।

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এইরূপ কোন সম্পত্তি।

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন্য কোন সংগঠন বা কোন ব্যক্তির নিকট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি।

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পত্তি এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশবিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পদ,

(ঙ) এমন অর্পিত সম্পত্তি যাহা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি।

(চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরূপ কোন অর্পিত সম্পত্তি।”

13. The government has presented a new Bill 'vested Property Return (Amendment) Bill, 2011' before the parliament to amend certain provisions of the 2001 Act. However, the 2011 Bill does not either exclude the properties listed as enemy property after enactment of 1974 Act, or reverse the actions taken under the 1976 Ordinance or amend section 6 of the 2001 Act.

14. Mr. Mohammad Imtiaz Farooq, the learned Advocate appearing on behalf of the petitioner submits that the concept of enemy property emerged from the war between Pakistan and India occurred in 1965, and thus with the break in history of Pakistan by the Bengali nation in 1971 had diminished any need or justification for continuance of the 1969 Ordinance in the independent Bangladesh and in this backdrop the 1974 Act repealed the 1969 Ordinance, but successive Governments have, in utter disregard of the proclamation of independence and history of struggle for liberation, has continued with the process of listing properties as 'enemy property' in independent Bangladesh, and as such any and all inclusion of the properties in the list of enemy property after enactment of the 1974 Act is liable to be declared to have been done without any lawful authority and is of no legal effect. He further submitted that although on 10 April 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistani laws which were in force in the then East Pakistan on or before March 25, 1971, and were not in

conflict with the Proclamation of Independence and thus the Ordinance No.I of 1969, which did not fit with the spirit of proclamation of independence of Bangladesh, automatically remained ineffective in the new state, successive Governments have, in utter disregard of the proclamation of independence and the Laws of Continuance Enforcement Order 1971, has continued with listing of properties as 'enemy property' in independent Bangladesh, and as such any and all inclusion of the properties in the list of enemy property after enactment of the 1974 Act is liable to be declared to have been done without any lawful authority and is of no legal effect.

15. He also submitted that since Bangladesh was not a successor state of Pakistan, and in fact Bangladesh established itself by waging a war of liberation against Pakistan, continuance of enlistment of 'enemy property' within the meaning of 1969 Ordinance is unconstitutional, and is liable to be declared to have been done without any lawful authority and is of no legal effect. He also submitted that in independent Bangladesh no one should be treated as 'Enemies of Pakistan,' because there is no existence of East Pakistan anymore. Rather, in other words the government of Pakistan and its occupation army became the enemies of Bangladesh. During our Liberation War the Enemy of Pakistan as determined in 1965 became the friends of Bangladesh and Bangladeshi people.

Thus continuance of enlistment of Enemy Property within the meaning of 1969 Ordinance is unconstitutional and is liable to be declared to have been done without lawful authority and is of no legal effect.

16. He further submitted that continuance of enlistment of 'enemy property' within the meaning of 1969 Ordinance is violative of articles 27, 28, 29, 32, 42 of the Constitution of Bangladesh and as well as fundamental principle of secularism under the Constitution. Since the parliament, through 1974 Act repealed the 1969 Ordinance, no further property should have been included as enemy property afterwards on the basis of a law which is already dead. In another judgment of the Appellate Division (civil) dated 14<sup>th</sup> August 2004 in **Saju Hossain Vs Bangladesh (58DLR (AD) (2006)** on Enemy Property (continuance of Emergency Provisions) Ordinance (1 of 1969) Section 2. It was stated that "Since the law of enemy property itself died with the Repeal Ordinance No.1 of 1969 on 23 March 1974 no further vested property case can be started thereafter on the basis of the law which is already dead.

17. He further submitted that promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) has been declared as illegal, void, and non east by the Hon'ble Appellate Division in the case of '**Khondokar Delwar Hossain, Secretary of B.N.P. and others Vs. Bangladesh Italian Marble**

**Works Ltd. and others (ADC 2010 Vol-VI(B, (5<sup>th</sup> Amendment case)'** and as such any actions taken pursuant to the said Ordinance which is also violative of fundamental rights of citizens of the republic, is liable to be declared to have been done without lawful authority and is of no legal effect. Enlisting the properties as enemy property and disposal of such properties belonging to citizens of Bangladesh on the pretext of being belonging to enemies of Pakistan pursuant to the 1976 Ordinance are clearly derogatory to the rights of the citizens and violative of the rights under the Constitution and thus not within the ambit of 'condoned acts' as decided by the Hon'ble Appellate Division and as such all actions taken pursuant to the 1976 Ordinance are liable to be declared to have been done without lawful authority and is of no legal effect.

18. He further submitted that by combined reading of the Laws of Continuance Enforcement Order, 1971, 1974 Act and judgment of the Hon'ble Appellate Division in the 5<sup>th</sup> Amendment case, it is clear that inclusion of any property in the list of enemy property subsequent to 1974 is illegal and such properties should be treated as if it has never been included in such list. Although the legislative history of the 2001 Act clearly shows that aim of the Parliament was to restore title and possession of the said land to the original owners who are Bangladeshi citizens or their lawful heirs, the 2001 Act applies a misnomer “প্রত্যর্পন” which is a concept unknown to the law of

property and thus wording of the statute has diluted the right of the citizens who had lost their properties. Indeed it is humbly submitted that the wording of the draft of 1999 prepared by the Parliamentary Standing Committee had more effectively dealt with the issue. The right of the land owners thus has not been extinguished by the operation of the law; it has been kept suspended for the time being. Section 6(Ga) and (Gha) of the 2001 Act makes an exception to “প্রত্যর্পন” of the properties which had been disposed of by the Government without taking into consideration that such right to dispose of the properties of citizens of Bangladesh on the pretext of being ‘properties of enemies of Pakistan’ is violative of the Constitution and as such the exception created by section 6 of the 2001 Act is also violative of the Constitution of the People’s Republic of Bangladesh. Section 6(Ga) and (Gha) of the 2001 Act makes an exception to “প্রত্যর্পন” of the properties which had been disposed of by the Government without taking into consideration that the exception also covers the properties listed after enactment of 1974 Act and subsequently disposed of and that inclusion of such properties as enemy property is itself violative of the Constitution. Section 6 of the 2001 Act is clearly violative of Articles 27, 28 and 42 of the Constitution.

19. Mr. Manzill Murshid, the learned advocate appearing on behalf of the respondent No.1 by filing an affidavit in opposition denied all the material allegations brought against the

respondent No.1 and stated *inter alia* that the Vesting of Property and Assets Order, 1972 (Order 29 of 1972) has been included in the list of First Schedule of the Constitution of the People's Republic of Bangladesh and the said order is protected by Article 47(2) of the Constitution. As per Article 47(1)(a) of the Constitution, the matter of control or management of any property shall not be deemed to be void on the ground that it is inconsistent with, takes away or abridges any right guaranteed by Part-III of the Constitution.

Article 47 runs as follows:

“47(1) No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges, any of the rights guaranteed by this Part-(a) the compulsory acquisition, nationalization or requisition of any property, or the control or management thereof whether temporarily or permanently; (b) the compulsory amalgamation of bodies carrying on commercial or other undertakings; (c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning share or stock (in whatever form) therein; (d) the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil; (e) the carrying on by the government or by a corporation owned, controlled or managed by the government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of profession, occupation,

trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking; If parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of State policy set out in Part-II of this Constitution.

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution:

Provided that nothing in this Article shall prevent amendment, modification or repeal of any such law."

20. Mr. Monzil Murshed continued submitting that there is no reasonable grievance of the petitioner that can reasonably justify the instant writ petition and hence the writ petition is not maintainable in the eye of law. The petitioner is not aggrieved at all in any manner, hence no cause of action arose to confront the law and hence the instant Rule should be discharged. He further submitted that section 6 of the অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ is not violative of the Constitution of the People's Republic of Bangladesh. The petitioner is not aggrieved by the provision contemplated in section 6 of the said Act. During preparation of list, the properties, which were under control of a different government institution and for using the same for

public purpose became protected under the provision of section 6 of the said Act. The reason to insert the provision of section 6 is aimed to secure greater public interest and thus the petitioner does not have any reason of being aggrieved. Hence the Rule is liable to be discharged.

21. He also submitted that the Government of Bangladesh has not made any disregard to the proclamation of independence and the history of struggle for liberation and independence of Bangladesh, the government has justifiably included all the properties in the list of the property named as 'vested property' lawfully. So, it cannot be declared illegal and without lawful authority. He further submitted that after following the procedure and legal steps the property of the persons who left the country for India was listed in the vested property list. So no right of the people has been violated by such list because the property was listed only who left the country. Hence, the question of violation of the right of any citizen guaranteed under the Constitution does not arise. He also submitted that section 6(Ga) and (Gha) of the অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ is not violative of the Constitution of the Peoples Republic of Bangladesh. The section has been inserted rather to protect the greater public interest and hence it is not violative of the rights of any citizen of Bangladesh.

22. He also submitted that the Hon'ble Supreme Court of Bangladesh in many cases decided that under Article 102 of

the Constitution of Bangladesh any citizen who is aggrieved may file a petition under the above provision of law, but neither the petitioner is aggrieved nor any property belonging to him has been listed in the vested property list, hence the instant writ petition is not maintainable and the rule is liable to be discharged.

23. He next submitted that the Laws Continuance Enforcement Order 1971 dated 10<sup>th</sup> April, 1971 having retrospective effect from 26<sup>th</sup> March, 1971 has legalized the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No.1 of 1969) along with other laws of Pakistan as the law of Bangladesh. Hence, it is not correct to say that with the Proclamation of Independence dated 10<sup>th</sup> April, the so-called Enemy Property law namely: the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No- 1 of 1969) which was passed to provide for the continuance of certain provisions of the Defense of Pakistan Rules 1965 relating to control of trading with enemy and control of enemy firms, and the administration of the property belonging to them, becomes dead and void. In view of the laws Continuance Enforcement Order 1971 dated 10<sup>th</sup> April, 1971 having retrospective effect from 26<sup>th</sup> March, 1971, the Enemy Property (Continuance of Emergency Provisions) Ordinance

1969 (Ordinance No.1 of 1969) is not a dead law in Bangladesh.

24. He went on to submit too that Bangladesh (Vesting of Property and Assets) Order 1972 (President's Order No-29 of 1972 was also made on 26<sup>th</sup> March,1972 as an ancillary to the enemy property law by the then President of Bangladesh giving it retrospective effect from the 26<sup>th</sup> March, 1971. On the other hand, the very P.O. No- 29 of 1972 has also been expressly protected by article 47(2) of the Constitution and included unhindered in the First Schedule to the Constitution of Bangladesh. Article 47(2) is reproduced as under:

“(2) Notwithstanding anything contained in this Constitution, the Laws specified in the First Schedule (including any amendment of Any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done Under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution” [underline is ours].

