

(Names and postal addresses of all Co-sharer raiyats)

Item No. in the schedule	Name of the Co-sharer raiyat	Postal address
	Schedule	
Column 1.	Name, father's/husband's name and residence of transferor or judgment-debtor	
Column 2.	Name, father's/husband's name and residence of the transferee or the decree-holder	
Column 3.	Name, father's/husband's name and residence of the purchaser in case of sale	
Column 4.	Nature of transfer	
Column 5.	Item No. in the document of sale or foreclosure	
Column 6.	Village and police station in which the land is situated	
Column 7.	Khatian No. and Plot No. of the holding transferred with area (when the whole of the holding is not transferred, the extent of interest transferred and the particulars of the plots with area to be given)	
Column 8.	Annual revenue of the holding	
Column 9.	Proportionate revenue in case of transfer of a portion or share of the holding	
Column 10.	Consideration money or value as set forth in the document of transfer or sale price in case of sale in execution of decree or certificate or market value determined by court in case of foreclosure of mortgage	

## West Bengal Restoration of Alienated Land Act, 1973

[West Bengal Act XXIII of 1973]

*An Act to provide for the restoration of land alienated under certain circumstances and for matters connected therewith;*

*Whereas it is expedient to provide for the restoration of land alienated under certain circumstances and for matters connected therewith. It is hereby enacted in the Twenty-fourth year of the Republic of India by the Legislature of West Bengal, as follows:*

**S. 1. Short title and extent.**—(1) This Act may be called the West Bengal Restoration of Alienated Land Act, 1973.

(2) It extends to the whole of West Bengal.

### SYNOPSIS

1. Short history of legislation
2. Records of transactions as to legislations—Notes on clauses—Whether the same can be used for the purpose of interpretation
3. Statement of Objects and Reasons—How far the same can be used in the matter of interpretation of the present Act
4. Rules of interpretation
5. Preamble of the present Act
6. Statute where mandatory and where directory
7. Proviso and its scope and jurisdiction
8. Title and sectional heads, if they help in interpretation
9. History of the Act and amendments

Intention of Legislature is expressed in best possible way in the words actually used in the statute itself. Courts cannot guess and interfere with the ambit of legislation in course of tracing and finding out the legislative intention—*Inder Singh v Gulzar Singh*, AIR 1969 Delhi 154.

**2. Records of transactions as to legislations—Notes on clauses—Whether the same can be used for the purpose of interpretation.**—Speeches delivered by a Minister in the Legislative Assembly and explanations furnished in regard to clauses of a Bill should not be used so as to derive the benefit of an aid towards construction of a statute or enactment.

**3. Statement of Objects and Reasons—How far the same can be used in the matter of interpretation of the present Act.**—The Statement of Objects and Reasons of this Act was published in the *Calcutta Gazette*, Extraordinary, Part IVA, No. 3 on 3.1.1973. It is not fit and proper that Statement of Objects and Reasons can be referred to as an aid to construction. The same may, however, be quoted for a limited extent so as to denote the circumstances for introduction of the Bill, its urgency and its attempt to eradicate the nature of wrongs i.e., the total background of legislation—*Gur Charan Singh v Kamal Singh*, AIR 1977 SC 5; *Standard Literature Co. v Union of India*, 71 CWN 727; *State of West Bengal v Subodh Gopal Bose*, AIR 1954 SC 92; 1954 SCA 65.

**4. Rules of interpretation.**—A state is the will of the legislature and the fundamental rule of interpretation to which all others are subordinated is that a statute is to be interpreted according to the intent of them that made it—Maxwell on *Interpretation of Statutes*.

The function of a court is to interpret the statutes according to the “intent of them that made it”—Maxwell on *Interpretation of Statutes*, 12th Edition, p.1. If the language of a statute is clear and explicit, the court must give effect to it, for in that case the words of the statute speak the intention of the legislature. The words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament—Maxwell on *Interpretation of Statutes*, 12th Edition, pp. 1-2; *Cheney v Conn*, (1968)1 WLR 242.

In course of interpretation of the provisions of a statute, court will consider only the plain and natural meaning of the words as used in the statute. Court will not, as a matter of course, introduce or alter or add any word in a section having no place in that section. But, it is also an accepted rule of construction that the court will tend in favour of reading sections with appropriate changes in order to give effect to the smooth and harmonious working of the system and for the fulfilment of the purpose of the Act—*Hukum Chand v Subhasini Roy*, 74 CWN 879; *Collector of Customs v D.Singh*, AIR 1961 SC 1549.

**5. Preamble of the present Act.**—From the preamble, it appears that the present Act has been made “to provide for restoration of land alienated under certain circumstances and for matters connected therewith”, only. It is therefore clear and explicit that all types of transfers cannot be the subject of

restoration of lands under the provisions of the present Act. Restoration of land transferred in course of certain circumstances only are to be dealt with within the ambit of the present Act. The necessary circumstances and the procedure for effecting restoration have been provided in section 4 of the Act.

Under sub-section (2) of section 1 of the Act, this Act extends to the whole of West Bengal. So, alienation of land which took place outside West Bengal is outside the purview of this present Act. Preamble of an Act can be referred to only when a doubt arises or there is an ambiguity in the matter of interpretation of a provision of a statute—*Venkata Swami v Narasram*, AIR 1966 SC 361.

Preamble can be used as a guide to the interpretation of a provision of the Statute and it may provide light on the intent and design of the legislature. It may indicate the scope and purpose of the legislation itself, in case of doubt or ambiguity only. Preamble may be resorted to ascertain reason for enactment—*P.Shah v State of Madras*, AIR 1953 SC 274; *Y.A. Mamade v Authority under the M.W. Act*, AIR 1972 SC 1721:(1973) 1 SCR 161.

**6. Statute where mandatory and where directory.**—Where a statute uses the word “shall” *prima facie*, it is mandatory but the court may ascertain the real intention of the legislature by carefully examining the whole scope of the statute. Court may consider all with other circumstances whether the object of the legislature will be defeated or furthered—*State of U.P. v Babu Ram*, AIR 1961 SC 751.

The use of “shall” or “may” is not conclusive on the question whether particular requirement of law is mandatory or directory. The real factor is the meaning and the intention of the Legislature which can be gathered not exclusively from the words used by the Legislative organ but from a host of other considerations and circumstances—*Rangashwami v Sugar Textile Mills*, AIR 1977 SC 1516.

**7. Proviso and its scope and jurisdiction.**—A proviso of a statute is normally a qualifying or a clause of exception. The effect of it is to provide exception from the preceding clause to which it is enjoined which but for the proviso, would have been within it—*Ram Narain & Sons Ltd. v Assistant Commissioner of Sales Tax*, AIR 1955 SC 765.

Inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken absolutely in their strict literal sense, but that a proviso is of necessity limited in its operation to the ambit of the section which it qualifies. So far as that section itself is concerned, the proviso again receives a restricted construction—Maxwell on *Interpretation of Statutes*, 12th Edition, Pages 189-190.

Although a proviso carves out an exemption to the main provision to which it is attached, yet the question is always, one of interpretation of the proviso, on its terms. There is no binding rule that a proviso must be confined to the ambit and periphery of the main section to which it is annexed—*Calcutta Pinjrapole Society v Habu Charan Ghosh*, 77 CWN 1.



The main part of a section must not be construed in such a way so as to render a proviso to the section redundant—Maxwell on *Interpretation of Statutes*, 12th Edition, Page 38.

**8. Title and sectional heads, if they held in interpretation.**—Title of a chapter cannot be used to restrict the plain meaning of an enactment—*Commissioner of Income-tax v Ahmed Bai*, AIR 1950 SC 834. Sectional headings can explain any wording, the meaning of which is open to doubt. Where the language of the section is open and clear, sectional headings cannot be of any help and cannot be considered to form a different meaning—*Ram Sankar v S.I. Foundry*, AIR 1966 Cal 512.

The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the Statute but may explain unambiguous words. Headings like marginal notes are not voted or passed by Parliament but are inserted after the bill has become law—Maxwell on *Interpretation of Statutes*, 12th Edition, Page 11.

**9. History of the Act and amendments.**—The West Bengal Legislature passed the West Bengal Restoration of Alienated Land Act (West Bengal Act XXIII of 1973) which duly received the assent of the President of India which was published in the *Calcutta Gazette, Extraordinary*, Part 3, No. 303 (III), dated 5.5.1973. Clause 4 of section 2 was later changed and substituted by West Bengal Act I of 1975. On 1st April, 1976 by the West Bengal Act XX of 1976, the Act was further amended and section 4 was amended which extended the period of 2 years to 4 years from the commencement of the Act. Original section 6 was also amended by W.B. Restoration of Alienated Land (Second Amendment) Act, 1975, assent of the President thereto having been published first in *Calcutta Gazette, Extraordinary*, Part 3, dated 10-5-1975.

Thereafter W.B. Ordinance No. IV of 1976 was passed which was subsequently replaced by West Bengal Act XX of 1976 i.e. W.B. Restoration of Alienated Land (Amendment) Act, 1976 published in *Calcutta Gazette, Extraordinary*, Part III, dated 1.4.1976.

Subsequently, West Bengal Restoration of Alienated Land (Amendment) Act, 1978 was passed which was assented by the President of India and was first published in *Calcutta Gazette, Extraordinary*, dated 11.7.1978.

The West Bengal Restoration of Alienated Land (Amendment) Act, 1980 and 1981 was passed by the State Legislature which received assent by the President of India, subsequently.

(*Calcutta Gazette*, dated 20.8.1981 and *Calcutta Gazette*, dated 27.1.1982)

The Legislative competence of the State of West Bengal to enact the West Bengal Restoration of Alienated Land Act, 1973, the Act in question together with the different matters of the Act were challenged before the Hon'ble Calcutta High Court in Civil Rules No.556 (W) together with Civil Rules Nos. 4830-31(W) of 1976, CR No. 4871 (W) 74 and CR No. 2786(W) 74. Judgment was delivered by Mr. Justice Amiya Kumar Mukherjee in CR No.

556 (W) of 1974 and the said judgment governed all questions raised in all those cases. The impugned case in question viz. *Chittaranjan Ghosh v State of West Bengal* was reported in (1976)2 CLJ 180 (up to page 194). It was decided in the said case that by the Constitution [Fortieth (40th) Amendment Act, 1976], the West Bengal Restoration of Alienated Land Act, 1973 has been placed as Entry No. 182 in the Ninth (9th) Schedule to the Constitution of India and it was also decided the Article 31-B of the Constitution of India became applicable to it.

It was held in the said case as mentioned above that *Alienation* means "the act of transfer of ownership of one to another and by alienation a person's right in land was transferred to another." Restoration was described to be "a means to bring back a thing to its previous position". It was decided that the State Legislature was competent to enact the West Bengal Restoration of Alienation Land Act. It was further decided in the case i.e. *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 that the State Legislature did not violate its legislative activities and the Act had no vice of excessive or supra legal delegation of legislative powers. It was held that section 4(5) did not violate Central Acts including the Indian Evidence Act, 1872 (Act I of 1872). It was arrived at that the term "*distress*" within the ambit of the Act meant "economic distress". Decision was made to the effect that selection of the particular year 1967 should be treated to have been settled under policy of Legislature and that it was not the province or jurisdiction of the court to judge, scrutinise or decipher the Legislative wisdom or judgment in such affairs.

**10. Pith and substance of the Act.**—The pith and substance of the West Bengal Restoration of Alienated Land Act, 1973 is to restore the rights over the land of raiyats, who alienated their rights in distress. The purpose of the Act was neither for acquisition nor for requisition of the property without any compensation—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180.

**S. 2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

<sup>1</sup>[(1) "Collector" means the Collector of a district or any other officer (Superior in rank to the Special Officer against whose order an appeal is preferred) appointed by the State Government to discharge the functions of a Collector under this Act, and includes the Additional District Magistrate, the Sub-divisional Officer and the Additional Sub-divisional Officer within their respective jurisdiction;]

(2) "land" means agricultural land and includes homestead, tank, well and water-channel;

(3) "prescribed" means prescribed by rules made under this Act;

<sup>2</sup>[(4) "Special Officer" means a Block Development Officer and includes

1. Clause (1) is substituted by the West Bengal Restoration of Alienated Land (Amendment) Act, 1980, published in *Calcutta Gazette*, dated 20.8.1981. (For old clause see Note 1.)

2. Substituted, *ibid*.

any other officer (not superior in rank to a Block Development Officer) appointed by the Commissioner of a Division to discharge within the Division the functions of a Special Officer under this Act.]