25. Hence, it is submitted that even if right to property of any citizen is affected in this regard, that cannot be challenged in any way for the reasons and constitutional provisions as cited above. On the other hand, right to property as enshrined in article 42 is a qualified right subject to any restrictions. Article 42(1) is reproduced below:

“ 42(1) Subject to any restrictions imposed by law, every citizen shall have right to acquire, hold, transfer of otherwise dispose of Property, and no property shall be compulsorily acquired, nationalized have by authority of Law.”

26. He further submitted that the constituent Assembly while framing the original Constitution of Bangladesh included the very P.O. No.29 of 1972 in the 1972 Constitution with an explicit conscience and / or wisdom of that assembly, which cannot be challenged unless altered / amended by the Parliament keeping itself within the limitations prescribed by the Constitution and the judgment of the Supreme Court of Bangladesh. Hence, an express provision of the constitution cannot be changed and thereby impugned laws should not be declared illegal and void by legal arguments of the jurists, which are mainly based on implied provisions of the constitution and hypothesis as well. Rather, the so-called enemy property was vested in the Government of Bangladesh lawfully and the properties are being managed, controlled and administered lawfully as well by different laws (Ordinances and Acts etc) and circulars. Article 2(1) of the very P.O. No.29 of 1972 authorizes the People's Republic of Bangladesh to pass order of vesting in the custodian of enemy property or Assistant Custodian of enemy property as appointed by the then Government of Pakistan. That means all enemy properties as identified by the then

Government of Pakistan got vested in the Custodians of enemy property. Those Custodians were allowed to manage the enemy properties under the laws promulgated during Pakistan.

27. Mr. Monzil Murshed further submitted that no new property can be included as enemy property in the enemy property list as per the judgment of the apex court after enactment of 1974 Act (i.e. the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act 1974) (Act No-XLV of 1974) by which the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No-1 of 1969) was repealed as on 23<sup>rd</sup> March, 1974. It is also submitted that by the provisions of the saving clause of the said repealing Act 1974 (Act No-XLV of 1974), all enemy Properties vested in the Custodians of enemy property shall vest in the Government (so, now termed as vested property) but nothing spelled out as regards how those vested properties will be dealt with. Accordingly, the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act 1974 (Act No-XLV of 1974) was amended by the Enemy Property (Continuance of Emergency Provisions) Ordinance 1976 (Ordinance No. XCIII of 1976) by which only the government was empowered with administration, management, control and disposal of vested property by transfer or otherwise. For the proper adjudication, the

relevant portion of the Act 1974 (Act No. XLV of 1974) and the Ordinance 1976 (Ordinance No. XCIII of 1976) are reproduced below:

**Section 3 of the Act 1974:**

3. Savings: (1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force on such repeal,-

(a) all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government;

(b) all enemy firms, the trade or the business . . . shall vest in the Government.

**Section 2 of the Ordinance 1976:**

“2. Amendment of section 3, Act XLV of 1974.- in the enemy property (Continuance of Emergency Provisions) (Repeal) Act 1974 (XLV of 1974), in section 3, in sub-section (1) after the word, “government” occurring twice, the following words and commas shall be inserted in both the places, namely:

“And shall be administered, controlled, managed and disposed of by transfer or otherwise by the Government

or by such office or authority as the Government may direct."

28. He also submitted that in view of such repealing Act 1974 (Act No.XLV of 1974) and subsequent judgment of the Hon'ble Appellate Division in **Saju Hosen and others Vs. Bangladesh and another** reported in **58 DLR(AD) 177**, there is no scope of opening or inclusion of new properties as enemy property subsequent to enactment of 1974 Act (Act No.XLV of 1974) above. On the other hand, the amendment above brought into the 1974 Act (Act No.XLV of 1974) by the 1976 Ordinance (Ordinance No. XCIII of 1976) does only relate to administration, management and control and dispose of the vested property, and it has not taken away any right of any citizen, and hence, the impugned 1976 Ordinance (Ordinance No. XCIII of 1976) and all actions taken there under are not *ultra vires* the Constitution of Bangladesh. He also submitted that in the order of Civil Review Petitions being No.17-18 of 2011 (arising out of Civil Petition for Leave to Appeal No.1044 and 1045 of 2009) (Khandaker Delwar Hossain and another Vs. Bangladesh Italian Marble Works and others (popularly known as Fifth Amendment case), the Hon'ble Appellate Division by its order disposed of the petitions with modification of the operating portion of the judgment of this Division to the effect that:

"1) All proclamations, Martial Law Regulations, Martial Law Orders made/promulgated during the period between 20<sup>th</sup> August 1975 and 9<sup>th</sup> April, 1979 are hereby declared illegal, void *ab initio* subject to the following exceptions:

a) All executive acts things and deeds done and actions taken during the aforesaid period which were required to be done for the ordinary orderly running of the country and which were not otherwise illegal at the relevant time;

b) All transaction, which are past and closed, and no useful purpose would be served by reopening them;

c) All acts and deeds which are past and closed and are not otherwise illegal;

c) All international treaties;

d) All day-to-day affairs of the executive are hereby provisionally condoned.

29. Hence, all the actions of the respondents under section 1976 Ordinance (Ordinance No. XCIII of 1976) are by virtue of the above review petitions order are past and closed transaction, on the other hand, they are condoned by the Honb'ble Appellate Division, Mr. Monzil Murshed added.

30. He further submitted that International Crimes Tribunal Act and its trial are similarly protected under Article 47. This provision was challenged in a writ petition on the grounds of fundamental rights of the persons facing prosecution and trial under the said Act, but in the said writ petition the petitioners did not get any benefit of fundamental rights only because they (war criminals) are excluded from enjoying such right by article 47(3) of the constitution of Bangladesh. That in the light of that judgment, the present petitioner should not get remedy by virtue of Article 47(2) of the Constitution as referred above. He also submitted that section 6(ga) and (gha) of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ is not violative of the Constitution of the People’s Republic of Bangladesh. Rather, the provisions of such section were inserted in to the Act 2001 to protect the greater public interest; hence it is not violative of the rights of any citizen of Bangladesh. He also submitted that by virtue of the Bangladesh (Vesting of Property and Assets) order 1972 (President’s Order No.29 of 1972), and the Enemy property (Continuance of Emergency Provisions) (Repeal) Act 1974 (Act NO.XLV of 1974), that property as referred in section 6(ga) and (gha) of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ has already been vested in the Government and the Government got the power of management and control and dispose of the

vested property by transfer or otherwise under the said 1976 Ordinance (Ordinance No. XCIII of 1976).

31. Further, article 47(2) shall prevail over article 42 and hence, section 6(ga) and (gha) of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ is not violative of the Constitution of Bangladesh. Moreover, the Hon’ble Appellate Division in Rahima Khatun’s case held that the vesting of the enemy property initially in the Custodian of Enemy Property and ultimately in the Government of Bangladesh is absolute. It also says that the enemy owner lost all of his title and interest in the property after such judgment. [40 DLR (AD) 23]. In view of the judgment, section 6(ga) and (gha) of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ is not violative of the Constitution of Bangladesh.

32. He further submitted that there has developed 3<sup>rd</sup> party interest in the properties as referred in section 6 of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১. He also submitted that during preparation of list, the property which are under the control of different government institutions and are being used for public purpose are protected under the provision of section 6 because all these are past and closed issues and those are condoned by the order passed in the Civil Review Petition No.17-18 of 2011 as referred to above. Moreover, the purpose of the law of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ was reflected in preamble as ‘কতিপয় সম্পত্তি . . . . . প্রত্যাপন. . সম্পর্কে বিধান

প্রনয়নকল্পে প্রণীত আইন। Hence inclusion of (Ga) and (Gha) under section 6 of the ‘অর্পিত সম্পত্তি প্রত্যাপন আইন’ ২০০১ is not illegal. Thus, the Rule is liable to be discharged.

33. Mr. Mahbubey Alam, the learned Attorney General appearing in this case submitted that by the Ordinance No.1 of 1969 the Pakistan Government promulgated Enemy Rules on 19.02.1969. Rule 2(3) defines the enemy territory, the persons who had been staying in India during 1965 India-Pakistan War, their properties were declared enemy property and the said properties were taken over by the then East Pakistan Government. He further submitted that though emergency rule was repealed after the cessation of the War between Pakistan and India, the Ordinance No.1 of 1969 was promulgated. He further submitted that by Ordinance No.1 of 1969 the territory which was treated as enemy land, after 26<sup>th</sup> March 1971 that land became friend's land. Thus, the territory as described as enemy territory according to Ordinance No.1 of 1969 cannot be treated as enemy territory after 26<sup>th</sup> March 1971.

34. Learned Attorney General candidly submitted that concept of enemy property after 26<sup>th</sup> March 1971 is absolutely wrong. It was historical mistake treating the Indian soil as enemy land even after 1971. He also submitted that by the Presidential Ordinance No.29 the property was vested to the government. The vested property cannot be treated

as enemy property. He further submitted that Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was an outcome of bad drafting. In the said Act the word 'enemy' should not have been used. He submitted that in view of the judgment of 5<sup>th</sup> amendment case, 1976 Ordinance is non-est. Thus, there is no justification to adjudicate the legality of the Ordinance 1976 which has already lost its' force by the above mentioned 5<sup>th</sup> amendment judgment.

35. He also submitted that since the Act of 1974 does not have existence any more, the Rule regarding the Act 1974 has become infructuous and thus the same is liable to be discharged. He further submitted that the purpose of filing this writ petition is to protect the interest of the minority people of Bangladesh who are the citizens of the country and to offer the minority citizen a feeling of dignity as a citizen of the country. In this regard he further submitted that the government after amending the law has been trying to return back the properties which were declared enemy property to the original owners who are the citizens of Bangladesh.

36. He further submitted that section 6(Ga)(Gha) of the Act of 2001 should not be declared illegal as those properties falling under the category of section 6(Ga) and (Gha) cannot be returned for the time being but the government

has made a way-out to return back most of the properties to the original owners or their successors-in-interest now living in Bangladesh. But if it seems to this Court that this procedure is cumbersome this Court can pass an order giving guidelines in conformity with the provisions of the said law.

37. The learned Attorney general added that in filing application for claims to the tribunal, provision of section 5 of the Limitation Act may be made applicable. He also submitted that if the property cannot be returned to the owners or successors of the owners they may be compensated in accordance with law. He also submitted that if any property being treated as enemy property, (subsequently vested property) is now under the control of any hospital, educational institution or charitable institution, those institutions may be named after the names of the original owner of the property to give recognition to them.

38. In his concluding submission Mr. Mahbubey Alam, the learned Attorney General emphatically submitted that to make the secular force in the then Pakistan minority in size, the then Pakistan Government deliberately promulgated the Ordinance of enemy property with a political motive. Bangladesh has been emerged as a secular country by achieving independence through a nine-month bloody battle against the Pakistan juntas. In this situation the properties which were treated as 'enemy properties' and

subsequently listed as 'vested property' should be released in favour of the original owners of the property or their lawful successors now living in Bangladesh as its citizens, in accordance with law.

39. Mr. Quamrul Huq Siddique, the learned advocate appearing in this case as *amicus curiae* submitted that our liberation war was against communalism which was the core spirit of Pakistan, which declared its own citizen as enemy. For securing equal right of the citizen of the country irrespective of religion, race and caste our freedom fighters sacrificed their lives in 1971. He further submitted that since the law of continuance order was promulgated the enemy property ordinance also remained continued. After the Liberation War the then Government under the leadership of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman took the decision to dispose of the property to the person who left the country out of fear during 1965 war that took place between India and Pakistan, but the Act of 1974 was done hastily that resulted in existence of the word 'enemy' in the Act. He further submitted that amending the 1974 Act by 1976 Ordinance has opened an unpleasant door. Bad process was thus re-opened.

40. He further submitted that in 1966 a list of enemy property was prepared. After 1966 no property was supposed to be

included in the list but in 1976 by promulgating the new Ordinance a door was opened and accordingly a list of enemy property became longer and longer.

41. He further submitted that in 1979 after the general election millions of acres of property was enlisted as enemy property and in 1984 listing the property again started with a political motive. He further submitted that the legislation of 1974 Act was frustrating. Though the present Government has taken initiative to return back the property to the original owners, but sections 9, 13, 14 of Act 2001 yet stand as bad laws. These sections need judicial review. He also submits that section 6(Ga)(Gha) is not in conformity with the Constitutional provision as the owner of property has been defined discriminately. These sections are *ultra vires* of Article 27 of the Constitution.

42. Mr. Abdul Wadud Bhuiyan, the learned advocate, an *amicus curie* submitted that the properties which were described as enemy property were later on vested to the government in 1972 which has been protected by Article 47(I)(II) of the Constitution. He further submitted that in 1974 this law was enacted with an intention to dispose of the vested properties to the persons who were the original owners of the properties. The Ordinance 1976 is only an enabling provision of 1974 Act which does not give power to the Government to get anymore property enlisted anew, it

only provides a power to the government to manage or control or dispose of the property already vested to the government. This is the incidence of the process of vesting. Thus, this Ordinance cannot be declared *ultra vires* to the Constitution. He further submitted that as per provision of Act of 1974 and the decision of our Apex Court the new listing of the property is absolutely illegal.

43. He further submitted that section 6 of the Act of 2001 is a valid piece of legislation, this is a mere guideline to go on with the process of disposal of the property vested to the government and thus it should not be declared *ultra vires* to the Constitution.

44. He further submitted that there is no need to strike down the law rather all actions taken subsequent to 1974 Act in listing new properties can be declared illegal in view of the decisions cited in the case of Saju Hossain reported in **58 DLR(AD) 206, Para-27**. He concludes his submission saying that all actions taken by the executive of the government in listing new properties after 1974 Act is absolutely illegal and this sort of action taken by the government should be declared illegal immediately. The government may be directed to take proper initiatives for releasing those properties in favour of the original owners or their lawful successors which got listed subsequent to 1974 Act, observing all legal formalities as soon as possible.

45. Mr. A.M. Amin Uddin, the learned advocate appearing in this case as *amicus curie* submitted that in view of the 5<sup>th</sup> amendment judgment, 1976 Ordinance has no more existence though it was a valid law. He concurring the submissions advanced by Mr. Abdul Wadud Bhuiyan, submitted that 1976 Ordinance only provided the government power to manage, control or dispose of the property already vested to the government in 1972, but since by the judgment of 5<sup>th</sup> amendment case all actions taken during the martial law of Ziaur Rahman was declared illegal, 1976 Ordinance has become non-existent. Thus, the Rule relates to 1976 Ordinance is liable to be discharged. He further submits that after 1974 inclusion of any property as vested property is illegal. He also submits that in the case of **Saju Hosein and others vs. Bangladesh and another** reported in **58 DLR (AD) 177** listing of a property of a single person was declared illegal, but since this application has been brought as a 'public interest litigation' to protect the interest of the citizens of the country and to remove stigma of enemy against the citizens of the country, this Court can declare all actions including enlisting the properties within the territory of the country as vested after 1974 is illegal.

46. He further submitted that after enacting the Act of 2001, the Act of 1974 has lost its force and vide judgment of 5<sup>th</sup> amendment case 1976 Ordinance has become non-existent. These two rules are liable to be discharged.

47. Mr. Amin Uddin further submitted that by the repeal Act of 1974, certain properties got vested in the Government, but there was no provision as to how those properties would be dealt with. By the amendment of 1976 Ordinance, nothing has been incorporated/ inserted in the repealed law authorizing the Government either taking any new property as vested property or in any way preparing any list. By the said amendment, only the 'management mechanism' has been provided in relation to the properties which have already been vested to the Government by the repeal Act of 1974.

48. Mr. A.M. Amin Uddin drew our attention to the relevant portion of the provision of section 3 of the Act, 1974 and the amendment Ordinance, 1976 which are quoted below:

**Section 3 of the Act, 1974**

3. Saving –(1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force, on such repeal-

(a) all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the defence of Pakistan rules contained in force by the said Ordinance shall vest in the Government;

Relevant Portion of Ordinance 1976

“And shall be administered controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct.”

49. Having cautious look to the above amendment, it is patent that the Ordinance 1976 does not seem to be conflicting or incompatible with any provision of law, any Article of the Constitution and it has not taken away any right of any citizen, in any manner and as such it cannot be said that the impugned Ordinance is *ultra vires*.

50. However, in this regard he submitted that since in view of the declaration made by the Hon'ble Appellate Division in the case of ***Khondker Delwar Hossain, Secretary, BNP Party and ors V. Bangladesh Italian Marble Works Ltd. & Ors*** reported in **62 DLR (AD) 298**, the Chapter 3A and 18 of the 4<sup>th</sup> Schedule of the Constitution of Bangladesh having declared void and as such the Ordinance, 1976 has become Non est.

51. In respect of the Act No.XLV of 1974 the enemy property he also submitted that, in view of intention of enacting the Act No. XLV of 1974, the Enemy Property (Continuance of Emergency provision) (Repeal), Act, 1974 no property can be treated as enemy property subsequent to 23.03.1974 as the said repealed Act came into force on that day.

52. In respect of section 6(Ga) and (Gha) of the অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ ভূ বতড় থননশ পয়ক্ষঢ়বনক্ষ submitted that these are *ultra virus* to Article 42 of the Constitution because by the said provisions of law the right of the citizens over the properties they own has

been taken away. He took us through the section 6 of the Act which runs as follows:

“৬। কতিপয় সম্পত্তি প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় অন্তর্ভুক্ত নিষিদ্ধ। প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবেনা, যথাঃ-

(ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি,

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এরূপ কোন সম্পত্তি,

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন কোন সংগঠন বা কোন ব্যক্তির নিকট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি,

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পদ এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশ বিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পত্তি,

(ঙ) এমন অর্পিত সম্পত্তি যা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি,

(চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরূপ কোন অর্পিত সম্পত্তি,

তবে শর্ত থাকে যে, উক্ত অধিগ্রহণকৃত সম্পত্তির বিপরীতে প্রদেয় ক্ষতিপূরণের অর্থ জমা থাকিলে উক্ত সম্পত্তির অধিগ্রহণ পূর্ব মালিককে বা তাহার উত্তরাধিকারী বা স্বার্থাধিকারীকে ক্ষতিপূরণের অর্থ এই আইনের বিধান অনুসারে প্রদান করা হইবে যদি উক্ত মালিক বা উত্তরাধিকারী বা স্বার্থাধিকারী বাংলাদেশের নাগরিক ও স্থায়ী বাসিন্দা হন।”

53. So the properties falling under sub-section (Ga) and (Gha) of section 6 should not have been included in the list of প্রত্যর্পণযোগ্য সম্পত্তির তালিকা and under section 10 of the said প্রত্যর্পণ আইন, an application seeking release of the property can be filed only in respect of the property which has been included in the list. Provision of section 10(1) is quoted below:

“১০। (১) [ ধারা ৯ এর অধীন গেজেটে প্রকাশিত ক তফসিলভুক্ত অর্পিত] সম্পত্তির মালিক উক্ত সম্পত্তি তাহার অনুকূলে প্রত্যর্পনের জন্য, উক্ত সম্পত্তির তালিকা প্রকাশের [৩০০ (তিনশত)]

দিনের মধ্যে, ট্রাইব্যুনালের নিকট আবেদন করিতে পারিবেন এবং আবেদনের সহিত তাহার দাবী সমর্থনে সকল কাগজপত্র সংযুক্ত করিবেন।”

54. He also submitted that in view of section 10(4) of the Act, 2001, if any property mentioned in section 6 of the Act, 2001 is included in the list of প্রত্যর্পনযোগ্য সম্পত্তির তালিকা the person having lawful interest can come up with the claim of releasing the same before the Tribunal. Section 10(4) is quoted below:

“১০। (৪) প্রত্যর্পনযোগ্য সম্পত্তির তালিকায় ধারা ৬ তে উল্লিখিত কোন সম্পত্তি অন্তর্ভুক্ত হইয়া থাকিলে সংশ্লিষ্ট স্বার্থবান ব্যক্তি ট্রাইব্যুনালের নিকট উক্ত সম্পত্তি প্রত্যর্পণ যোগ্য সম্পত্তির তালিকা হইতে অবমুক্তির জন্য উপ-ধারা (১) এ উল্লিখিত সময়সীমার মধ্যে আবেদন করিতে পারিবেন এবং দাবীর সমর্থনে সকল কাগজপত্র আবেদনের সহিত সংযুক্ত করিবেন। ”

55. He further submitted that on reading of section 10(1) and (4) of the Act, 2001, it is clear that in section 10(1) the word মালিক has been used and in section 10(4) the word স্বার্থবান ব্যক্তি has been used. Therefore, the owner has been disqualified from claiming the property. He also submitted that in view of section 7, right of claim has been barred by promulgating the Act, 2001 and in view of the same, the lawful owners of the property remained deprived from claiming their property which is in express conflict with Article 42 of the Constitution as the persons whose property has fallen in the category of section 6(Ga) and (Gha) of the Act, 2001 are being deprived of their right to property.