#### SYNOPSIS

1. History of the Amendment in the section.
2. Alienation—its meaning.
3. Restoration—what it means ?
4. Distress—what does it mean ?
5. Homestead—meaning thereof.
6. Power of granting instalments for payment by the alienator.
7. Family—what does it connote ?
8. Wide powers of Special Officer—Whether Article 226 of the Constitution of India can be invoked.
9. Notification regarding appointment of Sub-divisional Officer as a Collector.
10. Whether S.D.O. can transfer cases under Rule 10 of the W.B. Restoration of Alienated Land Rules, 1973.
11. Land—meaning.
12. Whether Block Development Officers can discharge the functions of Special Officers.
13. Definition of 'homestead' within the definition of 'land'—what does the same actually signify.
14. Amended section 2(4) of the Act whether confers unreasonable wide powers upon the Special Officers.

#### NOTES

**1. History of the Amendment in the section.**—(1) Prior to amendment, Clause 4, of old section 2 ran as follows :

“Special Officer” means an Officer not below the rank of a Sub- Deputy Collector appointed by the State Government to discharge the functions of a Special Officer under this Act.

Section 2(4) stood substituted for the old clause (4) of section 2 by the West Bengal Restoration of Alienated Land (Amendment) Act, 1975 (West Bengal Act I of 1975).

The assent of the President was first published in *Calcutta Gazette*, Extraordinary, Part III, No. 157, dated 19.3.1975.

By the Amendment Act of 1975 which came into force on 19.3.1975, clause (4) of section 2 being amended, under the amended definition “Special Officer” meant any Gazetted Officer appointed by the Commissioner of a Division to discharge within the Division the functions of a Special Officer under the Act—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p.184.

The “Bill No. 4 of 1975” which was published in *Calcutta Gazette*, Extraordinary, on 18.2.1975 stated that object of appointment of Special Officers u/s 4(4) was to bring expeditious disposal of cases. Result is yet to

be obtained. A question arose before the Hon'ble High Court if the Special Officer will have the necessary qualification for evaluating the complicated question of title or not. It was observed that sub-section (4) of section 4 of the Act was amended in such a way as would permit the Commissioner of the Division to clothe with the powers to be exercised under the Act to such Gazetted Officers who might not be unfit to be trusted with the power of making such orders for restoration—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p. 193.

Under new section 4A the power of deciding appeals have been entrusted with the Collector. The definition of the term “Collector” has been provided in section 2(1) of the Act.

**2. Alienation—its meaning.**—“Alienation” means disposition by act of the party and not transfer by operation of law, unless it can be collected from the context that the term was intended to have so wide a signification—*Stroud's Judicial Dictionary*.

“Alienation” means a conveyance of property to another—*Webster's New Collegiate Dictionary*. Alienation is the act of transferring of ownership of one to another. By way of alienation, a person's right in land is transferred to another. Restoration means bringing back to a thing in its former position. Through the procedure of restoration as laid down in the Act, a person gets back his “rights over the land” where certain conditions are fulfilled. This is not an Act relating to transfer and alienation of agricultural land but on rights in or over the land. Accordingly, there is no restriction for the Legislature to include in the definition of land, agricultural land as well as homestead, well, tank and water-channel —*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p.188.

**3. Restoration—what it means.**—Restoration has the following meanings according to particular circumstances :—

(a) Return; (b) Replacement; (c) Reinstatement.

In *Chittaranjan Ghosh v State of West Bengal* as cited above, it has been held that “Restoration” means bringing back to a thing to its previous position. Through the procedure of restoration as laid down in the West Bengal Restoration of Alienated Land Act, 1973, a person is eligible to get back his rights over the land, when certain conditions are fulfilled. The Act deals with restoration of rights of lands of persons who had alienated their rights over lands due to *economic distress*. Acquisition and or Requisition of property is not a subject-matter to be considered within the ambit and scope of this Act—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 188.

**4. Distress—what does it mean.**—The word “distress” has been mentioned in section 4(1)(a) of the Act. The meaning and significance of the word “distress” was discussed in the Civil Rule—*Chittaranjan Ghosh v State of West Bengal*. According to *Webster's New World Dictionary*, the word “distress” normally means misery, suffering or pain. The word may have divergent meanings. The Act has been effected with a view to catering to the

needs of poor people who were compelled to sell lands out of abject poverty or economic difficulties. Many raiyats were forced to transfer their lands due to need of money for their subsistence or for maintenance of their family or to meet the rising costs of cultivation. In some cases, even agreement was made for reconveyance of the property transferred to the transferor. Divergent meanings of distress cannot be invoked within the limited scope of the present Act. As the purpose of the present Act is to provide relief to the poor raiyats, the word, distress, must have only one meaning, i.e. "economic distress"—*Chittaranjan Ghosh v State of West Bengal*, (1976) 2 CLJ 180 at p. 191. W.B. Restoration of Alienated Land (Amendment) Act, 1980 has deleted the words "in distress or" in section 4(1)(a) of the principal Act.

**5. Homestead—meaning thereof.**—Section 2(2) of the Act defines land which means agricultural land and includes homestead, tank, well and water-channel. The meaning of the term homestead came up for discussion and decision in *Chittaranjan Ghosh v State of West Bengal* (1976)2 CLJ 180 at p. 189.

**6. Power of granting instalments for payment by the alienator.**—Section 4(4) of the Act provides scope of payment by transferor by instalments not exceeding ten (10), the amount of consideration money and interest, less income from land of the person in possession as a result of transfer. In the Civil Rule—*Chittaranjan Ghosh v State of West Bengal*, it has been held that sufficient guidance in the matter of instalments has been made in the very section 4(4) of the Act. It has been further held that it could not be said that the power of granting instalments conferred by the Statute upon the Special Officer was unguided and uncanalised. If an Act confers a discretion upon a Public Officer, it is expected that he should exercise his discretion fairly and properly and not arbitrarily or capriciously—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p. 192.

**7. Family—what does it connote?**—The word "family" appears in section 4(1)(a) of the Act. The judgment in Civil Rule—*Chittaranjan Ghosh v State of West Bengal* held—"Murray in *Oxford Dictionary*, Volume IV, Page 5 has given a meaning of the word 'family' which is extremely wide and it has again another meaning which is extremely restrictive." Webster's *Dictionary* has also given two meanings, one of which is too wide and the other too narrow. The provisions of the Act shall not be applicable if the conditions stated in section 4(1) are not fulfilled. When one of the conditions is that, if the transfer was made for the "maintaining himself and his family" in that case, the cost of maintaining himself would not be sufficient. It must be of himself and his family, both. It is the policy of legislature and it is not for the court to find out the reasons behind the legislative policy.

It is impossible to determine the limit of a "family" with clear precision. The question as to who is a member of a "family" depends upon the facts and circumstances of each and every case. The intention of the Act is to give relief to the raiyats, so the widest amplitude of the meaning of the word "family" should be given. A widowed sister wholly dependant upon her brother or even a son-in-law

who since his marriage is living permanently as a 'son' which the family of his father-in-law may be considered as a member of a family although normally he beings to another family. Two instances are only quoted. Besides, there are many cases which will have to be considered by the Special Officer taking into account the facts and circumstances of each case and after exercising his own judgment—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at pp.191-192.

**8. Wide powers of Special Officer—Whether Article 226 of the Constitution of India can be invoked.**—It was decided in the above Civil Rule—*Chittaranjan Ghosh v State of West Bengal* that "wide powers given to the Special Officers may be considered to be an unreasonable restriction on one's fundamental rights to hold property. Infringement of Article 19 cannot be challenged as the Act has been placed in the 9th Schedule. Besides, an appeal to the Collector has been provided for. Constitutional remedy under Article 226 of the Constitution of India is also not barred. Since the power of appointment to the post of Special Officer is given to the Commissioner of a Division, it may be assumed that such Gazetted Officers who would be really competent to discharge the functions of the Special Officers would be appointed. If the power is abused, then it is the abuse that would be struck down but the possibility of any abuse of power will not render the statute itself *ultra vires*—*Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p.193.

It is, therefore, evident that Constitutional remedies for issue of appropriate writ or writs have been well provided under Article 226 of the Constitution of India.

**9. Notification regarding appointment of Sub-divisional Officer as a Collector.**—Land Utilisation and Reforms and Land and Land Revenue Department Circular No. 12540-73, dated 30.6.1973 ran as follows :—

In exercise of the powers conferred by clause (1) of section 2 of the West Bengal Restoration of Alienated Land Act, the Governor has been pleased to appoint the Sub-divisional Officers to discharge the functions of a Collector under the said Act within their respective jurisdiction. Another Circular of the said Land Utilisation & Reforms and Land & Land Revenue Department No. 210221, dated 3.10.1976 ran as follows:—

In exercise of the power conferred by clause (1) of section 2 of the West Bengal Restoration of Alienated Land Act, 1973, the Governor has been pleased to appoint the Additional Sub-divisional Officers to discharge the functions of a Collector under the said Act within their respective jurisdiction. It will therefore be evident from the above two circulars that Sub-divisional Officers as well as Additional Sub-divisional Officers have been appointed to function as a "Collector" by notifications. Unlike the Special Officers, a Collector has to be appointed by State Government while a Special Officer may be appointed by the Commissioner of a Division.

**10. Whether S.D.O. can transfer cases under Rule 10 of the West Bengal Restoration of Alienated Land Rules, 1973.**—Circular No. 517/4, Ref./80, dated 17.3.1980:—



The word "Collector" in Rule 10 of the West Bengal Restoration of Alienated Land Rules, 1973 means the Collector of a District i.e. the District Magistrate or the Additional District Magistrate and not the Officer who has been appointed to discharge the functions of a Collector under the Restoration of Alienated Land Act, 1973. The Sub-divisional Officers and Additional Sub-divisional Officers who have been vested with the power of a Collector under the Act, *are not therefore*, competent to transfer cases from one Special Officer to another Special Officer under Rule 10.

It is therefore evident from the above cited Circular that a Sub-divisional Officer *cannot* transfer cases from one Special Officer to another Special Officer under Rule 10, of the West Bengal Restoration of Alienated Land Rules, 1973.

**11. Land—Meaning.**—According to sub-section (2) of section 2 of the Act, 'land' means agricultural land and includes homestead, tank, well and water—channel. From the definition of land as provided in this Act, it will be evident that 'land' means only agricultural land within the meaning of this Act and excludes non-agricultural lands.

The definition of "land" as provided in this Act is of limited dimension only and the same definition will not be applicable to matters under the provisions of other Acts. The extended meaning of Land as given in other Acts cannot be invoked within the narrow scope of this Special Act. In *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at pp. 188-189, it has been held that "the present Act is not an Act relating to transfer and alienation of agricultural land as well as homestead, well, tank and water-channel. By including 'homestead, tank, well and water-channel', in the definition of 'land', it cannot be said that the State Legislature has transgressed its legislative powers".

The word 'land' in the Constitution of India, Schedule 7, List 2, Entry No. 49, is wide enough to include all lands, whether agricultural or not—*Jagannath Baksh v State of Uttar Pradesh*, AIR 1962 SC 1963.

A question arose as to whether a shop room can be regarded as land or homestead and if the same can be brought within the definition of 'land' as provided in section 2(2) of the present Act. It was observed that a shop room (the disputed property), is not a land or homestead and so, the same cannot be brought under the purview of the Act—*Himangshu Kumar Samanta v J.L.R.O., Mahishadal*, (1979)2 CLJ 408.

Definition of land in Halsbury's *Laws of England* is wide and includes even houses and buildings. "Land includes any ground, soil or earth, such as meadows, pastures, woods, moors, waters, marshes and heath; houses and other buildings upon it, the air space above it and all mines and minerals beneath it. It includes anything fixed to the land, and growing trees and crops, except those which broadly speaking are produced in the year by the labour of the year"—Halsbury's *Laws of England*, 3rd Edition, Vol.32, page 249.

**12. Whether Block Development Officers can discharge the functions of Special Officers.**—A question arose as to whether the Block Development Officers working in different blocks could be appointed to discharge the functions of Special Officer. Before amendment of section 2(4), Special Officers were to be appointed by the State Government. There was subsequent delegation of power and after the amendment of the Act by West Bengal Act I of 1975. Section 2(4) stood amended so that Commissioner of a Division was entitled to make appointment to the posts of Special Officer.

The West Bengal Act I of 1975 came into force on and from 19.3.1975. After such amendment, a Special Officer appointed under section 2(4) (amended) shall have jurisdiction to decide restoration cases filed after 19.3.1975 and also pending applications on the date of such amendment. In fact, section 2(4) was amended by West Bengal Act I of 1975 to the effect that any Gazetted Officer appointed by the Commissioner of a Division will be entitled to act as a Special Officer—*Himangshu Kumar Samanta v J.L.R.O., Mahishadal*, (1979)2 CLJ 408. It was further held in the above cited case that an application addressed to Special Officer which was being tried or dealt with by J.L.R.O. who became subsequently appointed as a Special Officer and was so competent to act under the Act being appointed by the Commissioner of a Division, was a valid application—*Himangshu Kumar Samanta v J.L.R.O., Mahishadal* (1979)2 CLJ 408.

Notification No.12542-L, dated 30.6.1973. The Governor has been pleased to appoint the Block Development Officers working in different Districts to act as Special Officers under the West Bengal Restoration of Alienated Land Act, 1973 (under section 2(4) thereof) within their particular jurisdictions and within such local limits further, if any, as may be allotted to each of them by the Collector. The power of appointing Gazetted Officers as Special Officers within the meaning of section 2(4) of the Act was further extended and the Commissioner of Burdwan Division appointed all Sub-divisional Land Reforms Officers, Junior Land Reforms Officers, Special Revenue Officers, Grade II and Settlement Kanungos as Special Officers to perform the functions as a Special Officer in their jurisdictions. It has been further seen that Notifications have been issued appointing good numbers of officers as "Special Officers" or "Collectors". A notification made by virtue of a power given by a Statute is as much a part of law, as if the same was included in the Act itself—*Emperor v Abdul Hamid*, AIR 1923 Patna 1. The most vital rule under a Statute however is that the framing of rules should be in conformity with the Act itself, which is mandatory—*Dharangadhra Chemical Works Ltd. v State of Gujarat*, AIR 1973 SC 1041, 1044.

**13. Definition of 'homestead' within the definition of 'land'—what does the same actually signify.**—In *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at p. 189, the term "homestead" was considered and decided as follows:—

"The term "homestead" is intended to denote such land as used by a

raiyat for residential purpose. A part of an agricultural land may be used by a raiyat for residential purpose although the character of the land would not justify its use as a homestead. Since amendment of section 182 in 1928, of the Bengal Tenancy Act (since repealed) the incidence of tenancy in "homestead" used to be governed by the Bengal Tenancy Act. By inclusion of homestead, tank, well and water-channel in the definition of "land" it cannot be said that the State Legislature has transgressed its legislative powers. The definition of Homestead in section 182 of the Bengal Tenancy Act (Act VIII of 1885) was as follows:—

"The term "homestead" is not used in this section as a generic term descriptive of a particular kind of land but is intended to denote any land used by the raiyat or under raiyat for residential purposes. It is sufficient to show that the character of the land is such as would justify its use as a homestead"—*Prodyot v Umesh*, AIR 1924 Cal 367.

**14. Amended section 2(4) of the Act whether confers unreasonable wide powers upon the Special Officers.**—"When an act confers a discretion upon a statutory authority it is expected that the said authority should exercise its discretion fairly and properly and not arbitrarily or capriciously. It is urged that Special Officer could be any Gazetted Officer—whether such person had the necessary qualification for evaluation title to immovable property or not. Sub-section (4) of section 4 of the Act has been amended in such a manner as would permit the Commissioner of the Division to clothe with the powers to be exercised under this Act, to such Gazetted Officers who might not be unfit to be trusted with the power of making such orders for restoration. Wide powers given to the Special Officers may be considered to be an unreasonable restriction on one's fundamental rights to hold property. Infringement of Article 19 cannot be challenged as the Act has been placed in the 9th Schedule. Besides, an appeal to the Collector has been provided for Constitutional remedy under Article 226 of the Constitution of India is also not barred. The power of appointment to the post of Special Officer has been given to the Commissioner of a Division. It may be assumed that such Gazetted Officers who would really be competent to discharge the functions of the Special Officers would be appointed by the Commissioner. If the power is abused, then it is the abuse that would be struck down but the possibility of any abuse of power will not render the Statute itself *ultra vires*."

These observations were made in *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 at pp. 181 & 193. From the above discussions, it may transpire that chance of abuse of power cannot be completely ruled out.

**S. 3. Act to override other law, etc.**—The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force : Provided that nothing in this Act shall apply to any land which is evacuee property under section 3 of the West Bengal Evacuee Property Act, 1951 (West Bengal Act V of 1951).

### SYNOPSIS

1. What is evacuee property ?
2. West Bengal Rural Indebtedness Relief Act (37 of 1975), Section 3— Preamble and scheme of Act—stay of suit for recovery of debt.
3. Overriding effect except in case of an evacuee property.

"Evacuee" means any person who on account of the settling up in the Dominion of India and Pakistan or on account of civil disturbance or the fear of such disturbances, has on or after the first day of March, 1947, left any place in the territories to which this Act extends and who is now residing in any place forming part of Pakistan—Section 2(d) of Transfer of Evacuee Deposits Act, 1954.

**1. What is evacuee property?**—It means any property of an evacuee whether held by him as an owner or as a trustee or as a tenant or in any other capacity and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947 by any mode of transfer which is not effective by reason of the provisions contained in section 40 of the Administration of Evacuee Property Act, 1950 but does not include—

- (i) any ornament and any wearing apparel, cooking vessels or other household effects in the immediate possession of an evacuee;
- (ii) any property belonging to a joint stock company, the registered office of which was situated before the 15th day of August, 1947 to any place now forming part of Pakistan and continues to be so situated after the said date. [Administration of Evacuee Property Act, 1950 Section 2(f)].

Section 3 of the West Bengal Evacuee Property Act, 1951 (W.B. Act 5 of 1951) defines evacuee property as—

Evacuee property is declared to be property of an evacuee which is lying in the State of West Bengal except property in charge of the Court of Wards.

In terms of section 2(d) of the West Bengal Evacuee Property Act, 1951, section 2(d) thereof, "property" means and signifies, "immovable property".

**2. West Bengal Rural Indebtedness Relief Act (37 of 1975), Section 3—Preamble and scheme of Act—stay of suit for recovery of debt.**—Whether section 3(ii) is to be read independently of section 3(i)—interpretation whether a suit relating to the recovery of a debt from a person who is not a "debtor" within the meaning of the West Bengal Rural Indebtedness Relief Act, 1975, is to be stayed under the provisions of section 3 of the Act, is the question which arises for determination in this revision case.

Held, in *Manoranjan Das v Lal Muhammed Khan*, (1977)1 CLJ 338. A question may arise: Can section 3(ii) of the Act be read independently of section 3(i)? Section 3(i) makes it clear that the relief as provided therein is only available to a debtor in respect of any debt incurred by him. Although section 3(ii) does not mention the fact that the suit, application or proceeding must relate to the recovery of a debt from a "debtor", nevertheless from the

Preamble of the Act and the Schedule of the Statute, it is clear that section 3(ii) must necessarily relate to the recovery of a debt from a 'debtor' as defined in the Act. In that view of the matter the learned Munsif was right in dismissing the application for stay of the suit under section 3 of the Act. It is to be noted here that section 8A of the W.B. Restoration of Alienated Land Act, 1973 provides stay of payments for a period of two years. Para I of the said section may be consulted for ready reference.

**3. Overriding effect except in case of an evacuee property.**—It is held that section 3 of the W.B. Restoration of Alienated Land Act shall have overriding effect except in case of any land which is an evacuee property under section 3 of the W.B. Evacuee Property Act, 1951—*N.R. Nanda v Rajeswari Pahari*, 86 CWN 691.

**S. 4. Procedure for effecting restoration of lands alienated under certain circumstances.**—(1) Where before the commencement of this Act, <sup>1</sup>[or between the date of such commencement and the date of the commencement of the West Bengal Restoration of Alienated Land (Amendment) Act, 1980] a person being the transferor holding not more than 2 hectares of land in the aggregate *on the date of transfer*, transferred the whole or any part of his land by sale to any person being the transferee, then, if—

- (a) such transfer was made after the expiry of the year 1967 being in need of money for the maintenance of himself and his family or for meeting the cost of his cultivation, or
- (b) such transfer was made after the expiry of the year 1967 with an agreement, written or oral, for reconveyance of the land transferred, to the transferor, the transferor may <sup>2</sup>[within ten (10) years from the date of commencement of this Act];

make an application in the prescribed manner to the Special Officer having jurisdiction in the area in which the land transferred is situated for restoration of such land to him.

(2) On receipt of such application, the Special Officer, shall cause a notice thereof to be served in the prescribed manner on the transferee.

(3) On the date fixed in the notice for hearing such application or on any subsequent date to which the hearing may be adjourned by the Special Officer, the Special Officer shall receive such evidence as may be adduced by the transferor and the transferee.

1&2. Sec. 4(1) has been changed, significantly. The words "or within four years from the date of such commencement" have been substituted by the words, "or between the date of such commencement and the date of the commencement of the West Bengal Restoration of Alienated Land (Amendment) Act, 1980". Also, the words "within five years from the date of such transfer or within four years from the date of commencement of this Act, whichever period expires later", have been replaced by the words "*within ten years from the date of commencement of this Act*" by the W.B. Restoration of Alienated Land (Amendment) Act, 1980 has therefore extended the period of making application by a transferor within ten (10) years from the date of commencement of the Act i.e. the principal Act (W.B. Act XXIII of 1973) which came into force on 5.5.1973.

(4) If after considering such evidence and hearing the parties, the Special Officer is satisfied that such transfer was made by the transferor within the time, and for the purpose referred to in clause (a) of sub-section (1), or, as the case may be, within the time, and under the conditions, referred to in clause (b) of that sub-section, the Special Officer shall make an order in writing restoring the land transferred to the transferor and directing the transferor to pay, in such number of equal instalments not exceeding ten and by such dates as may be specified in the order, the amount of the consideration which was actually paid by the transferee to the transferor for such transfer, together with interest on such amount at the rate of four per centum per annum from the date of his receipt of such consideration and the amount of any compensation for improvements effected to such land, allowed by the Special Officer and determined by him in the manner prescribed, less the amount determined in the manner prescribed of the net income from such land of the person in possession of such land as a result of such transfer :

Provided that the first of the instalments provided in the order made under this sub-section shall be payable within three months of the date of the order.

<sup>1</sup>[Provided further that all the heirs of a deceased transferor or a deceased transferee shall be made parties in every proceeding under this Act.

Provided also that if the transferred land is partitioned by the transferee or his heirs, the Special Officer shall make an order in writing restoring the whole or any part of the land, as he may deem fit, to the transferor or his heirs, and where there are several heirs of a deceased transferor and some of them are not willing for restoration of the transferred land the Special Officer shall make such order restoring the whole of such land in favour of the heirs who are willing for such restoration.]

*Explanation.*—Subject to the other provisions of this section—

- (i) <sup>2</sup>the word "transferor" referred to in this Act means the first transferor or, where the first transferor is unwilling to get the transferred land restored, any subsequent transferor between the expiry of the year 1967 and the date of commencement of the West Bengal Restoration of Alienated Land (Amendment) Act, 1980 and includes the heirs of such first or subsequent transferor;
- (ii) <sup>3</sup>the word "transferee" shall mean where the land is in the possession of any person other than the first transferee by virtue of a subsequent

1. Two provisos have been added by the W.B. Restoration of Alienated Land (Amendment) Act, 1980.

2. The definition of the term "transferor" as previously made out under (i) of Explanation to section 4, has now been changed by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980.

3. In clause (ii) of the Explanation to section 4, the words "such subsequent transferee; and" have been substituted by the words "such subsequent transferee and shall include the heirs of such transferee; and" by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980.



transfer such subsequent transferee and shall include the heirs of such transferee; and

- (iii) the expression "consideration which was actually paid by the transferee to the transferor" shall mean where there was more than one transfer, the amount which was paid by the first transferee to the first transferor.

(4a)<sup>1</sup> An application made under sub-section (1) shall be filed before the Block Development Officer having jurisdiction over the area in which the transferred land is situated, who may either refer the same to any other Special Officer within the Block or dispose of it himself.

(4b)<sup>1</sup> The Block Development Officer may, on his own motion or on an application made by a transferor or transferee, for reasons to be recorded in writing, transfer any application made under sub-section (1) from one Special Officer other than himself to another Special Officer or withdraw such application for disposal by himself.

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872, any evidence adduced by a transferor varying, adding to, or subtracting from, the terms of the sale deed to prove the necessity or purpose for which the transfer was made or the amount of consideration actually paid by the transferee to the transferor, shall be admitted:

<sup>2</sup> Provided that if an application made under sub-section (1) has been rejected by the Special Officer only in consideration of the written recital of the purpose of transfer recorded in the sale-deed overlooking the evidence adduced by the transferor, the transferor may, within a period of one year from the date of commencement of the West Bengal Restoration of Alienated Land (Amendment) Act, 1980, apply afresh and thereon the Special Officer shall proceed with the hearing of such application, consider such evidence as may be adduced by the transferor and the transferee and make such order thereon as he may deem fit.