56. Furthermore, since the properties which has fallen under section 6(Ga) and (Gha) will not be included in the প্রত্যর্পনযোগ্য সম্পত্তির তালিকা the person having legitimate claim of ownership over the property as mentioned in sub-section (Ga) and (Gha)

of section 6 is debarred from raising claims under section 10. In view of the above facts, the provision of section 6(Ga) and (Gha) of the Act, 2001 are not in conformity with the Article 42 of the Constitution and is *ultra vires*.

57. Mr. Fida M. Kamal, the learned advocate as *amicus curiae* submitted that Bangladesh is not a successor State as we fought against Pakistan in achieving independent Bangladesh and thus no property can be treated as the enemy property after 26<sup>th</sup> March 1971.

58. He concurring the argument advanced by Mr. A.M. Amin Uddin submitted that section 6(Ga)(Gha) and (Umo) are bad laws, all the properties vested to the government are returnable property to the original owner. He further submitted that the territory which was treated as enemy during 1965, was no more enemy of the people of Bangladesh, after 26<sup>th</sup> March 1971 and thus in the 'Continuance of the Enemy Property (Repeal) Ordinance 1974' the word 'enemy' should not have been used. Those were vested properties, only which were vested to the government. He further submitted that after the Act of 1974 and the judgment pronounced in **58 DLR(AD)117** and **62 DLR (AD) 298** all actions including enlisting the properties in the enemy property list/vested property by unscrupulous employees of the country should be declared illegal in general.

59. However, Mr. Kamal moved up the question of *locus standi* of the petitioner for filing this petition and submitted that since no aggrieved person has come up to the Court and the petitioner either directly or indirectly is not aggrieved person, he has no *locus standi* in bringing this writ petition.

60. Mr. Probir Neogi, the learned advocate as an *amicus curiae* on the point of *locus standi* submitted that in view of Article 7 of the Constitution which declares that all powers lying in the Republic belong to the People, the writ petition is maintainable. Article 21(1) also provides "It is the duty of every citizen to obey the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property." The petitioner being a member of the 'people' and citizen of Bangladesh has the right to challenge any provision of law which is *ultra vires* the Constitution of the Peoples' Republic of Bangladesh. This view will find support in a number of decisions by the Appellate Division including **Kazi Mukhlesur Rahman Vs. Bangladesh**, reported in **26 DLR (AD) 44** and in the case of **Dr. Mohiuddin Farooque Vs. Bangladesh**, reported in **49 DLR (AD) 1**. Therefore, he submitted that the petitioner can file this writ petition as Public Interest Litigation (PIL).

61. On merit of the Rule he submitted that Article 7 contemplating the supremacy of Constitution which was termed as the 'pole star' of our Constitution by our Appellate

Division in the Constitution (8<sup>th</sup> Amendment) case. The provision of Article 7 runs as follows:

“7(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”

62. Mr. Probir Neogi also referred-

Part III of the Constitution containing fundamental rights starts with Article 26 which provides:

“26. (1) All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency, be void.”

Articles 27, 31, 41 and 42 also provide:

“27. All citizens are equal before law and are entitled to equal protection of law.

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

41.(1) Subject to law, public order and morality –

(a) every citizen has the right to profess, practice or propagate any religion;

(b) every religious community or denomination has the right to establish, maintain and manage its religious institutions.

(2) No person attending any educational institution shall be required to receive religious instruction or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.

42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law.

(2) A law made under clause (1) of this article shall provide for the acquisition, nationalization or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate;"

63. Mr. Probir Neogi submitted that having regard to the provisions of the above Articles of our Constitution, and the Proclamation of Independence and the Laws Continuance Order, the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance 1 of 1969) was rendered void, being *ultra vires* the aforesaid constitutional instruments. And which is void being *ultra vires* the historical, constitutional instruments, namely the Proclamation of Independence, the Laws of Continuance Order and above all the Constitution of the People's Republic of Bangladesh, need not be avoided.

64. He also submitted by questioning that can a law like the Enemy property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance 1 of 1969) be passed by our parliament even unanimously? Answer is an emphatic "No", he added. He also submitted that which a legislature themselves cannot do, they cannot ratify/save such a piece of legislation

made by others even employing the word "Repeal". The Enemy Property (Act XLV of 1974) has been impugned in this writ petition, this Hon'ble Court should declare the said Act void taking the principle of constitutional law as submitted above into account. Once this principle of constitutional law is accepted, the Amendment Ordinance 1976, the Vested Property Restitution Act, 2001 all in fact become rendered void.

65. He went on to submit too that the contention made in paragraph No.10 of the affidavit in opposition filed on behalf of respondent No.1 is misconceived, incorrect and untenable. In this regard, it is submitted that it is true that the Vesting of Property and Assets Order, 1972 (P.O. 29 of 1972) has been listed in the First Schedule of the Constitution; but in view of the fact that the law relating to so called 'enemy property' having embraced its natural death with the Proclamation of Independence dated 10<sup>th</sup> April, 1971 with effect from 26 March, 1971 and with the promulgation of Laws Continuance Enforcement Order, 1971, the properties vested in the Government of Pakistan and East Pakistan under that dead law, stood divested with effect from 26 March, 1971, and as such the so called notion of enemy properties do not come under the purview of "properties" as defined in P.O. 29 of 1972 made on 26 March, 1972. Moreover, in view of the proviso of Article 47(2) of the Constitution to the effect-- "Provided that

nothing in this article shall prevent amendment, modification or repeal of any such law."—

66. Mr. Probir Neogi also submitted that the Legislature is under constitutional obligation to formally repeal the unconstitutional laws. He further submits that since the laws challenged in this writ petition are discriminatory and unconstitutional the Rule is liable to be made absolute.

67. This application has been filed by a public feisty person as public interest litigation, upon which Rules were issued to dispose of the Rules (including supplementary Rule) we are to retort three questions.

i. Whether the Enemy Property (Continuance of Emergency Provision) (Repeal) Act 1974 was enacted in conformity with the Constitutional provision of Bangladesh?

ii. Whether the amendment Ordinance 1976 (Ordinance No.XLII of 1976 (Amendment) was done for any just purpose?

and

iii. Whether section 6(Ga) and (Gha) of অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ could pass the test of constitutionality?

68. To answer the above three questions, we are to search of the root of Pakistan Defence Rule 1965 and Ordinance No.1 of

1969. What is Enemy Property Act? At the outbreak of India and Pakistan in 1965, proclamation of Emergency was issued and Defence Ordinance 1965 was promulgated by the President of Pakistan in exercise of power conferred by Clause 4 of Article 30 of the Constitution of Pakistan 1962. The Defence of Pakistan Rule (DPR) was framed by the central government of Pakistan in exercise of power given in section 3 of the Defence of Pakistan Ordinance. It is to be noted that the Enemy Property Act (EPA) was passed in both countries, India and Pakistan in order to control properties of non-resident citizens in their absence. After 17 days war, which ended with the Tashkent Pact, the Indian Government withdrew the law, but it was kept alive in Pakistan. Basically, Enemy Property Act was an international law. Once it's application is found to exist in Europe during World War II. Under this law the government was supposed to control enemy properties as a 'custodian' during the owner's absence and not as an owner, and hand it over to the owner when the war ended. Similarly after the Tashkent Pact between Pakistan and India the law in relation to control enemy properties should have been virtually dead, but it did not happen. In that situation the Pakistan Government introduced the above mentioned Pakistan Defence Rules Ordinance 1965. The EPA was not a discriminatory law at the beginning. However, within 15 days of the proclamation, the land Ministry of Pakistan published a circular which stated,

'Enemy property owners are those, who belong to minority communities,' and by such discriminatory view contemplated in the said circular the norm of international law was gravely degraded.

69. As per Rule 2(2) of the DPR the '**enemy**' means any persons or State at war with Pakistan.

2(3) '**enemy territory**' means-

- (a) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of a State at war with Pakistan, and;
- (b) any area which may be notified by the Central Government to be enemy territory, for the purposes of these rules or such of them as may be specified in the notification."

70. Rule 182 provided treatment of enemy property which are reproduced below:

"182(1) With a view to preventing the payment of monies to an enemy fund, and preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Central Government may appoint a Custodian of Enemy Property for Pakistan and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local areas as may be prescribed and may by ordered-

(a).....

(b) Vest, or provide for an regulate the vesting in the prescribed custodian such enemy property as may be prescribed;

(c) Vest in the prescribed custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is not required by the order to be, vested in the custodian.”

**Historical background of the law:**

71. Instead of independence, India was partitioned in 1947 giving birth of two separate States—Pakistan and India, patently on communal basis. Of those, Pakistan declared itself to be an Islamic Republic. On the other hand, the Union of India though declared itself to be a secular State started going on by maintaining congenial relationship amongst religious communities. The inevitable result was enmity erupted between two States maintaining communal division of the population in the sub-continent. In course of such antagonism, war broke out between India and Pakistan in 1965. Leaders of Pakistan had been endeavoring to consolidate their position on communal basis with reference to the War. On the plea of war, emergency was proclaimed by the President of Pakistan in exercise of powers conferred upon him by Article 30(1) of the Constitution of Pakistan, 1962.

72. Following the proclamation of emergency, the President of Pakistan also promulgated an ordinance on 06.09.1965 titled “Defence of Pakistan Ordinance, 1965” (Ordinance No.23 of

1965). Section 3 of the said Ordinance empowered the Central Government to make rules to reduce 'Constitutional' and 'Civil' rights of the people on the plea of "Defence of Pakistan." Particularly section 3(2)(IV) empowered the central government to make rules to prevent anything "Likely to assist the Enemy or to prejudice successful conduct of War." In exercise of the said power the central government on the same day i.e. on 06.09.1965 framed rules entitled "The Defence of Pakistan Rules" (hereinafter referred to as DPR). Rule 2(2) defined "Enemy" and Rule 2(3) defined "Enemy Territory." Part-XV of DPR starts with sub-title "Control of Trading with ENEMY." This part started from Rule 161. The word 'enemy' has been further defined in Rule 161 for the purpose of this part. Part XVI starting from Rule 169 dealt with control of Enemy funds. In Rule 169 'Enemy Subject' and 'Enemy Property' have been defined. Rule 181 dealt with "ENEMY FIRM". Rule 182 dealt with 'Collection of Tax' of enemy firms and custody of property. By these legislations, the concept of "Enemy Property" has been originated in our legal and socio economic classification. Subsequently, the "Enemy Property Laws" had under gone several changes. On 03.12.1965 by notification in the official gazette the central government of Pakistan appointed Deputy Custodian and Assistant Custodian of "Enemy Property" and made order of vesting of "Enemy Property" to the custodian in accordance with Rule 182(1)(b) of the DPR.

73. It further reveals that on 08.01.1966 the Provincial Government of the then East Pakistan made another notification in exercise of the powers given in Rule 182(1) naming it as "East Pakistan Enemy Property (Land and Buildings) Administration and Disposal Order, 1966." This order of 1966 conferred certain more powers to the Custodian, Deputy Custodian and Assistant Custodian to deal with 'Enemy Properties' and for disposal and administration including taking over possession evicting persons possessing Enemy Property unlawfully.