(6) When the Special Officer makes an order for payment under sub-section (4), he shall direct that—

- (a) Where such land has been sold, before or after such order is made, in execution of a decree or of a certificate under the Bengal Public Demands Recovery Act, 1913 (Bengal Act II of 1913), against the transferee, the whole of the amount payable under the said order, or such part of it as may then remain due, shall, notwithstanding anything contained in such order, become due and payable at once and on such payment being made, such sale in execution of the decree or the certificate shall be set aside and the amount paid shall be applied

1. After sub-section (4), two new sub-sections (4a) and 4(b), have been inserted by W.B. Restoration of Alienated Land (Amendment) Act, 1980.

2. A new proviso has been added to sub-section (5) of section 4 by the W.B. Restoration of Alienated Land (Amendment) Act, 1980. The proviso relates to consideration of evidences afresh, for which the transferor has to apply within one year from the date of commencement of the W.B. Restoration of Alienated Land (Amendment) Act, 1980

towards satisfaction of the decree or the certificate, as the case may be;

- (b) in the case where such land has been alienated by the transferee before the date of such order by means of a *bona fide* lease for valuable consideration or a usufructuary mortgage, such payment shall be made to the transferee and the person in possession of such land as a result of such transfer in such proportion and in such manner as may be determined by the Special Officer and specified in the order; and

- (c) in other cases, such payment shall be made to the transferee:

Provided that if such land is subject to a *bona fide* mortgage other than a usufructuary mortgage and such mortgage was executed after the transfer of such land referred to in sub-section (1), the Special Officer shall direct that such instalments shall first be paid to the mortgagee until the amount due under the mortgage as determined by the Special Officer is paid off and that thereafter any such instalments or part thereof still remaining due shall be paid in the manner provided in clause (a), clause (b) or clause (c) of this sub-section, as the case may be.

(7) The amount ordered to be paid by instalments under sub-section (4) shall be a charge on the land in respect of which the order under that sub-section has been made.

(8) Where any land, in respect of which an order under sub-section (4) is made, is, after the date on which such order takes effect under sub-section (1) of section 5, sold in execution of a decree or of a certificate filed under the Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913), against the transferor to whom restoration had been made, or otherwise transferred by him, the whole of the amount payable under such order then remaining due shall, notwithstanding anything contained in such order, at once become due and payable, and the person to whom such amount is payable shall be entitled to recover it under section 6.

<sup>1</sup>[(9) Notwithstanding anything to the contrary contained in any other law or in any agreement or in any judgment; decree or order of any Court, Tribunal or any other authority, there shall not be any amicable settlement or compromise in respect of any proceeding under this Act other than a settlement or compromise resulting in restoration of transferred land to a transferor and in all such cases the provisions of this Act and the rules made thereunder shall apply.

<sup>2</sup>[(10) If the transferee including the members of his family holds on the date of transfer not more than one acre of land including the transferred land

1 & 2. After sub-section (8) of section 4, two new sub-sections (9) and (10) have been inserted by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980 and again sub-section (10) was substituted by the W.B. Restoration of Alienated Land (Amendment) Act, 1981 (Act XXI of 1981)

and such land becomes the principal sources of income of the transferee including the members of his family, the Special Officer shall not make any order under sub-section (4) unless the transferor including the members of his family holds not more than one acre of land including the transferred land on the date of transfer.]

**S. <sup>1</sup>[4A. Appeals.**—Any transferor or transferee may, within thirty days from the date of an order made under sub-section (4) of section 4, prefer an appeal in the prescribed manner to the Collector and the decision of the Collector thereon shall be final.]

**S. <sup>1</sup>[4B. Representation of transferor and transferee.**—No transferor or transferee shall be entitled to be represented by a legal practitioner in any proceedings under this Act.]

**S. <sup>1</sup>[4C. Filing and transfer of appeal.**—An appeal preferred under section 4A shall be filed before the Sub-divisional Officer or the Additional Sub-divisional Officer, as the case may be, having jurisdiction over the area in which the transferred land is situated, who may either refer the same to any other Collector under this control for disposal or dispose of it himself and may, on his own motion or on an application made by an appellant or a respondent and for reasons to be recorded in writing transfer such appeal from one Collector other than himself to another Collector under his control or withdraw such appeal for disposal by himself :

Provided that the Collector of a district or the Additional District Magistrate may, on his own motion or on an application made by an appellant or a respondent, call for the records in respect of any appeal pending before any Collector under his control and, for reasons to be recorded in writing, transfer such appeal from one Collector to another Collector or withdraw such appeal for disposal by himself.]

#### SYNOPSIS

1. Scope
2. West Bengal Restoration of Alienated Land Act (XXIII of 1973), Section 4(4), Proviso—Payment of instalments within three months should be mentioned in the order made by authority concerned—Absence of such direction—Effect thereof—Remand to Special Officer for rectification of irregularity committed by appellate authority

1. New-sections 4A, 4B, 4C have been inserted by the W.B. Restoration of Alienated Land (Amendment) Act, 1980. These new sections 4A, 4B, 4C deal with filing and transfer of appeal as well as prohibition of representation through legal practitioner. It is to be noted carefully that under the provisions of amended sec.4(1)(b) of the Act, the transferor gets the scope of making an application for restoration within 4.5.1983 i.e. within ten (10) years from the date of commencement of the principal Act. Amendment No. 3(a)(iv) in respect of Section 4 of the principal Act, as stated in the W.B. Restoration of Alienated Land (Amendment) Act, 1980 [Published in the Calcutta Gazette, Page 2406, dated August 20, 1981] may be read prior to the Amendment 3(a)(i) thereof. Nevertheless, transfers by sale from 1.1.1968 up to 4.5.1973 will come under the scope of this Act, against which the transfer can make an application for restoration of land before the Special Officer in prescribed manner.

3. Benefits of the West Bengal Restoration of Alienated Land Act will be available for transfers of land made between the 1st January, 1968 and the 4th May, 1977
4. Amendment of section 4 of the West Bengal Restoration of Alienated Land Act, 1973
5. Amicable settlement towards restoration application
6. Power of Special Officer to reject or to allow restoration is both appealable
7. Special Officer is a *persona designata*
8. *Persona designata*
9. Proceeding under section 4 is a quasi-judicial one
10. Sale and an agreement of reconveyance are necessary for applying for restoration
11. Provisions of appeal in the present Act—Whether appellate authority is vested with the power of remand
12. Order of remand by appellate authority—Proceedings completed before the Special Officer—Challenging original application, permissible if
13. Special Officer is required to act quasi-judicially
14. Whether Special Officer should record at least summary of evidence—Difficulty of Appellate Authority—Futility of Appeal, if at least summary of evidences are not recorded by the Special Officer
15. Time limit and circumstances for Application of Restoration
16. Procedure for effecting restoration of possession under the West Bengal Restoration of Alienated Land Act, 1973
17. Notes & Comments on Circular—Procedure for application—Transfer of land by sale
18. Shop room cannot be treated as land for restoration
19. Power of State Legislature is within its limit
20. Sections 4(1)(a) and 4(1)(b)
21. Section 37A of the Bengal Money Lenders Act
22. Manner of service of Notice under section 4(2) of the Act
23. Effect of substituted service
24. Where service substituted, time for appearance to be fixed
25. Power of Special Officer to reject or to allow restoration is both appealable—Transfer and payment
26. Instalments under section 4(4) of the Act *vis-a-vis* section 8A
27. Income from the land and power of Special Officer and function
28. Need of money for residential accommodation—Applicable provision of C.P.C.
29. Meaning, ambit and scope of the words “before the commencement of this Act”
30. Form A.
31. Special Officer is neither a court nor a civil court
32. Date of transfer—What does it mean
33. Cost of cultivation
34. “Family”—what does it mean under section 4(1)(a) of the Act

35. **Power of Special Officer—Meaning of the words “Transferor” , “Transferee” and consideration**
36. **Scope of sections 4(6)(b) and 4(6)(c)**
37. **Difference between “Charge” and “Mortgage”.**
38. **Scope of sub-section (8) of section 4.**
39. **Homestead on non-agricultural land does not come within the meaning of land and cannot fulfil the requirement of section 4 of the Act.**
40. **Proviso to section 4(5) of the Act, evidence against recital in the deed, effect**
41. **Power of Special Officer to take evidence—Special Officer if a court within the meaning of Evidence Act**

1. **Scope.**—Section 4 of the Act has been radically amended by the recent W.B. Restoration of Alienated Land (Amendment) Act, 1980 (W.B. Act LVI of 1980)—Assent of the President was first published in the Calcutta Gazette, of the 20th August, 1981. (Please see footnote under the section.)

2. **West Bengal Restoration of Alienated Land Act (XXIII of 1973), Section 4(4), Proviso—Payment of instalments within three months should be mentioned in the order made by authority concerned—Absence of such direction—Effect thereof—Remand to Special Officer for rectification of irregularity committed by appellate authority.**—In *Sabyasachi Pathak v State of West Bengal*, (1930)2 CLJ 118 the Special Officer rejected the application for restoration of the alienated land of the transferors. There was an appeal by the transferors. The appellate authority reversed the decision of the Special Officer and directed restoration of the disputed land to the transferors. In doing so, the appellate authority himself calculated the usufructs of the land, deducted the same from the consideration and the interest payable and directed payment by instalments.

It was held that, under section 4(4) of the W.B. Restoration of Alienated Land Act, 1973, the first instalment should be payable within three months from the date of the order. This has not been done by the appellate authority in directing repayment of the consideration with interest less the amount calculated by him as the share of income. This is the only defect in the appellate order. No doubt it would have been better, if the appellate authority had merely set aside the order of the Special Officer and sent the matter back to the Special Officer for determination of the income and for fixing the instalments payable. But, because he did not do so that does make the order illegal or without jurisdiction. The first instalment of payment should have been directed to be paid within 3 months from the date of the order. That was not done and there is a violation of the provisions of section 4(4), proviso to the said Act. The order of the appellate authority is quashed to the extent that the direction contained therein as to the payment of the amount determined by the said authority by instalments is set aside. Rest of the order is sustained. The matter is sent back to the Special Officer under the Act for fixing the instalments in accordance with law.

3. **Benefits of the West Bengal Restoration of Alienated Land Act will be available for transfers of land made between the 1st January, 1968 and the 4th May, 1977.**—Land Utilisation and Reforms and Land and Land Revenue Department. Land Reforms Branch No. 2733 (18)—4 Ref., dated 11.7.1978.

The cases of restoration which were rejected earlier by Special Officers on the ground that transfer was made after 4th May, 1973 may be revived in suitable cases. The W.B. Restoration of Alienated Land (Amendment) Bill, 1978 has received the Assent of the President of India.

*Note:* This position has been changed by way of 1980 Act. [Sec. 4(1)(b)].

4. **Amendment of section 4 of the West Bengal Restoration of Alienated Land Act, 1973.**—Land and Land Reforms Department, Land Reforms Branch No.3881—L.Ref./11 R-3/78 (Pt.III), dated 10/19.12.1979.

A person may apply for restoration of land within ten (10) years from the date of commencement of the principal Act. The Act came into force on 5.5.1973. It is therefore clear that at the time of granting any application for restoration of land, it is to be seen whether the same has been filed within ten (10) years from the date of commencement of the Act.

The last date for submission of application for restoration will vary according to the date of transfers, but it cannot go beyond 4.5.1983, in any case.

5. **Amicable settlement towards restoration application.**—D.O. of 4 R. Commissioner. No. 12099 State dated 3.7.1978.

It is to be noted that Special Officer should note that there is no provision for amicable settlement under the law and no cases of amicable settlement against the interest of the petitioner can be entertained by Special Officer. [Sub-section (9) of section 4 as introduced by W.B. Restoration of Alienated Land (Amendment) Act, 1980 may be referred to.]

6. **Power of Special Officer to reject or to allow restoration is both appealable.**—In *Kanailal Chattopadhyaya v Satyendra Nath Mazumdar*, (1977)1 CLJ 23, the following principles of law were settled and decided.

(i) Order allowing or rejecting application are both appealable.

The expression, any order in the context of section 7 of the W.B. Restoration of Alienated Land Act means that every order made under section 4(4) is appealable. Therefore, the contention that an order rejecting an application for restoration is not an order made under sub-section (4) is not tenable. An order either allowing an application under section 4 or rejecting the same comes within the ambit of section 4(4) of the Act. The power of Special Officer to pass an order under section 4 includes a power either to allow the application or to reject the same.

7. **Special Officer is a *persona designata*.**—So, no question of exercise of inherent powers in the matter of rejection of an application for restoration could possibly arise. *An order rejecting an application as well as an order allowing it, both would be appealable.* Section 4(4) by necessary implication



confers jurisdiction upon the Special Officer so that he may pass an order rejecting an application for restoration, if he *not* satisfied that the conditions as indicated in section 4(1) or such of them as may apply have been so fulfilled by the applicant. Section 7, proviso (now deleted) thereof, in respect of appeal has been substantially replaced by new section 4A of Act, 1980.

**8. *Persona designata*.**—“*Persona designata*” is a person selected to act in his private capacity and not in his capacity as a judge. A *persona designata* is a person who is pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character—*Dharmendra Prosad v State of U.P.*, AIR 1969 All 484.

**9. Proceeding under section 4 is a quasi-judicial one.**—It was held that proceeding under section 4 was a quasi-judicial one and Special Officer was required to pass an order under sub-section (4) as to whether prayer for restoration was to be granted or not. Inherent power of the Special Officer that he might not pass an order at all could not be accepted—*Kanailal Chattopadhyaya v Satyendra Nath Mazumdar*, (1977)1 CLJ 24.

**10. Sale and an agreement of reconveyance are necessary for applying for restoration.**—The Special Officer is required only to satisfy himself that there was both a sale and an agreement for reconveyance. Once these two conditions are fulfilled a person may apply for restoration under section 4(1) and the Special Officer may either order for restoration or reject it—*Kanailal Chattopadhyaya v Satyendra Nath Mazumdar*, (1977)1 CLJ 25.

**11. Provision of appeal in the present Act—Whether appellate authority is vested with the power of remand.**—Remand is consequential and incidental to the power conferred upon the appellate authority. The provisions of the present Act to appeal are not self-contained and exhaustive. The appellate authority in order to effectually discharge its duties, must be deemed to possess a power to direct the Special Officer to pass consequential orders in terms of section 4(4) of the Act. An express provision for remand is not required to be conferred upon the appellate authority in order to authorise issue of a direction upon the Special Officer. It may be also pointed out that section 7 does not expressly provide that the appellate authority would be entitled to receive evidence—*Kanailal Chattopadhyaya v Satyendra Nath Mazumdar*, (1977)1 CLJ 30.

On the question whether the appellate authority under the Act has the power to remand the matter before the Special Officer, in view of the fact that there is no express provision in the said Act to that effect it was held that although the authority under section 4(1) of the Act and the appellate authority under the said Act are not courts, but such authorities, being judicial of *quasi-judicial* tribunals, have all the trappings of the court with the inherent power under section 151, C.P.C. for effectively discharging the duties and functions for which such tribunals are constituted. Therefore, it was held, the tribunal can exercise such power of remand which is ancillary and incidental to the power for effectively discharging the duties of the appellate

authority under the said Act—*Ratu Dutta v State of West Bengal*, 93 CWN 942; see also *Nawabganj Sugar Mills v Union of India*, AIR 1976 SC 1152; *Grindlays Bank Ltd. v Central Government Industrial Tribunals*, AIR 1981 SC 606.

**12. Order of remand by appellate authority—Proceedings completed before the Special Officer—Challenging original application, permissible if.**—In the instant case an application for restoration was originally made and against the Order of the Special Officer an appeal was preferred before the tribunal. But the matter was remanded by the appellate authority before the Special Officer with certain directions. But after completion of the entire proceedings before the Special Officer, the order passed on remand by the Special Officer was challenged on the ground that the original application for restoration was not maintainable under the said Act and the authority under section 4(1) of the said Act could not assume any jurisdiction to decide the case. Held on facts that if a party who contends that the application itself was not maintainable but allows the entire proceedings to be completed after a contested hearing and prefers an appeal against such decision, as also takes part in the proceedings on remand, he should not be permitted to contend before the Writ Court that the very proceedings at the inception was without jurisdiction—*Ratu Dutta v State of West Bengal*, 93 CWN 942.

**13. Special Officer is required to act quasi-judicially.**—In *Abdus Sattar v Abdul Jalil*, (1979)2 CLJ 551, while considering Civil Rules Nos. 20298 and 20299 (W) of 1975, the Hon'ble Mr. Justice Chittatosh Mookerjee was pleased to observe in his judgment “The West Bengal Restoration of Alienated Land Act (Act XXIII of 1973) and the West Bengal Restoration of Alienated Land Rules, 1973 do not expressly prescribe for recording evidence adduced in cases under the said Act. But the Special Officer exercising the jurisdiction under section 4 of the Act is required to act *quasi-judicially*. The Special Officer acting under the Act has all the power of a civil court under the Code of Civil Procedure, 1908 for the purpose of receiving evidence, administering oath, enforcing the attendance of witnesses and compelling the production of documents. Thus, the Special Officer for the purposes specified under section 8 is required to act in the manner the civil court functions. Under sub-section (4) of section 4, the Special Officer is enjoined to consider the evidence adduced by the parties and to hear them. The Restoration Order made under section 4 is subject to an appeal. An appeal taken against the order of the Special Officer will be practically futile unless at least the substance of the evidence adduced by the parties before the Special Officer is recorded. The findings made by the Special Officer as to whether the transfer in question was made in distress or in need or for other needs specified in section 4(1)(a) or whether the transfer was with an agreement for reconveyance cannot be examined by the appellate authority unless such records of evidence adduced by the parties before the Special Officer are kept—*Abdus Sattar v Abdul Jalil*, (1979)2 CLJ 553.

**14. Whether Special Officer should record at least summary of evidence—Difficulty of Appellate Authority—Futility of Appeal, if at least summary of evidences are not recorded by the Special Officer.—**At least, the Special Officer had the duty to record summary recordings of evidences adduced before him. As the Special Officer did not record any evidences, there was no finding of fact recorded by the Special Officer. The appellate authority therefore could not validly come to a finding of fact contrary to those made by the Special Officer. Unless, at least, the substance of the evidences adduced by the parties are recorded before the Special Officer, an appeal preferred and taken against the order of Special Officer would be futile for all practical purposes—*Abdus Sattar v Abdul Jalil*, (1979)2 CLJ 553, 554.

**15. Time limit and circumstances for Application of Restoration.—**In section 4 of the Act in the *Explanation* in clause (i) the words “*the expiry of four years from*” within bracket were added (by way of substitution) with retrospective effect by the West Bengal Restoration of Alienated Land (Amendment) Act, 1978 (W.B. Act XXIV of 1978) which was published in the Calcutta Gazette, Extraordinary, Part III No. 1344-L. dated 11.7.1978. Clause (i) to explanation under sub-section 4(4) has been further changed by Amendment Act, 1980.

Section 4(1) prescribes the time, conditions and to whom the present Act will be applicable so that a petitioner becomes *prima facie* eligible to apply for restoration of land transferred by him. The relevant conditions and circumstances are reproduced below :—

(1) Section 4 refers only to one kind of transfer i.e. transfer by way of sale. Other kinds of transfer of lands such as by gift, mortgage, exchange etc. do not come within the purview of the present Act. The most important condition for restoration is that the transfer was effected earlier by way of sale.

Sale has been defined in section 54 (Chapter III) of the Transfer of Property Act, 1882 as:

“Sale” is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversioner or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees (Rs. 100.00), such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immovable property takes place when the seller places the buyer or such person as he directs, in possession of the property.

(2) The transferor transferred the whole or any part of his land by sale to any person known as transferee.

(3) The transferor did not hold more than 2 hectares of land in the aggregate at any time between 1.1.1968 and 4.5.1973.

(4) The transferor transferred property i.e. land before the commencement of the present Act i.e. before 5.5.1973.

(5) The alienation was made by the transferor being in need of money for the maintenance of himself and his family or for meeting the cost of his cultivation.

(6) Or, alternatively, the transfer was made with an agreement, oral or written, for the reconveyance of the land transferred.

(7) The application has to be filed by the petitioner to the Special Officer within ten (10) years from 5.5.1973. In any event, under the present circumstances of the Act, the last date for submission of application for getting the relief of restoration, in no case, can go beyond 4.5.1983.

(8) The application shall have to be filed in the prescribed manner before the Special Officer.

“Prescribed Manner” means that such application shall be in Form A, appended to the West Bengal Restoration of Alienated Land Rules, 1973, or in a Form which is substantially similar to that.

(9) The application must be stamped with the Court Fees of Rupees one and fifty paise only.

(10) A process-fee of rupee one and paise fifty only per party on whom a notice is to be served, shall have to be paid by the applicant in Court Fees stamps along with the application.

(11) One hectare corresponds to 10,000 square metres or 2.471 acres. Two hectares of land is equivalent to roughly 4.95 acres.

**16. Procedure for effecting restoration of possession under the West Bengal Restoration of Alienated Land Act, 1973. [Land Utilisation and Reform and Land Revenue Department. Land Reforms Branch Memo No. 2734(18)-L. Ref., dated 11.7.1978].—**It has been laid down in section 5 of the Act that the order of restoration passed by the Special Officer under sub-section (4) of section 4 shall have effect on the 1st day of Baisakh next following the date of the order. Under sub-section (2) of section 5 of the Act, from the 1st day of Baisakh next following the date of the order, the right, title and interest of the land shall be deemed to have vested in the transferor free from all encumbrances.

According to sub-section (3) of section 5 of the said Act, the Special Officer may of his own motion and shall, on the application of the transferor, eject the transferee and place the transferor in possession of the land, if delivery of possession of the land has not been made to the transferor by the transferee on or before the 1st day of Baisakh next following the date of order.

From the above, it is clear that right, title and interest in the land automatically vests in the transferor, subject to appeal, on the 1st day of Baisakh next following the date of order. If possession remains undelivered on the 1st day of Baisakh, the Special Officer has been authorised to eject the transferee and to place the transferor in possession of the land. If the

Special Officer is an Executive Magistrate, he shall enforce the delivery of possession and if he is not, he shall apply to an Executive Magistrate and such Magistrate shall enforce the delivery of possession of such land to the transferor.

**17. Notes & Comments on Circular—Procedure for application—Transfer of land by sale.**—Circumstances may arise where in a document, the number of transferors are more than one. It has to be decided whether lands possessed by different transferors will be considered severally or jointly for the purpose of calculating the aggregate area of lands keeping in view the ceiling limit. Land possessed and held by each transferor will have to be considered severally i.e. separately. In course of transfer of land, the transferor transfers land in proportion to his respective share only. The words “a person being the transferor holding not more than 2 hectares of land in the aggregate” on the date of transfer as provided in section 4(1) of the Act has to be carefully looked into.

Rule 3 of the West Bengal Restoration of Alienated Land Rules, 1973 stipulates that “each transfer of land by sale shall form the matter of one application under sub-section (1) of section 4 and every such application shall be in Form A, appended to the rules or in a form substantially similar thereto”. A question may arise whether all the transferors will be compelled to file one application only or they will have to file separate and individual applications, if by only one document, transferors more than one had transferred land and wanted restoration of their respective shares of transferred land. From Rule 3, it transpires that the said rule makes a bar towards filing of more than one application against each transfer of land by sale. From Rule 3, it appears that the said rule does not prohibit filing of only one document for transfers made by more than one of transferees seeking the relief of restoration of land. Therefore, it appears that if by one document, transferors more than one had transferred land, they may file joint application or separate applications for getting restoration of their shares of the land transferred by them.

Section 4(1) of the Act has mentioned “land” which has been defined in section 2(2) of the Act. Section 2(2) has defined “land” which means agricultural land and includes homestead, tank, well and water-channel. The definition of land given in this Act is restricted for the purpose of this Act only. Definitions of “land” given in other Acts such as Land Acquisition Act, 1894, Major Port Trusts Act, 1963, West Bengal Land Reforms Act, 1955 cannot be invoked within the purview of this present Act. It is interesting to note that land does not include tank within the purview of West Bengal Land Reforms Act, 1955. Under section 2(7) of the said Act, “land” “means agricultural land other than land comprised in a tea-garden which is retained under sub-section (3) of section 6 of the West Bengal Estates Acquisition Act, 1953, and includes homesteads but does not include tank”.

**18. Shop room cannot be treated as land for restoration.**—A question arose whether a shop room should be treated as a land coming under

“homestead” within the purview of section 2(2) of the Act. In *Himangshu Kumar Samanta v J.L.R.O., Mahisadal*, (1979)2 CLJ 408 & 416, the Hon’ble Mr. Justice Ganendra Narayan Roy was pleased to observe that “a shop room is not homestead and cannot be treated as land within the meaning of the Act”. Circumstances may arise when by a single document only a few transferors had alienated land but only one or two of them applied for restoration of land but some others were not inclined to apply and remained aloof. Question may crop up, whether, in such an exigency of circumstances, the application for restoration of land will be rejected outright, or it will be allowed, or it will be allowed only, in part. Proper course in such circumstances, may be, that the application for restoration may be allowed only in regard to the specific share of transferred land in respect of which the applicants had been the owners, since other transferors did not prefer application for restoration. The petitioners may be directed to pay only rateable consideration money depending upon their own shares.