74. Afterwards, the state of emergency was lifted on 16.02.1969 when the Government of Pakistan promulgated Enemy Property (Continuance of Emergency Provision) Ordinance, 1969, but the provisions which were related to vesting the enemy property continued to be in force. The Government of Pakistan promulgated Enemy Property (Continuance of Emergency Provision) Ordinance 1969 stating that "*WHEREAS it is expedient to provide for the continuance of certain provisions of the Defence of Pakistan Rules relating to the control of trading with enemy and control of enemy firms, and the administration of the property belonging to the;*...." The laws so far made and actions so far taken with respect of Enemy Properties were preserved and kept in force in spite of lifting of emergency. As a result thereof War, Emergency, Defence of Pakistan Ordinance and DPR died natural death leaving their

offspring "Enemy Property" alive. With all these legacies of the past, through the glorious War of Liberation of 1971, Bangladesh a new legal entity came into being with effect from 26<sup>th</sup> day of March, 1971.

75. At the early hour of 26<sup>th</sup> day of March 1971 our Father of the Nation Bangabandhu Sheikh Mujibur Rahman declared the independence of the country. Thereafter, the proclamation of independence and formation of the Provisional Government of Bangladesh took place at Mujibnagar on April 10, 1971.

76. By the Proclamation of Independence, the elected representatives of the People's Republic of Bangladesh, "*in order to ensure for the people of Bangladesh **equality, human dignity** and **social justice**" declared and constituted Bangladesh as a sovereign Republic. On the same day, i.e. on 10 April 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistan laws which were in force in the then East Pakistan on or before March, 25, 1971, which were not in conflict with the Proclamation of Independence.*

77. Immediately, after liberation, the Government of Bangladesh enforced on March, 26, 1972, the Bangladesh Vesting of Property and Assets Order, 1972 (Order 29 of 1972) By this order, *all properties situated in East Pakistan that belonged to Pakistan Government became vested in the People's*

*Republic of Bangladesh. Thus all government properties, including but not limited of Khas land, river, enemy properties listed under the 1965 and 1969 Ordinance etc all became vested in Bangladesh. But this did not change the nature and the character of the enemy properties which were taken in custody from the purported enemies of Pakistan.*

78. In 1974 the Government of Bangladesh passed the Enemy Property (Continuance of Emergency) Provision (Repeal) Act, (Act XLV of 1974), expressly repealing Ordinance I of 1969. In which Rule 3(a) stated that *“all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government.”*

79. On 20 January 1975, the Ministry of Law, by its Circular No.51, issued an order to immediately de-list any property included in the enemy property list after enactment of the 1974 Act. Subsequently, on 26 July 1975, the Ministry of Law by its Circular No.VNR 29/75 issued a direction to stop any further listing of property as enemy property and also to submit a detailed report on any such listing. The government further promulgated the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) by which section 3 of the 1974 Act amended to give further power to the government with regards the ‘enemy properties’. Section 2 of the Ordinance, added the

following sentence to section 3 of the 1974 Act, "*And shall be administered, controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct.*" Through the 1976 Ordinance, the government, with ill motivation and following discriminatory practice, continued to include new properties belonging to the Hindus in the enemy property list and also started to dispose of such properties in favour of interested quarters, often to the anti-liberation forces. The practice of inclusion of new properties purported to belong to enemies of State of Pakistan continued up until 21 June 1984, and by notification dated 23 November 1984, the Ministry of Land ordered that any decision to list a property after 21 June 1984 shall be null and void.

80. It may be mentioned here that enmity between Pakistan and India continued to remain while Bangladesh, the newborn State, took its birth as a friend of India and therefore it could be thought that the spirit of Enemy Property laws came to cessation in Bangladesh. Accordingly, the term "Enemy Property" was transformed to "Vested Property." It was rather the same old wine, but in a new bottle. By Ordinance No.XLVI of 1974 procedure was laid down for the administration of the 'Enemy Property' transformed to "Vested Property." The said two ordinances were ratified by the Parliament on 01.07.1974 by enactment of the Act No.XLV and XLVI of 1974. In this way, a black law, patently infringing right to property of some of the

citizens treating them as "Enemies" was allowed to persist in spite of the fact that the Constitution of Bangladesh 1972 guarantees equality before law and right to property as fundamental rights. Unfortunately, the black legacy of the past with the banner of 'Enemy Property' has been transformed into 'Vested Property' which is persisting in our legal system.

81. In 1999, the Parliamentary Standing Committee prepared Vested Property (Return of Possession) Bill 1999 intending to return back possession of the properties listed as 'enemy property' since 1969 to the original owners who are citizens of Bangladesh, or their lawful heirs under applicable personal law. Section 3 of the draft law stated that subject to the provision of determination claim provided in the draft Act, any property which was not listed prior to 16 February 1969 would cease to be treated as vested on the government as enemy property and the title and possession of the original owner who is a citizen of Bangladesh or his lawful heirs would be restored.

82. Indo-Pakistan War continued for 17 days starting from September 6, 1965. On February 16, 1969, the President of Pakistan revoked Emergency, being "satisfied that the grounds on which he issued the proclamation of emergency on the 6<sup>th</sup> September 1965, have ceased to exist." This revocation of emergency was notified in the gazette of Pakistan dated February 17, 1969. On the very day of revocation of emergency i.e. 16 February 1969, he promulgated Enemy Property

(Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance I of 1969). This ordinance also was published in the gazette of Pakistan on February 17, 1969. Preamble of Ordinance I of 1969 made it clearly that the purposes and objectives of this Ordinance and provisions laid down in sections 2, 3, 5 and 6 thereof made it clear too that notwithstanding the revocation of emergency, it continued in respect of so called enemy property.

83. Bangladesh came into force on 26 March 1971 through the declaration of independence by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. The proclamation of independence of Bangladesh was made on 10<sup>th</sup> April, 1971 with effect from 26 March 1971. Laws of Continuance Enforcement Order 1971 came into force with effect from 26 March 1971. This Order provided that "all laws were enforced in Bangladesh on 26 March 1971 subject to proclamation aforesaid continuance to be so enforcement with such consequence as may be necessary on account of creation of the independence of Bangladesh formed by the will of the People's Republic of Bangladesh. The relevant portion of the proclamation of independence is reproduced below:

*"..... having held mutual consultations, and in order to ensure for the people of Bangladesh **equality, human dignity and social justice** declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman."*

84. The Constitution of the People's Republic of Bangladesh came into being on the 4 November 1972 and came into force on 16 December, 1972. Our parliament passed the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (XLV of 1974) on 1<sup>st</sup> July 1974, effect has been given to this Act from 23<sup>rd</sup> March 1974. In view of the proclamation of independence dated 10 April, 1971 with effect from 26 March 1971, Laws Continuance Enforcement Order 1971 with effect from 26 March 1971 and the Constitution of the People's Republic of Bangladesh which came into force on 16 December, 1972, the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance I of 1969) stood inoperative, void, and ultra vires on 10 April 1971. We are of the view that the law which ceased to exist on 26 March, 1971 could not be repealed by an Act passed on 1 July, 1974. So, it is a misnomer to call the Act XLV of 1974 as the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974. Yet, we can examine what were gifted to the nation by Act XLV of 1974 and the Rule made there under:

“3 Savings-(1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force on such repeal-

(a) all enemy property vested in the custodian of Enemy Property appointed under the provisions of the

Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government;

(b) All enemy firms the trade or business of which was being carried on by any person or board authorised under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government.

Explanation: In this sub-section-

(i) "Custodian of Enemy Property" includes an Additional Custodian and an Assistant Custodian of Enemy Property appointed under the Defence of Pakistan Rules continued in force by the said Ordinance; and

(ii) "enemy property" and "enemy firms" shall have the same meaning as are respectively assigned to them in the Defence of Pakistan Rules continued in force by the said Ordinance.

(2) Subject to the provisions of sub-section (1) the repeal of the said Ordinance shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the said Ordinance or the provisions of the Defence of

Pakistan Rules continued in force by the said Ordinance or any order made there under or anything duly done or suffered under the said Ordinance or such provisions or order;

(c) affect any right, title, privilege, obligation or liability acquired, accrued, or incurred under the said Ordinance or the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance or any order made there under; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as aforesaid.

85. And any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the said Ordinance had not been repealed.

4. Indemnity: No suit, prosecution or other legal proceeding shall lie in any Court against the Government

or any person for anything, or for any damage caused by anything, which is in good faith done or intended to be done in pursuance of any of the provisions of the said Ordinance or the Defence of Pakistan Rules continued in force by the Ordinance or any order made there under.

14. Surrender of non-resident property: If any non-resident or vested property is found to be in the unlawful possession of any person, and if such person does not surrender possession of such property to the committee on being directed to do so by the date fixed by it, the Sub-Divisional Magistrate or any other officer authorized by him in this behalf may, on the application of the committee, enforce the surrender of such property by such person to the Committee and the Sub-Divisional Magistrate or the officer so authorized may use or cause to be used such force as may be necessary for taking possession of the property.

15. Procedure of records etc: (1) A committee may, for the purposes of this Act, by notice in writing, require any person to make or deliver to it a statement or to produce before it records and documents in his possession or control relating to any vested property or non-resident property at such time and place as may be specified in the notice.

(2) Every persons required to make or deliver a statement or to produce any record or document under sub-section (1) shall be deemed legally bound to do so within the meaning of sections 175 and 176 of the Penal Code (XLV of 1860).

16. Indemnity: No suit or other legal proceeding shall lie against the government or a committee for anything which is in good faith done or intended to be done in pursuance of this Act or the rules made there under.

86. From the above we are of the view that this Act, XLV of 1974 was "Repealed" in name, but "Saving" the colonial Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 in substance.

87. We will see whether this could be validly, constitutionally and lawfully done by our parliament. Before that we see what the Amendment Ordinance, 1976 added to Act XLV of 1974. The relevant portion of 1976 Ordinance runs as follows:

*"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the government or by such office or authority as the government may direct"*

88. The issue in this Rule also traces its root in the exercise of powers of Pakistan's President conferred by the Constitution of Pakistan, 1962. The preamble of that Constitution candidly pointed out its source:

**“Now, therefore, I, filed Marshal Mohammad Ayub Khan, Hilal-i-Zuraat President of Pakistan,** in exercise of the mandate given to me on the fourteenth day of February, 1960, by the people of Pakistan, and in the desire that the people of Pakistan may prosper and attain their rightful and honoured place amount the nations of the world and make their full contribution towards international peace and the progress and happiness of humanity, **do hereby enact this Constitution.”**

89. So, this was enacted by a military dictator who imposed it upon the people of Pakistan and also upon its colony, the then East Pakistan.