**19. Power of State Legislature is within its limit.**—Circumstances may crop up when there may be only one document but a few transferors who had transferred their lands out of distress filed only one application for restoration. On scrutiny of such application, it may be seen that on the date of transfer, some of the transferors had lands above ceiling i.e. more than 2 hectares of lands and some had lands less than 2 hectares of land. In such circumstances, it appears reasonable that application may be allowed only in respect of such transferor who had less than 2 hectares of land on the date of transfer, in aggregate. Application may be disallowed in respect of such transferor applicant who had more lands in excess of 2 hectares in aggregate on the date of transfer. Legislative validity of the present Act and various other matters regarding certain provisions of this Act came up for decision before the Hon’ble Calcutta High Court in C.R. 556 (W) of 1975, C.R. No. 4830-31 (W) of 1974, C.R. No. 4871 (W) of 1974 and C.R. No. 2786 (W) of 1974. In *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 (continued up to page 194), the Hon’ble Mr. Justice Amiya Kumar Mookerji was pleased to deliver judgment in C.R. No. 556 (W) which judgment was ordered to “govern all other cases”. In Paragraph 20, page 188 of the said judgment, it is stated that His Lordship was pleased to observe that “Through the procedure of restoration as laid down in the Act, a person gets back his *rights over land*, where certain conditions are fulfilled. This is not an Act relating to transfer and alienation of agricultural land but on the rights in or over the land. Accordingly, there is no restriction on the part of legislature to include in the definition of land agricultural land as well as homestead, well, tank and water-channel. The subject of legislation, wholly comes within item 18 of List II of 7th Schedule to the Constitution. Therefore, the State Legislature is competent to enact the West Bengal Restoration of Alienated Land Act”.

It was further observed in paragraph 21, page 189 of the above case that “by including homestead, tank, well and water-channel in the definition of land, it cannot be said that the State Legislature has transgressed its legislative powers”.



The present Act was challenged before the Hon'ble Calcutta High Court on the grounds:

- (1) The words of diverse meaning and import have been used in the Act. The result is that essential legislative functions have been delegated to the Special Officer without express provision being made in the Act.
- (2) The provisions of the Act are uncertain and vague.

The Special Officer in applying the provisions of the Act would be in a boundless sea of uncertainty. In paragraphs 28-29, page 190 of the said judgment his Lordship was pleased to observe what guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act, including its Preamble.

In the instant case, sufficient guidelines have been given in the preamble as well as in the order provisions of the Act itself. So, it cannot be said that the provisions of the Act suffer from the vice of excessive delegation of legislative powers. In interpreting the words in the Act, the intention expressed by the words used to be ascertained. The words may have different meanings according to the circumstances with respect to which they are used. The meaning and import of the word "distress" as provided in section 4(1)(a) of the Act came up for discussion and decision before the Hon'ble High Court in the Civil Rules. His Lordship Mr. Justice Amiya Kumar Mookerji was pleased to observe (reported in page 191 of (1976)2 CLJ) in *Chittaranjan Ghosh v State of West Bengal*, that 'It is true that distress has got divergent meanings. But where the purpose of the Act is to give relief to the poor raiyats, the word distress, must have only one meaning, i.e. "economic distress". It is impossible for the legislature to lay down the detailed items of cost. Flexible powers have been conferred by the Act upon the Special Officer to meet the exigencies of the situation'. It was urged before the Hon'ble Court, Calcutta that powers given to Special Officer being wide, the same has reasons to be misused in future. In the judgment of *Chittaranjan Ghosh v State of West Bengal*, at page 193, paragraph 42, it was observed, "Wide powers given to the Special Officer may be considered to be an unreasonable restriction on one's fundamental rights to hold property. Infringement of Article 19 cannot be challenged as the Act has been placed in the 9th Schedule. Besides, an appeal to the Collector has been provided for Constitutional remedy under Article 226 of the Constitution is also not barred. If the power is abused, then, it is the abuse that would be struck down but the possibility of any abuse of power will not render the Statute itself *ultra vires*".

It was also contended before the Hon'ble High Court that fixation of the year 1967 was arbitrary and should be struck down. It was held by his Lordship, Mr. Justice Amiya Kumar Mookerji, that "It is contended that only those transfers made after the year 1967 could be restored under the Act. There is no reason why that particular year has been fixed by the legislature. So, the

fixation of the year 1967 is arbitrary and should be struck down. Legislature understands and correctly appreciates the needs of its own people and the degree of harm which has prompted the enactment of a particular law. So, the selection of that particular year, namely 1967, must be regarded to have been made under a policy of legislature. It is not the province of the court to scrutinise the legislative judgment on such matters".

**20. Sections 4(1)(a) and 4(1)(b).**—Section 4(1)(a) stipulates the condition against which sale should have been made i.e. in need of money for the maintenance of himself and his family or for meeting the cost of his cultivation.

Section 4(1)(b) stipulates alternative conditions where the sale was not effected for the purposes as mentioned above in section 4(1)(a). If the transfer was made after the expiry of the year 1967 with an agreement, written or oral, for reconveyance of the land transferred and if such agreement for reconveyance is proved, petition of restoration will be entertainable under section 4(1)(b) of the present Act. Section 37A of the Bengal Money Lenders Act, 1940 (Bengal Act X of 1940) provides declaration of a transaction as mortgage by conditional sale, which appears to be relevant to be noted.

**21. Section 37A of the Bengal Money Lenders Act.**—Section 37A of the Bengal Money Lenders Act, 1940 provides :

In the case where any loan is secured by a mortgage and the mortgagor ostensibly sells the mortgaged property on any of the conditions specified in sub-section (e) of section 58 of the Transfer of Property Act, 1882 (IV of 1882) then, notwithstanding anything to the contrary contained in the proviso to the said sub-section, the transaction shall always be deemed to be a mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale for the purposes of the said sub-section. This section is retrospective. It has to be attracted even to transactions which were made between the parties even previous to the Amendment Act of 1965 which brought this section—*Abdul Rahim v Kamalapati Mukherjee*, AIR 1972 Cal 54. There is scope of two alternative remedies in a case of agreement, oral or written for reconveyance. Depending upon circumstances and date of transfer after 1967, a person i.e. the transferor can seek relief under section 37A of the Bengal Money Lender's Act claiming the transaction as a loan transaction and/ or a mortgage by conditional sale or he may claim for the relief of restoration of land within the ambit of this Act.

**22. Manner of service of Notice under section 4(2) of the Act.**—Sub-section (2) of section 4 of the Act provides service of notice upon the transferee in prescribed manner, on receipt of an application for restoration. The manner of service of notice as provided in section 4 of the W.B. Restoration of Alienation Land Rules, 1973 are the following :

- (a) By delivering or tendering a copy thereof, endorsed by the Special Officer, to the person concerned, or
- (b) if such person is not readily traceable or, refuses to accept the copy of the notice so delivered or tendered by affixing a copy thereof on

the outer door or some other conspicuous part of the house in which the person ordinarily resides or carries on business or personally works for gain, or

- (c) by sending it to the person concerned by registered post with acknowledgment due at his last known address.

The manner of service of notice as above has similarity with the manner of service and issue of summons as provided in Order V of the Code of Civil Procedure, 1908.

(As amended by Amendment Act, 1976.) Order V rule 10 of the C.P. Code provides :—

Service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the court.

Rule 4(b) of the W.B. Restoration of Alienated Land Rules, 1973 corresponds to Order V rule 17 of the C.P. Code which provides :—

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant (who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time) cannot find the defendant and there is no agent empowered to accept service of summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address (if any) by whom the house was identified and in whose presence copy was affixed.

Rule 4(c) of the present Act corresponds to Order V rule 19A of the Code of Civil Procedure, 1908. The latter provision is however more enlarged and exhaustive. Order V rule 19A(1) of the C.P. Code provides :—

19A(1). "The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant or his agent empowered, to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain :

Provided that nothing in this sub-rule shall require the court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers unnecessary".

Circumstances may crop up when the transferee may keep him out of the way for the purpose of avoiding notice and the Special Officer may have

reason to believe that the transferee is going out so as to avoid service of notice upon him. Rule 4 of W.B. Restoration of Alienated Land Rules, 1973 has not provided such an exigency by framing corresponding sub-rule to meet such condition. Order V rule 20 of the Civil Procedure Code provides, however, mode of *substituted service*, therein which stipulates as follows :—

20(1). Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof, in some conspicuous place in the Court house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

**23. Effect of substituted service.**—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

**24. Where service substituted, time for appearance to be fixed.**—(Relevant sections of Evidence Act, C.P.C. and T.P. Act.)

Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Section 4(3) stipulates that the Special Officer shall receive such evidence as may be adduced by the transferor and the transferee. In *Abdus Sattar v Abdul Jalil*, (1979)2 CLJ 551, it was decided that the Special Officer should record at least the summary of evidence otherwise any appeal made against the decision of Special Officer will be futile. Section 3 of Indian Evidence Act, 1872 defines Evidence. According to the said definition, "Evidence" means and includes—

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of facts under inquiry. Such statements are called oral evidence.
- (2) All *documents* produced for the inspection of the Court. Such documents are called documentary evidence.

Document has also been defined in the said section 3 as "it means any matter expressed or described upon any substances by means of letters, figures or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter".

The modalities of examination of witnesses have been described in Chapter X of the Indian Evidence Act and some of the sections thereof are very important to be considered. A few important sections are reproduced below for ready reference and for expediency:

*Section 135* : The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the direction of the Court.

*Section 137* : The examination of a witness by the party who calls him shall be called his examination-in-chief. The examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination.

*Section 138* : Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

*Section 139* : A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

*Section 140* : Witness to character may be cross-examined and re-examined.

*Section 141* : Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

*Section 142* : Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

*Section 143* : Leading questions may be asked in cross-examination.

It is to be noted that the Law of Evidence is very intricate and wide and the same cannot be described in a narrow compass. Some fundamental principles of law as to admissibility of documentary evidences with corresponding provisions in Order 13 of the Code of Civil Procedure, 1908 (since Amended) reproduced here for ready reference:—

There is a distinction between mere “production” of documents and their “admission in evidence” after being either admitted by the opposite party or ‘proved’ according to law. When documents are produced by the parties before a Court, they are only temporarily placed with the record subject to their subsequent admission in evidence, in due course. Only those documents which are admitted in evidence should form part of the record. Documents “not admitted in evidence” should be removed from the record as soon as the trial is concluded and the same should be returned to the party producing those documents.

Order 13, rule 7 provides:

7(1). Every document which has been admitted in evidence, or a copy thereof, where a copy has been substituted for the original, shall form part of the record of the suit.

(2). Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

A party, who intends to use a document against his opponent party must formally tender it in evidence and prove it unless it is admitted. If no objection is made to the document towards its admissibility in evidence, an endorsement to that effect should be made by the Court with his own hand. The admission of the party or his lawyer may also be usefully recorded on the order sheet and the signature of the lawyer obtained. Such a document may be marked as “exhibit” with the remark “formal proof dispensed with”. If, however, a document is not admitted by the other party, it must be proved in accordance with the law before it is “admitted in evidence”. It must then be signed and endorsed by the Court with his own hands with a statement that the document has been so admitted by the process of “On proof” (Vide Order 13 rule 4 of C.P. Code). The documents which are rejected as being inadmissible must similarly be endorsed with the particulars specified in Order 13 rule 6 of the C.P. Code together with a statement of their being rejected and the endorsement must be signed or initialled by the Court.

An erroneous omission to object the admissibility of a document under the Evidence Act, does not make a document admissible. The Court is bound to consider *suo motu* whether there is any legal objection of the admissibility of the document concerned or not. The essentials of a valid sale (section 54 of Transfer of Property Act, 1882) are the following :

- (1) The seller must be a person competent to transfer.
- (2) The buyer must be a person competent to be the transferee.
- (3) There must be a transfer of ownership.
- (4) The transfer must be in exchange for a price.
- (5) The price must be paid or promised or part-paid and part promised.
- (6) There must be a registered conveyance in case of—
  - (i) tangible immovable property of the value of Rs. 100 and upwards,
  - or
  - (ii) a reversion or other intangible thing of any value.
- (7) In the case of tangible immovable property of a value less than Rs. 100, there must either be —
  - (i) a registered conveyance, or
  - (ii) delivery of property.

**25. Power of Special Officer to reject or to allow restoration is both appealable—Transfer and payment.**—Section 4(4) stipulates the manner as to how the Special Officer shall consider the restoration application. The Special Officer is empowered to grant or reject an application for restoration after considering evidences and after hearing the parties contesting before him. It has been held that an order either allowing an application under section 4(4) of the Act or rejecting an application under the said sub-section are both appealable—*Kamailal Chatterjee v Satyendra Nath Mazumder*, (1977)1 CLJ



23. The Special Officer has to be satisfied that the transfer was made by the transferor within time. He has to be satisfied that the transfer was made being in need of money for the maintenance of the transferor and his family or for meeting the cost of cultivation within the meaning of section 4(1)(a) or alternatively, the Special Officer has to be satisfied that "the transfer was made after the expiry of the year 1967 with an agreement, written or oral for reconveyance of the land transferred, to the transferor" within the meaning of section 4(1)(b).

It will be evident that depending on dates of transfers, filing of petitions may vary, but in no case it can go beyond 4.5.1983. If the conditions stated in section 4(1)(a) or section 4(1)(b) are satisfied, the Special Officer shall make an order of restoration of land in writing restoring the land transferred to the transferor. He shall direct the transferor to pay the amount of consideration which was actually paid by the transferee to the transferor in respect of such transfer. The amount actually paid will have to be arrived at by considering evidences as may be adduced before the Special Officer. If however, there is admission as to the amount actually paid and/ or if there is a consent thereto in respect of the same between the contesting parties, there may not be any requirement of further evidences so as to settle the amount actually paid. The Special Officer will direct payment in equal instalments not exceeding *ten (10)* the amount of consideration money actually paid by the transferee to the transferor in connection with the transfer. The Special Officer shall specify the dates of payments in his order. He will also direct payment of interest on the amount *at the rate of four (4) per centum per annum* from the date of receipt of such consideration and the amount of any compensation for improvement effected to such land allowed by the Special Officer and determined by him in the manner prescribed, less the amount determined in the manner prescribed of the net income from such land of the person in possession of such land as a result of such transfer.

The first of the instalments provided in the order made by the Special Officer under section 4(4) of the Act shall be payable within three (3) months of the order.

Section 4(4) of the Act enjoins upon the Special Officer, the duty of consideration of evidences and hearing the parties before him so as to be *satisfied*. So, consideration of evidences properly appears to be a very vital matter to be adequately looked into by the Special Officer. While Order XIII of the Code of Civil Procedure, 1908 (since amended) deals with production, impounding and return of documents, Order XVIII of the said Code deals with hearing of the suit and examination of witnesses. Although, a Special Officer is a quasi-judicial officer, it is expected that manner of taking and considering of evidences by him will follow fundamental principle of judicial procedure so that there may not be any abuse of power. Civil Rules and Orders, Volume I, [Issued by the Authority of the High Court (Appellate Side)] in Part III, Chapter 17 thereof deals with documents. A few rules from the said Chapter, pages 128-129 are reproduced below for ready reference.

*Rule 379 (Page 128):* Every document "admitted in evidence" shall be annexed to a separate list after being immediately endorsed with the particulars stated in Order 13, r. 4 of the C.P. Code and signed and initialled by the judge in the manner required by that rule and marked with an exhibit number.

*Rule 380 (Page 128):* Documents admitted evidence shall be marked with numerals, 1, 2, 3, etc. and capital letters A, B, C, etc. according as they are admitted on behalf of the plaintiffs/petitioners or defendants/opposite party and separate list of the documents thus admitted shall be prepared by the Bench Clerk in Form (J) 23 and signed by the presiding judge. The documents shall be entered in the lists in the order in which they are admitted and marked. If the capital letters are exhausted, double capital shall be used.

*Rule 381(1) (Page 128):* Where there are two more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, etc. and those of the second A2, B2, C2 etc.

*Rule 382 (Page 129):* When documents are admitted at the instance of the Court and neither party is willing to accept them as evidence on his behalf, they shall be marked I, II, III, etc. Rule 6 of the West Bengal Restoration of Alienated Land Rules, 1973 describes the manner of determination of the amount of compensation for improvement under section 4(4) of the Act. It is stipulated in the said Rule 6 that :—

For the purpose of determining the amount of compensation for improvement under sub-section (4) of section 4, the Special Officer shall have regard to—

- (a) the amount by which the value, or the produce, of the land or the value of that produce, is increased by the improvement effected to such land;
- (b) the condition of the improvement and the probable duration of its effect;
- (c) the labour and capital required for making the improvement.

It is to be noted that the matter of providing compensation for improvement cannot arise, if no improvement was made at all. The Special Officer shall have to take evidences to arrive at a definite conclusion and if he cannot do so, he shall have to make enquiry by himself and shall have to record evidences of persons possessing adjoining lands.

**26. Instalments under section 4(4) of the Act vis-a-vis section 8A.**—Land Utilisation and Reforms and Land & Land Revenue Department. Land Reforms Branch No. 4813—L. Ref., dated 27.8.1976.

It is required that the number of instalments in which the transferor will be required to pay the amount determined under sub-section (4) of section 4 of the West Bengal Restoration of Alienated Land Act, 1973 will not exceed ten (10) and that the instalments will be of equal amount. It is for the Special Officer to decide, having regard to the circumstances of the transferor and the transferee, the number of instalments and the dates by which such instalments are to be paid in each case. According to the proviso to sub-section (4) of

section 4, the first instalment is payable within 3 months from the date of order. But the position has been changed by section 8A which was inserted by the West Bengal Restoration of Alienated Land (Amendment) Act, 1976. (Published in Calcutta Gazette, Extraordinary, Part III, No. 529, dated 1st April, 1976.) It will no longer be necessary for a transferor to make any payment for a period of two years from the 16th October, 1975, the date of commencement of the West Bengal Rural Indebtedness Relief Act, 1975 (West Bengal Act XXXVII of 1975) either for obtaining restoration of possession of his land or where possession has already been obtained towards instalments payable in accordance with the orders of the Special Officer. No interest is payable upon any amount the payment of which has been stayed under this section. In fixing the date of payment of the first instalment, the provisions of section 8A, should, therefore, be kept in view. Instalments will be payable by the transferor to the transferee direct and not through the Special Officer. No process fee is recoverable from the applicant.

**27. Income from the land and power of Special Officer and function.**—It is however to be noted specially that although in terms of the above condition, the transferor was not required to make any payment for a period of two (2) years from the 16th October, 1975 but the Special Officer was required to ascertain the money which was to be paid by the transferor to the transferee within the purview of section 4(4) of the Act. It was to be written only in the order that instalments towards payment of recoverable amount was to be stayed till 15.10.1977. The order for restoration of land should have remained in force, as usual. The manner of determination of the net income under section 4(4) of the Act has been provided in section 7 of the West Bengal Restoration of Alienated Land Rules, 1973, which runs as follows :

The amount of net income from the land of the person in possession of such land shall be determined by the Special Officer under sub-section (4) of section 4 in the following manner :—

- (a) the gross receipts from the land shall first be calculated by multiplying the amount of each kind of the normal produce of the land determined by the Special Officer after such enquiry, as he may think fit to make, by the average rate of price, after taking into consideration the publications of the rates of prices authorised by the Government of each such kind of produce during the period of such possession immediately before the date of the order of restoration;
- (b) 25 per cent of the gross receipts from the land so calculated shall be the net receipts from the land;
- (c) the net income shall then be computed by deducting from the net receipts, any sum payable as land revenue, cesses, rates or taxes on account of the land. It appears reasonable that if the amount of compensation was below the net income obtained by the person in possession of land as a result of transfer, the question of providing any compensation cannot be sustained. In *Chittaranjan Ghosh v State*

of *West Bengal*, (1976)2 CLJ 180-194, it was argued that unfettered and unguided powers were conferred upon the Special Officer by way of section 4(4) of the Act to grant any number of instalments and to fix any period for payment by the transferor. It was argued that period may be extended to 10 years at the choice of Special Officer which provided uncanalised powers upon a Special Officer which should be struck down. It was however decided in the said case, (1976)2 CLJ 192 that "Sufficient guidance has been provided in the section itself. Maximum number of instalments are ten and first instalment shall be payable within three (3) months, from the date of order. If the amount is large, obviously the number of instalments would be spread over a large period in comparison to a smaller amount. So, it cannot be said that power of granting instalments conferred by the Statute upon the Special Officer is unguided and uncanalised. When an Act confers a discretion upon a Public Officer, it is expected that he should exercise his discretion fairly and properly and not arbitrarily or capriciously".

The Special Officer has to satisfy himself also that the transferor did not hold land more than 2 hectares in the aggregate and that transferred the whole or any part of his land by way of sale to a person who was a transferee, as the transferor was in need of money.

**28. Need of money for residential accommodation—Applicable provision of C.P.C.**—In *Sadhan Ch. Koley v Dulali Devi*, (1978)1 CLJ 233, it was held that the need of money for construction and completion of the only residential accommodation comes within the purview of clause (a) of section 4(1) of the West Bengal Restoration of Alienated Land Act, 1973. Inability to construct and complete the only dwelling house for residence and need of money for completion of such house is also a kind of economic 'distress'. It was also held in the above quoted case—*Sadhan Chandra Koley v Dulali Devi*, that the provisions of Code of Civil Procedure, 1908 (as amended) has been made to apply in the present Act by virtue of section 8 of the Act. Section 8 of the Act which deals with the powers of the Special Officer prescribes that "the Special Officer shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents". Provisions of the Civil Procedure Code however do not, in terms apply to proceedings under this Act in respect of joinder of parties. It is to be noted here that Order I of the Code of Civil Procedure, 1908 (amended by Amendment Act, 1976) deals with parties to suits. Or. 1, r. 9 of the above C.P. Code runs as follows:—

*Misjoinder and non-joinder.*—No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party. From the above case, it appears that at least, the provisions of joinder of parties as contemplated in the Civil Procedure Code, 1908, do not apply strictly in respect of proceedings under this Act. Further, in the case of *Sadhan Chandra Koley v Dulali Debi*, an application for restoration was preferred without making the ultimate transferees as parties. An appeal was made against the decision of the Special Officer. The subsequent purchasers joined as appellants at the appellate stage so as to challenge the order of the Special Officer. As the ultimate transferees appeared in the appeal, the plea of defect of parties could not be sustained, as they were bound by appellate order. The purpose of serving notice upon the transferee is to provide him an opportunity to contest the manner of restoration proceeding. As the ultimate transferees appeared as witnesses and were present at the proceeding, before the Special Officer no prejudice was caused to those subsequent transferees who by their own acts not only submitted to the jurisdiction of the appellate officer but also were present when the restoration was opposed. Be that as it may, the contention in respect of defect of necessary parties in regard to the restoration application could not be sustained.

**29. Meaning, ambit and scope of the words "before the commencement of this Act".**—In section 4(1) of the Act came up for decision in the Civil Rule—*Chittaranjan Ghosh v State of West Bengal*, (1976) 2 CLJ 180 at p. 193 and it was decided in the said rule that—"It is submitted that the word 'before' occurring in section 4(1) of the Act means in its grammatical sense any time before May, 1973. It gives power to the Special Officer to choose any person at any point of time who was a transferor holding not more than two hectares of land. Such transferor may hold two hectares of land at any point of time before the commencement of the Act. If the Special Officer has to apply the provisions of the Act, he has to give a different meaning of the word 'before' within its grammatical meaning. Such a function is an essential legislative function. The word 'before' should be read along with the entire provisions of section 4(1). Only those transactions made after the year 1967 could be restored under the Act. There is no uncertainty or ambiguity in applying the provisions of the Act with respect to a transferor holding two hectares of land before the commencement of the Act". As it was contended at the time of hearing of the above Civil Rule that only transfers made after the year 1967 could be restored under the Act and there was no reason why the particular year 1967 had been fixed by the Legislature. The fixation of the year 1967 was therefore arbitrary and should be struck down. Against such background of contentions raised towards fixation of the year 1967, it was held "Legislature understands and correctly appreciates the needs of its own people and the degree of harm which has prompted the enactment of a particular law. So, the selection of that particular year, namely, 1967, must be regarded to have been made under a policy of legislature. It is not the province of the Court to scrutinise the legislative judgment on such matters."

**30. 'Form A'.**—'Form A' has been framed as an Appendix to West Bengal Restoration of Alienated Land Rules, 1973 in terms of sub-rule (1) of Rule 3. The said "Form A" stipulates the form of application of restoration of alienated land. Item No. (V) of the said Form A prescribes that the application should state total area of land held by the applicant or applicants on the date of the transfer of the land in question by sale.