90. Now, let us see the preamble of the Constitution of the People’s Republic of Bangladesh, which is reproduced below:

**“ We, the people of Bangladesh, having proclaimed our independence on the 26<sup>th</sup> day of March, 1971 and through a historic struggle for national liberation, established the independent, sovereign People’s Republic of Bangladesh;**

Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the State to realize through the democratic process a **socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;**

Affirming that it is our sacred duty to safeguard , protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 BS, corresponding to the 4<sup>th</sup> day of November, 1972 AD, do hereby adopt, enact and give to ourselves this Constitution."

91. This fundamental difference between the above mentioned two constitutions as appearing from their respective preamble totally dislodged and wiped out the concept of 'enemy' and legitimacy of so called 'enemy property' rules altogether.

92. The preamble of 1962 Constitution of Pakistan reflects the test of Pakistani military junta and disrespect to the democratic

norms of the people of Pakistan. Though the 1962 Constitution of Pakistan has no existence even in Pakistan as the same was abrogated by another general the successor of Ayub Khan, Mr. Yahia Khan in 1969, but we have no hesitation to say that 1962 Constitution was not a Constitution in the eye of law at all. For the same was not given to the nation by the people's representatives of Pakistan. Rather, the same was given by a dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. In this regard the observation of my Lord Justice Md. Tofazzul Islam (as his Lordship then was) in the case of ***Khondker Delwar Hossain vs. Italian Marble Works***, report in **62 DLR(AD) 298** may be of imminence benefit to all of us. His Lordship summarized the submission of Mr. Mahmudul Islam in the following manner:

*“A constitutional and legislative practice has been devised and restored to by the extra-constitutional rulers of Pakistan, and subsequently, in Bangladesh. this practice was that some Generals at the gun-point took over the state power ousting the legitimate government sometimes with bloodshed and sometimes without bloodshed. At one stage under an exit scheme they formed a parliament through an election conducted by them and in the first session of the parliament their extra-constitutional regime that ruled the country in between is ratified by a constitutional amendment.”*

93. The summary of Mr. Mahmudul Islam's submission relevant in this case was as follows:

"Our Constitution does not contemplate governance by any authority other than the elected representatives of the people and thus, any government formed by the members of military service is unconstitutional and constitutes gross violation of the Constitution and the governance by such authority is also contrary to the legal order established by the Constitution and such a government is out and out an unconstitutional government and all its actions are ultra vires to the Constitution and Martial Law Government continues because the people had hardly any way of defying the mandate of the arms but once a Martial Law government goes, it goes leaving no trail unless its deeds and actions are condoned by application of the doctrine of necessity but there are limits to the application of such doctrine and to come out of this the parliament has resorted to the private law contrivance of ratification of unauthorized actions of agents by principals but **there is inherent limitation even to such ratification as life cannot be given to a prohibited transaction by ratification and moreover, by the device of ratification an authority cannot enhance its authority inasmuch as it can ratify only those actions of other which it can lawfully do and thus, Parliament cannot, by resort to the device of ratification, ratify and render valid an amendment which it cannot itself do because of infringement of the basic features of Constitution** and accordingly the inclusion of impugned paragraphs 3A and 18 in the Fourth Schedule by Fifth Amendment is not only unconstitutional but also violative of the basic features of the Constitution, namely, Supremacy of the Constitution, Rule of Law, Independence of Judiciary and its Power of Judicial Review as all of them are basic features or structures of

*the Constitution and the Parliament does not have any competence under Article 142 of the Constitution, even in exercise of the power with two-third majority, to make an amendment damaging or flouting any of the basic structures of the Constitution as held by their Lordships of this Division in Anwar Hossain's case."*

94. In view of the observation of My Lord Justice Tofazzal Islam and the submission of Mr. Mahmudul Islam made in Khondker Delwar Hossain Vs. Italian Marble Works case reported in 62 DLR(AD)298 we are of the view that the act which was done under a void Constitution of 1962, given by Ayub Khan an usurper i.e. Pakistan Defence Rule 1965 and the Ordinance I of 1969 and it's continuance under the garb of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was a 'historical mistake'.

95. It is an argument of the respondent No.1 Mr. Manzill Murshid that the constituent assembly framed the original Constitution of Bangladesh which included the PO 29 of 1972 in the year 1972 giving retrospective effect from 26 March 1971; by which the properties which were declared as enemy property during Pakistan were vested to the Government by this order. The said order has been given protection under Article 47(2) of the Constitution and it has been included in the 1<sup>st</sup> schedule of the Constitution of Bangladesh.

96. In this regard we are of the view that PO 29 of 1972 was not passed to include the property which was declared by Pakistan government as enemy property. Since in view of the fact that Ordinance, 1969 died its natural death with the proclamation of independence dated 10.04.1971 with effect from 26<sup>th</sup> March 1971 and with the Promulgation of Laws Continuance Enforcement Order, 1971, the properties vested in the Pakistan and East Pakistan government under the dead law, stood divested and as such the so called enemy property do not come under the purview of "properties" as defined in P.O 29 of 1972 made on 26 March 1972.

97. We are of the view that some unscrupulous government officials who also served under the Pakistan government during 1971 liberation war of the country, without realizing the real spirit and intent of the proclamation of independence and "Laws Continuance Enforcement Order" to its proper perspective gave wrong interpretation of PO 29. Thus, we accept the submission of Mr. Probir Neogi, the amicus curiae that the Act of 1974 was a misnomer. We want to add that the enactment of Act XLV of 1974 was a historical mistake.

98. Mr. Manzill Murshid also argued that the P.O 29 of 1972 is a protected piece of legislation like the International Crimes (Tribunals) Act, 1973 (ICT Act). We are not agreed with this argument as the ICT Act enacted in 1973 was given constitutional protection by the Article 47 to ensure the

unhindered trial of the perpetrators of crimes as enumerated in the Act, committed in 1971 war, during the war of liberation. But the P.O 29 of 1972 was made in 1972 regularly for the purpose of the vesting of the property. We have already expressed our view that the property as meant in the Ordinance does not include the Enemy Property as the core concept of Enemy Property Act died its natural death on the 26<sup>th</sup> March of 1971 with the proclamation of independence and as per law of continuance of Enforcement Ordinance, 1971. Thus, these two laws are quit distinguishable.

99. In respect of submission advanced by Mr. Manzil Murshid in light of the decision rendered in the case of Rahima Akhter reported in 40 DLR (AD) page-23 we are of the view that the Hon'ble Appellate Division while considering the interpretation of addition of words by 1976 Ordinance, was not required to consider the applicability of the definition of 'enemy' as provided in the Defence of Pakistan Rules, 1965 after proclamation of independence of Bangladesh, which is the primary contention of the instant Writ Petitioner.

100. Furthermore, from the facts of Rahima Akhter case it is revealed that the *bainapatra* executed by the original owner before vesting of the property in 1965 was upheld to be enforceable and as such in view of the factual matrix, the actions of the original owner before promulgation of the Defence of Pakistan Rules, 1965 had been validated. Therefore,

we do not consider that the judgment of their Lordships in the Rahima Akhter case, on principle contradicts the views expressed by us in the instant writ petition.

101. With the tragic assassination of the Father of the Nation on 15<sup>th</sup> August 1975 the political paint of the country started changing. In 1976 when another Ordinance regarding vested property came into force so many things as well were erased from the Constitution by that time. The then rulers obliterated the principle of secularism from the Constitution.

102. On the other hand, the then rulers introduced the aforesaid Ordinance for the purpose of dealing with the properties' management including its disposal. In the midst of hearing we directed the respondent No.1 to ask all the Deputy Commissioners of the country to furnish a comprehensive report to this Court providing information about listing of properties as 'vested' after promulgation of 1976 Ordinance and also to inform this Court as to how those properties were disposed of. We received as many as 46 reports from the office of the Deputy Commissioners. It transpires from the reports that the Deputy Commissioners failed to satisfy the question of the Court.

103. However, from their reports it transpires that huge properties are still lying with the government as vested property. The office of the Deputy Commissioner, Sirajgonj stated that

“উপর্যুক্ত আইন/বিধি/পরিপত্র/নির্দেশনা অনুসরপূর্বক ১৯৬৬ সালের Enemy Property Census list অনুযায়ী প্রস্তুতকৃত সেন্সাস তালিকা মোতাবেক ১৯৭৬ সালের পর হতে অর্পিত সম্পত্তির দখল গ্রহণ পূর্বক স্থানীয় ব্যক্তি/প্রতিষ্ঠানের নিকট হতে আবেদন প্রাপ্তি সাপেক্ষে লীজ নথি সৃজন করে বিভিন্ন ব্যক্তি/প্রতিষ্ঠান/সংস্থা/দপ্তরকে একসনা বন্দোবস্ত প্রদান করা হয়েছে। তবে অর্পিত সম্পত্তিভুক্ত পুকুর/দিঘী এবং ফলের বাগানের ক্ষেত্রে প্রকাশ্য নিলামের মাধ্যমে সর্বোচ্চ ডাককারীর নিকট ০৩(তিন) বছর মেয়াদে ইজারা দেয়া হয়।” The above statement speaks of the fact that the government took possession of the newly listed properties after 1976 Ordinance came into force.

104. Our apex Court in the cases of **Laxmi kanta Roy Vs. UNO** reported in **46 DLR(HCD) 1994**, Page-136, **Aroti Rani Paul vs. Shudarshan Kumar Paul and others**, reported in **56 DLR (AD) 73**, **Saju Hosein and other** reported in **58 DLR(AD) 177** and **Pulichand Omraolal Case** reported in **33 DLR(AD) 30**, has clearly declared that after 23.03.1974 no property can be enlisted in the list of enemy property and no new VP Case should be started. But from most of the reports furnished by the office of the Deputy Commissioners it transpires that number of properties have been enlisted in the list of vested property and many new VP Cases have been initiated, even after 1974 Act.

105. Reality is that by the repealed Act of 1974, certain properties were vested in the Government despite absence of any provision as to how those properties will be dealt with. By the Ordinance 1976, only the management mechanism has been provided for the properties which were already vested to the government under the repealed Act of 1974. There was no

provision to incorporate/insert in the repealed law authorizing the government either taking any new property as vested property or in any way preparing any list in this regard.

106. The government machinery in the field level being over enthusiastic sometimes has done excess of their jurisdiction. However, since in the case of ***Khondker Delwar Hussain vs. Italian Marble Works***, reported in **62 DLR (AD)298** the Chapter 3A and 18 of the 4<sup>th</sup> schedule of the Constitution of Bangladesh having declared void, the Ordinance, 1976 also became Non-est.

107. Since no person of the then Pakistan was declared engaged in war against Pakistan or nobody's name was published by the gazette notification as the enemy of Pakistan the members of Hindu community who being feared had left the property after 1965 should not be termed as 'enemy'. A country cannot infringe the fundamental right of any of its citizen and to retain his property treating it to be of enemy. State has no right to stigmatize any of its citizens as enemy of his or her mother land. Thus, the people belonging to Hindu community, who left the territory of the then Pakistan out of fear after 1965 war should not have been declared enemy of Pakistan. The purpose of the Ordinance was aimed to manage or occupy the properties of the persons who left Pakistan to the enemy territory i.e. to India leaving their assets and properties in Pakistan. But scenario changed in the year of 1971 when the

country which was declared enemy by Pakistan Government became the friend of the new born Bangladesh (the then East Pakistan). On the other hand, Pakistan (Particularly West Pakistan) and the government of Pakistan as a whole rather became enemy of Bangladesh. The properties of those people who got engaged themselves working with Pakistani government and participated in the War against Bangladesh or left the country leaving behind their property uncared were declared abandoned property vide P.O. 16 of 1972. Thus, the person who left the territory of Bangladesh [the then East Pakistan] during 1965 war out of fear and being oppressed by Pakistani government should not be allowed to be stigmatized as enemy any more, after the nation achieved its independence in 1971.

108. The Enemy Property Act, 1965 and the Ordinance 1969 were enacted by the Pakistan government with an ulterior motive having a hidden political agenda. After 1948 when Mr. Jinnah's speech regarding the State language was protested by the students of the then East Pakistan in Curzon Hall of the Dhaka University the then Pakistan government and its Pakistani bureaucrats could realize that the size of Bengali population in Pakistan is to be reduced so that the Bengali population in the country (Pakistan) could not be bigger than the non-Bengali population. The Pakistan government was moving on with an antagonistic behaviour to the Hindu minorities living in the then

East Pakistan so that they felt forced to leave the country with the purpose of materializing Jinnah's daydream. In an opportune moment in 1965 at the outbreak of India-Pakistan War the Proclamation of emergency was issued and Defence of Pakistan Ordinance, 1965 was promulgated by the President of Pakistan in exercise of power conferred by Clause (4) of Article 30 of the Constitution of Pakistan, 1962, wherein "Enemy" and "enemy territory" have been defined.

109. After achieving independence from Pakistan in 1971, the newly formed Republic of Bangladesh retained the inequitable provisions of the EPA through the Vested Property Act (VPA). By cataloging Hindus as "enemies" of the state in the erstwhile East Pakistan and later on in Bangladesh, the EPA and its subsequent adaptations, not only led to a colossal misappropriation of land owned by Hindu, but also hurried a dire decline in the Hindu population. The EPA and its subsequent adaptations have methodically violated the norms of fundamental human rights of Hindu community living in Pakistan and Bangladesh in breach of established human rights treaties and conventions.

110. According to United State Commission on International Religious Freedom (USCIRF) a quasi-governmental body responsible for promoting religious freedom throughout the World, described the Enemy Property Act (EPA) as "one of Pakistani key instruments of anti Hindu discrimination," which

was used "selectively to siege Hindu owned property after the 1965 Indo-Pakistan War."

111. Additionally, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompass the key human rights treaties that prohibit discrimination based on religion, race, nationality, sex, colour, language, or political affiliation.

112. Thus, it is to be noted that the right to property, equal protection under the law, and freedom of religion are some of the basic norms and principles which are broadly recognized and accepted as by most civilized nations around the world. Almost all countries ensure constitutional protections for minorities and prohibit discrimination based on religion or race. Therefore, as discussed above, the inequitable provisions, and discriminatory application of the EPA and VPA have obviously violated the legal standards created and practiced by the international community. Accordingly, the action under and use of the EPA and VPA by the Governments of Pakistan and then Bangladesh to stifle the rights of Hindus are infringement of obligations under customary international law as well.

113. Now let us see what was the scenario existed in Pakistan and India who are still arch rivals in the sub-continent. Though

the Defence of Pakistan Rule was enacted in 1965 and thereafter the Ordinance No.1 of 1969 was promulgated by the then Pakistan Government to administer and manage the enemy properties by a custodian, suddenly in the year of 1971 the Pakistan Government flouting the provisions of Tashkent Declaration, disposed of all the properties listed as enemy property in Pakistan, particularly in the then West Pakistan.

114. It is to be noted that India and Pakistan had signed the 'Tashkent declaration' after the 1965 war and had decided to discuss the possibilities of returning of enemy properties under control of each side. The birth place of the former Indian Prime Minister Inder Kumer Gujral (IK Gujral) situated at Pari Darweza under the Tehsil Sohawa District Jhelun was sold to one Raza Shahid who presently has been owning the property. Though Mr. Gujral migrated to India after 1947 during partition of India many properties of Hindus who left Pakistan during 1965 war have been sold out who left Pakistan during 1965 war.

115. In 1971 when war was going on between the freedom fighters of Bangladesh and the Pakistan occupation army for the independence of Bangladesh with the help of India, Pakistan and India also locked into a war, at a stage. In the said war Pakistan was defeated and its occupation Army in Bangladesh (the then East Pakistan) surrendered to the joint force of Indian army and Bangladesh Liberation Force. Pakistan government in that situation when acrimony was in its highest

position between two countries (India and Pakistan) sold all the properties listed as enemy property within Pakistan (West Pakistan) shutting the doors of returning those properties to the persons, who were treated as enemy of Pakistan during 17 days war in 1965 between Pakistan and India.

116. However, on the other hand, Indian government has also amended the Enemy Property Act and enacted new law to dispose of the enemy properties in India, despite some opposition parties opposed the enactment of the said new Act. By this Act the 40 years old Enemy Property Act has got a new status. The Indian government initially enacted the Enemy Property Act in 1968. This law laid down the powers of custodian of enemy, management and preservation of enemy property. President of India time to time made Ordinances aiming to manage and control the enemy properties. The last Ordinance was issued in the years 1969 which has been replaced recently by a law enacted by the parliament.

117. We have already discussed that Pakistan had enacted a similar law in 1965 to manage and preserve the properties of the citizen who left for India in 1965, but unlike of India they sold all the properties in 1971 ignoring the terms of Tashkent Declaration.

118. It is true when nations are locked into war, they often seize the properties in their countries belonging to the citizens and corporations of the enemy country. This happened during the

First and the Second World Wars when both the United States and the United Kingdom seized properties of German corporations and citizens. Properties that are seized under these circumstances are referred to as 'alien properties' or 'enemy properties'. The Idea behind seizing these properties is that an enemy country should not be allowed to take advantage of its assets in the other country during war. India too seized properties belonging to Pakistani and Chinese citizens when it was engulfed in war with these countries. Parliament of India recently has passed the Enemy Property (Amendment and Validation) Bill, 2016, incorporating comprehensive amendments to the existing law relating to confiscation of enemy property in India.

119. The bill of 2016 was passed by the 'Rajya Shobha', India on 10<sup>th</sup> March 2017 and with some other amendments made in Rajya Shobha were also incorporated by the Lokshobha of India on 14<sup>th</sup> March 2017. This bill amends the Enemy Property Act, 1968 with intent to vest all rights, title and interest over the enemy property. The custodian of enemy property has become the owner under this Act in India. The bill declared transfer of enemy property by the enemy conducted under the Act to be void. These apply retrospective to transfer that occurred before or after 1968. The bill prohibits Civil Court and other from entertaining the disputes related to enemy properties. The new definition of enemy in the said Indian Act

also covers legal heirs of enemy even if they are the citizens of India or any other country and nationals of an enemy country who changed their nationality.

120. Though the Supreme Court of India in the case of Union of India & another vs. Raja Mohammad Amir Mohammad Khan reported in 8 SCC(2005) page-696 decided that " the definition of enemy provided under section 2(b) excludes citizens of India as an enemy", the new law in India included the heirs of enemy as enemy even if they are now the citizens of India.

121. In the circumstances many properties which were declared enemy property in 1968 cannot be claimed to be returned in his/their favour by the heirs of any person who left India for Pakistan or China, even if the claimant is a citizen of India. As a result, the house of Mohammad Ali Jinnah situated in Malabar Hill of south Mumbai, the property of Raja Mohammad Amir Mohammad Khan, son of 'Raja' of Mahmudabad, Uttar Pradesh, some properties of Nawab of Bhopal presently the bollywood actor Saif Ali Khan has been declared enemy property. Saif Ali Khan has been fighting a legal battle in the Court. In India lot of Muslim families are affected by the movement and actions of the government. Lot of Nawab's, Zaminder's properties is in the process of disposal due to enacting the aforementioned Act. It is known from various news reports of India and Pakistan that as the new Act

of 2017 has been enacted many middle class Muslim families are being threatened as well.

122. We have opted to portray the above state of affairs with a view to show that the India and Pakistan who are the arch rivals are engaged in an action of **'tit for tat'**. Action similar to that taken by Pakistan in 1971 has been taken by India too in 2017. Certainly we are not dealing with the properties of the citizens of India and Pakistan. We are to see the justification as to whether any property of Bangladeshi citizen should be treated as enemy or vested property when Bangladesh and India are now two most friendly countries in this sub-continent. Bangladesh always memorizes and recognizes the contribution of Indian people and the government of India in the liberation war of Bangladesh in 1971.

123. Though the territory of India has never been treated as enemy territory of Bangladesh, we believe that some people left Bangladesh (the then East Pakistan) out of fear of war in 1965. The action of leaving the country by the minority community which was encouraged by the then East Pakistan government and thus those people can never be treated as enemy of the country and for this reason Government of Bangladesh and our legislature has enacted "অর্পিত সম্পত্তি প্রত্যাপন আইন ২০০১" which has been amended in 2013 to return back the properties which were listed as vested property in 1974 and

thereafter, to the original owners or their successor-in-interest living in Bangladesh.

124. The government of Bangladesh and the legislature considering the grave situation erupted owing to migration of minority population from the then East Pakistan (now Bangladesh) to India has enacted the Act of 2001.

125. Census of India 1901-1941, Census of East Pakistan 1951-1961, and Bangladesh Government Census 1974-2011 shows that the percentage of Hindu population in East Bengal in 1901 was 33.00%. In 1911 the percentage was dropped to 31.50%. In 1921 it again dropped to 30.60%. In 1931 it went down to 29.40%. In 1941 it was dropped to 28.00%. In 1951 it was went down to 22.05%. In 1961 it again dropped to 18.50%. In 1974 it was 13.50%. In 1981 it was 12.13%. In 1991 it was 10.51%. In 2001 it went down to 9.20% and in 2011 it was dropped to 8.96%. Since 1901-1941 the minority people of East Bengal particularly belonging to the upper class migrated to different towns of West Bengal of India chiefly to Kolkata with the hope of enjoying better livelihood.

126. It is seen that in 1951 this percentage dropped around 6% which means after 1947 many of the minority population thought that since the Pakistan had been created for the Muslims they would not feel good in this land and thus opted to migrate to India. For the similar reason again the percentage of Hindu population dropped for about 4% in 1961. Up to 1974 it

was reduced about 5% population. The minority population migrated to India mostly due to the situation prevailing during the war of 1965. But within 27 years, since 1981 to 2011 3% people migrated not only to India but to some other developed countries also which is lesser than the trend as has already been focused.

127. Why the minority people migrated from Bangladesh to India? To get its answer we have endeavored to go into the root of the cause by making above deliberation. In our opinion, after the liberation of Bangladesh different reasons have caused such migration. Many Bangladeshi minority 'bride' and 'groom' both got married to the citizens of India when they went for pursuing higher studies in the countries where his/her future life partner came for the same purpose. They liked each other and got married. Other reason is for reunification of family. Some citizens of Hindu Community migrated from Bangladesh to India opt to be united with the family members who left Bangladesh much earlier for India. People at all times want to have a better life where economy is sturdy. For these various reasons some people of Hindu community might have migrated to India. However, since the government of Bangladesh and the legislature of our country thought in a positive way to return the properties which were listed as vested property in 1974 to the original owners or their successor-

in-interest living in Bangladesh will certainly stop the trend of migration of minority people from Bangladesh to India.

128. Another portion of the Rule is “to show cause as to why section 6(Ga) and (Gha) of the Act, 2001 should not be declared to have been passed without lawful authority and is of no legal effect.”

129. In this regard the submissions extended on part of respondent No.6 drew our attention. Mr. Rana Das Gupta, the General Secretary of the Hindu, Buddhist, Christian Unity Council by filing an application sought permission of this Court for allowing them to be added as respondent No.6. We allowed the application and added Mr. Rana Das Gupta, General Secretary as respondent No.6 as they are the stake holders in this case.

130. Mr. Subrata Chowdhury, the learned advocate appearing on behalf of the added respondent No.6 submitted that although in the original law, i.e. in Act No.16 of 2001, there was a provision for publication of the list of returnable properties in official gazette under the provisions of section 9(1) thereof, but through amendment made by Act No.23 of 2011, the provisions for publication of ‘ka’ and ‘kha’ schedule was made and the council, the added respondent No.6 with National Co-ordination Cell for Implementation of Vested Property Return Act formed by various social organizations expressed their

resentment against such classification of 'ka' and 'kha' schedules and demanded deletion of 'kha' schedule from the Act of 2001 (as amended) as it was against the decision of the Apex Court and the spirit of the original law. In the backdrop of this situation and after discussion with the Hon'ble Prime Minister by the Council, Act No.46 of 2013 was passed and the provisions of publication of list in 'kha' schedule was repealed and all the lists already published thereby were cancelled. By such amendment it was also provided that the property listed and published in the 'kha' schedule would not be treated as vested property and shall be deemed as if to be those which were never vested properties.

131. Mr. Subrata Chowdhury candidly submitted that though section 6(Ga) and (Gha) are discriminatory Act, but for the purpose of returning the property to the persons whose property was declared enemy or vested property government may have some mechanism. The property which cannot be returned at all the lawful claimants, government may retain those properties, upon which industry, charitable institution or commercial establishment, school, college have been established. But in the case of other properties the intention of the government is clear and it is acceptable. Mr. Chowdhury also submitted that to give the full and true effect of the law this Court also may give some directions, Mr. Subrata Chowdhury added.

132. At the very outset the object of enacting the said Act, 2001 has been defined as under:

“অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়নকল্পে প্রণীত আইন।

যেহেতু অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়ন সমীচীন ও প্রয়োজনীয়।”

133. The above clearly indicates the intention of the legislature and the government to return back the vested property as being vested to the government in the year 1974 and thus the Act 2001 (Amended up to 2013) can be termed as an instrument to help the Bangladeshi owners, successors-in-interest whose property has been listed as enemy property/vested property. Thus, the very intention of the government appears to be *bonafide*. Section 6 is the provisions meant for making a list of the property which cannot be returned back to the persons whose properties or whose predecessor's properties have been declared enemy or vested property. The provision of section runs as follows:

“৬। কতিপয় সম্পত্তি প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় অন্তর্ভুক্তি নিষিদ্ধ- [প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না।] যথাঃ-

(ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি,

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এরূপ কোন সম্পত্তি,

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন্য কোন সংগঠন বা কোন ব্যক্তির কিট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি,

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পদ এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশবিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পত্তি,

(ঙ) এমন অর্পিত সম্পত্তি যাহা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি,

(চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরূপ কোন অর্পিত সম্পত্তিঃ তবে শর্ত থাকে যে, উক্ত অধিগ্রহণকৃত সম্পত্তির বিপরীতে প্রদেয় ক্ষতিপূরণের অর্থ জমা থাকিলে উক্ত সম্পত্তির অধিগ্রহণ-পূর্ব মালিককে বা তাহার উত্তরাধিকারী বা স্বার্থাধিকারীকে ক্ষতিপূরণের অর্থ এই আইনের বিধান অনুসারে প্রদান করা হইবে যদি উক্ত মালিক বা উত্তরাধিকারী বা স্বার্থাধিকারী বাংলাদেশের নাগরিক ও স্থায়ী বাসিন্দা হন।”

134. This provision under section 6 has been kept in the Act to retain those properties which cannot be returnable. It means some of the properties out of total quantum of enemy or vested property which was vested to the government would be retained by the government. The legislature in section 6(Ga) intended to say that if any property which was vested to the government and has been permanently given settlement to any statutory authority or organization or anybody will be treated as non returnable. By section 6(Gha) the legislature wanted to say that the property (vested property) on which industry, commercial institutions have been established also cannot be returned to any claimant. We are of the view that these two sub-sections no doubt curtail the right of the persons

whose property has been declared as enemy or vested property.

135. In view of our observations regarding 1974 Act and 1976 Ordinance we hold that some more legislative and administrative measures are essentially needed aiming to give proper effect of the object of the Act, 2001 (amended in 2003) and these are the matter to be dealt with and resolved by the legislature and executive.

136. However, since the government has a fair intention to return back the vested properties to the actual and lawful claimants of the property presumably for avoiding any further complications section 6(Ga) and (Gha) have been inserted in the said Act as a transitory measure. Again we believe that the legislature should come forward in taking further legislative measure regarding the properties listed under section 6(Ga) and (Gha) of the Act.

137. We have discussed how Pakistan dealt with the enemy property so declared in 1965. They sold all the properties in 1971. On the other hand India has already enacted a law in 2017 to dispose of the enemy properties by selling all. In such a situation existing in the sub-continent we find that the attempt taken by the Bangladesh government and our legislature is friendlier to the stake holders. This initiative on part of the Bangladesh government indubitably will help in establishing

peace among the people of the subcontinent. Thus, we are not inclined to declare section 6(Ga)(Gha) ultra vires to the Constitution at this stage and under circumstances as discussed above.

138. However, in view of our discussions made above and considering the provision of Act of 2001 as a whole and the scenario existing in the Tribunals and also considering other material aspects we are inclined to pass the following observations and directions:

### **Observations**

(a) 1962 Constitution of Pakistan was not a Constitution in the eye of law at all, because the same was not given to the nation by the people's representatives of Pakistan, rather the same was given by an usurper dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. Thus the Enemy Property Act [EPA] which was promulgated under a void Constitution of 1962 given by an usurper, the Pakistan Defence Rule 1965 and the Ordinance I of 1969 and its continuance under the grab of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions)(Repeal) Act, 1974 was a historical mistake.

(b) In view of our observations regarding 1974 Act and 1976 Ordinance we hold that measures are likely to be needed to give proper effect of the objective of the Act, 2001(amended in 2013) and these are the matter to be dealt with by the legislature and executive.

139. In the light of the decisions in the cases of **Laxmi Kanta Roy Vs. UNO** reported in **46 DLR (HCD) 1994**, Page-136, **Aroti Rani Paul vs. Shudarshan Kumar Paul and others**, reported in **56 DLR (AD) 73**, **Saju Hosein and other** reported in **58 DLR (AD) 177** and **Pulichand Omraolal Case** reported in **33 DLR (AD) 30**, we believe and further observe that:

(c)all actions, decisions regarding listing any property within the territory of Bangladesh as enemy property or vested property after 23.03.1974 are illegal;

(d) the persons engaged with the task of listing the property as vested property after 23.03.1974 are liable to be held responsible for doing illegal works; and

(e) the above decisions were given by the Supreme Court of Bangladesh during 1980-2004. Not a single judgment has yet been pronounced in contrary to the principles enunciated by our apex court in the

above mentioned cases. Thus, the persons who were/are engaged in listing properties as vested property subsequent to 18.06.1980 are liable to be proceeded with for contempt of Court.

140. Now, in view of above observations based on deliberation made herein above we are convinced to make directives as below:

**Directions**

- a. All the government officials are hereby directed not to take any attempt in future to enlist any property in the official gazette as the vested property;
- b. Government may set up an exclusive Tribunal having no other jurisdiction, but only to dispose of the applications under section 10 of the Act No.16 of 2001 in each District and where huge number of petitions are pending more than one Tribunal may be set up;
- c. The Tribunals already set up under the Act No.16 of 2001 are directed to dispose of the applications maintaining the time frame strictly as provided in the Act No.16 of 2001;
- d. The Limitation Act should be made applicable in filing application under section 10(1) of the Act;

e. The concerned authorities are directed to implement /execute the decision of the Appellate Tribunal or in the case of Tribunal where no appeal has been preferred within the time of limitation and **the government officials are directed not to make any delay in executing the decree of the Tribunal on the plea of filing writ petition or any other plea in any way or in any other form as the government by enacting this Act has decided to return back the property to the owner or successors-in-interest in the property within shortest period of time;**

f. Since the law provides to set up a Special Appellate Tribunal to decide the appeal against the verdict of the Tribunal there should be a Special Appellate Tribunal in each district;

g. The property which has been lying with the government as vested property having no legal claimant should be utilized by the government for the purpose of human development only;

h. The government may take necessary measures by enacting law in respect of properties which were vested to the government and where institution have already been developed for the purpose of the development of the country may be named after the name of the original and lawful owner;

i. The legislature may enact law to give sufficient and just compensation to a lawful claimant in lieu of returning the property to him whose property has already been made non-returnable under the provision of section 6.

141. With the observations and directions as made herein above the Rules (main Rule and supplementary Rule) are **disposed of.**

142. Let a copy of this judgment be communicated at once to the parties and the government in the Ministry of Law, Justice and Parliamentary Affairs.

**Krishna Debnath, J.**

*I agree*

**Ismail H. Pradhan**  
BO