**31. Special Officer is neither a court nor a civil court.**—Section 8 of the Act, if clearly understood will signify that the Special Officer will have the powers of a civil court under the Code of Civil Procedure only for the limited purpose of receiving evidences, administration of oaths so as to enforce the attendance of witnesses and for compelling the production of documents before him. The provisions of Civil Procedure Code has no general application to this Act which is a Special Act. The Special Officer is neither a civil court nor a court. He is a quasi-judicial officer or authority. The provisions of Civil Procedure Code apply to this Special Act only for the limited purpose of receiving evidences as provided in section 8 of the Act. The disputed question of title cannot be traversed and decided by a Special Officer which entirely is the domain of a civil court. In *Panchanan Singh v State of West Bengal*, (1977)1 CLJ 353-354, 357, which was a case for eviction under West Bengal Public Land Eviction of Unauthorised Occupants Act, 1962, his Lordship Mr. Justice Nirmal Chandra Mukherji and his Lordship Mr. Justice Bankim Chandra Ray had been pleased to observe that "Disputed question of title can only be gone into by a civil court and not by a competent authority under the W.B. Public Land (Eviction of Unauthorised Occupations) Act, 1962". The said principle of law of the above case holds good also in respect of limited powers of a Special Officer under the present Act which is the subject of consideration. In another case *Asoke Kumar Majumdar v State of West Bengal*, 80 CWN 388, it was held that "a quasi-judicial tribunal cannot claim or exercise the inherent power of a civil court unless the statute confers all the powers of a civil court in the said quasi-judicial tribunal". It has been held in another case, i.e. *Indira Devi v State of West Bengal*, AIR 1967 Cal 469 that "quasi-judicial Tribunal cannot claim or exercise an inherent power of a civil court, unless a statute conferred all the powers of civil court upon such a Tribunal. Such a Tribunal cannot be equated to a civil court except on the authority of law. Unless a Statute conferred upon such quasi-judicial Tribunal, all the powers of a civil court either expressly or by implication, the inherent powers of civil court cannot be exercised by such Tribunal". In another leading case i.e., *Chapala Bala Adhikary v Monoranjan Das*, (1975)2 CLJ 448, 456, it was held that a quasi-judicial Tribunal is bound to act in consonance with the fundamental principles of justice and the civil court may have jurisdiction if there is total disregard of fundamental principles of justice and the civil court may have jurisdiction if there is total disregard of fundamental principles of justice. It is a settled principle of law that the exclusion of the jurisdiction of civil court may not be readily inferred. The exclusion must be expressed clearly or implied explicitly. Although the jurisdiction of a civil court is cut



down, still it will have its jurisdiction to examine into the cases where the provisions of the Act have not been observed or the statutory Tribunal did not act in conformity with the fundamental principles of judicial procedure—*Secretary of State v Mask*, 44 CWN 307; *Dewji v Ganapatlal*, AIR 1969 SC 560.

According to section 2(2) of the Act “land” means agricultural land and includes homestead, tank, well and water-channel. It is therefore unnecessary for one to consider what quantity of non-agricultural land was being possessed by the transferor at the material date of selling of his land to the transferee for valuable consideration.

**32. Date of transfer—What does it mean.**—The words “the date of such transfer” occurs in section 4(1)(b) of the Act. The said expression i.e. “the date of transfer” has not been clearly indicated and definition of the same has not been provided in the Act. The question necessarily arises as to what should be taken as the date of transfer, date of registration of a deed or the date of its execution or when the copy of the deed in question was entered in the register. A deed might have been registered say, on 10.11.1968, although it was executed before 1.1.1968. A deed might have been executed before 5.5.1977 but registered after 5.5.1977. A document might have been copied in the Register after 5.5.1977 but it might have been executed and registered before 5.5.1977. The question is posed as to what particular date should be taken as “the date of such transfer” within the ambit and meaning of section 4(1)(b) of the Act. The present Act deals with only one mode of transfer i.e. sale of land made due to distress. The definition of land has been provided in section 2(2) of the Act. Under section 54 of the Transfer of Property Act, 1982, sale of tangible immovable property of the value of one hundred rupees and upwards can be made only by a registered instrument. The question will necessarily arise as to the date when the transfer i.e. sale was completed. Now, delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. In case of a sale, ownership does not pass or is not transferred until registration is effected. In consideration of section 47 of the Indian Registration Act, the title embraces to the date of execution for the purposes of priority, once registration is effected. On the other hand, it does not follow necessarily, that property passes as soon as the instrument of sale is registered. The true test is the intention of the parties which should be gathered from the attending circumstances. Registration is *prima facie*, proof of transfer but it is no proof of an operative transfer if any condition was imposed earlier as to delivery of deed or as to payment of consideration. Seller may, in some cases, retain the deed till payment of price. In that case, there is no transfer till the price is paid and the deed is delivered. There are only two modes of transfer by sale and these are the following :—

- (1) Registered instrument,
- (2) Delivery of possession.

The first overlaps the second. Only, in case of tangible immovable property of a value less than Rs. 100 simple method of delivery of possession has been provided. In all other cases, a registered instrument is necessary.

The payment of price is not necessarily a *sine qua non* to the matter of completion of sale. If the intention is that the property should pass on registration, the sale is complete as soon as the deed is registered, whether price has been paid or not. This becomes clear from the definition of sale as given in section 54 of the T.P. Act which reads as : “Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised”. From the above background, it may perhaps be said safely that intention of the parties will have to be observed, although date of registration of the deed of sale *normally* may be taken to be the date of transfer.

A contention was raised before the Hon’ble High Court, Calcutta that the provisions of this Act under consideration were uncertain and vague. In *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 190 at p. 191. His Lordship Hon’ble Mr. Justice Amiya Kumar Mookerjee was pleased to hold the following observations :

“Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the court should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act, including its Preamble.

Where the provisions of the Act are open to diverse construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. The probability of misuse of law in its application cannot be presumed. The court instead of striking down the law itself, may set aside or quash the particular order of the Special Officer if it is found that the application of the law in the facts and circumstances of a particular case is wholly illegal or without jurisdiction.” The word “distress” which did occur in section 4(1)(a) was discussed in the aforesaid judgment and it was observed that :

“It is true that the word ‘distress’ has got divergent meanings. But where the purpose of the Act is to give relief to the poor raiyats, the word, distress, must have only one meaning, i.e. economic distress.” In *Sadhan Chandra Koley v Dulali Devi*, (1978) 1 CLJ 236, it was held that the need of money for construction and completion of the only residential accommodation was well within the ambit of clause (a) of section 4(1) of the Act, the words “in distress or” has been however omitted by the Act of 1980.

**33. Cost of cultivation.**—The words “for meeting the cost of his cultivation” occurs in section 4(1)(a) of the Act. What items should only be considered as items of cost have not been stated and detailed clearly either in the Act or in the Rules. Regarding cost of cultivation it was decided in the judgment i.e. *Chittaranjan Ghosh v State of West Bengal*, (1976) 2 CLJ 180 at p. 191 that “It is impossible for the legislature to lay down the detailed items of cost. The

cost of cultivation of an owner of less than two hectares of land, obviously, does not include the cost of either of a costly tractor or the cost of diesel or electric pumps for the purpose of irrigation. In West Bengal, the cost of cultivation varies from one district to another. It depends upon the nature and character of the soil, the availability of the labour, facilities of irrigation, cost of manures and similar other factors. Flexible powers have been conferred by the Act upon the Special Officer to meet the exigencies of the situation."

**34. "Family"—what does it mean under section 4(1)(a) of the Act.**—The meaning and dimension of "family" has not been defined either in this Act or in the Rules (West Bengal Restoration of Alienated Land Rules, 1973). In *Chittaranjan Ghosh v State of West Bengal*, it was held "The provisions of the Act shall not be applicable if the conditions enumerated in section 4(1) are not fulfilled. When one of the conditions is that, if the transfer was made for "maintaining himself and his family" in that case, the cost of maintaining himself would not be sufficient. It must be of himself and his family both. It is the policy of legislature and it is not for the court to find out the reasons behind the legislative policy. It is impossible to determine the limit of a "family" with clear precision. The question as to who is a member of a "family" depends upon the facts and circumstances of each and every case. The intention of the Act is to give relief to the raiyats, so the widest amplitude of the meaning of the word "family" should be given. A widowed sister wholly dependent upon her brother or even a son-in-law who since his marriage is living permanently as a "son" with the family of his father-in-law, may be considered as a member of a family although normally he belongs to another family. Besides, there are many cases which have to be judged by the Special Officer on taking into account the facts and circumstances of each case and after exercising his own judgment". It appears therefore from the above judgment that the word "family" should be given wide meaning. It is also to be realised that facts and circumstances of each case will have to be considered by the Special Officer in each individual case to determine the question of family.

The provision of granting of instalments by Special Officer under section 4(4) of the Act is not unguided or uncanalised. Section 4(4) of the Act stipulates that on satisfaction by the Special Officer about transfer within time and for the purpose under specified conditions and time as made under sub-section (1)(a) or (b) of section 4 of the Act, the Special Officer shall make an order in writing about restoration of the land transferred to the transferor who will be directed to pay amount in such number of equal instalments which should not exceed ten and by such dates as may be specified in the order. It is expected that if the amount is large, the number of instalments should be spread over a long period. It is also expected that when an Act provides a discretion upon a Public Officer say, upon a Special Officer, he is expected to exercise his discretion properly with due fairness and would also avoid arbitrary method—*Chittaranjan Ghosh v State of West Bengal*, (1979)2 CLJ 180.

**35. Power of Special Officer—Meaning of the words "Transferor", "Transferee" and consideration.**—The proceeding under section 4 of the Act is a quasi-judicial one and the Special Officer is required to pass a reasoned order under sub-section 4(4) as to whether an order for restoration shall be made or not. He has to decide whether power conferred on him by section 4 shall be exercised or not. The power of Special Officer under section 4, includes a power either to allow the application or to reject it. The Special Officer is a *persona designata*. He has no inherent power. An order rejecting an application as well as an order allowing an application under section 4(4) of the Act, will be both appealable orders. Section 4(1) does not provide for reconveyance but only provides for restoration. The provision of appeal in this Act, is not self-contained and exhaustive. An express provision for remand is not necessary. In the matter of rejection under section 4(4) no exercise of inherent power arises—*Kanailal Chattopadhyay v Satyendra Nath Majumdar*, (1977) 1 CLJ 23-25. The words "transferor", "transferee" and "consideration which was actually paid by the transferee to the transferor have been explained and defined under the term *Explanation*, to sub-section 4(4) of the Act. The word "transferor" referred to in this Act means the first transferor or any subsequent transferor between the expiry of the year 1967 and 20.8.1981 and includes the heirs of such first or subsequent transferor. It is to be noted that the word "transferor" includes also heirs of the first transferor. It transpires that heirs of a transferor shall have the right to make an application for restoration if the transferor dies, provided the petition is made within prescribed period on due compliance of other formalities. It is not however clear if a petition for restoration will be at all maintainable or not, when some of the heirs want to get restoration but some are unwilling to join and/or do not want to proceed with such an application. Every such case depends upon circumstances of each case and has to be disposed of, on merit, considering the facts and circumstances of each case.

Definition of the term "transferee" as made in section 4(4)(ii) of the Act is that the word "transferee" shall mean where the land is in the possession of any person other than the first transferee by virtue of a subsequent transfer such subsequent transferee and shall include the heirs of such transferee. Therefore, it is clear that a subsequent transferee will be deemed as a transferee under the provisions of this Act. If after the death of a transferee, an application is filed against the heirs of such deceased transferee and a notice is served upon such heirs, the said notice is quite maintainable. The words "the amount of the consideration which was actually paid by the transferee to the transferor" appearing in section 4(4) of the Act has been clearly explained by sub-section 4(4)(iii) of the Act itself, later. It has been described and explained that the expression "consideration which was actually paid by the transferee to the transferor" shall mean where there was more than one transfer, the amount which was paid by the first transferee to the first transferor. So, the amount paid by the subsequent purchaser to the first transferee as a result of such later transfer cannot be deemed as consideration which was actually paid by the transferee to the transferor.

It is to be noted that in terms of section 4, sub-section (5) of the said section, any evidence adduced by a transferor varying, adding to, or subtracting from, the terms of the sale deed to prove the necessity of purpose for which the transfer was made or the amount of consideration actually paid by the transferee to the transferor, shall be admitted by the Special Officer in course of continuance of hearing of cases, irrespective of anything of a contrary nature thereto contained in the Indian Evidence Act, 1872 (Act I of 1872). Therefore, irrespective of any recital in the deed about consideration money purpose, necessity of transfer, the same can be challenged later by the transferor by adducing contrary evidences varying, adding to or subtracting from the terms of the sale deed and provisions of Indian Evidence Act shall never be a bar to that. In order to arrive at a definitive conclusion as to the real nature of transactions, such evidences even contrary to the provisions of Indian Evidence Act may be admitted, "if at all the same is placed and adduced by the transferor". It has been very recently observed by Hon'ble Mr. Justice, M.N. Roy in a case reported in 85 CWN 967, that "sub-section (5) of section 4 of West Bengal Restoration of Alienated Land Act, 1973, the Act allowed the applicant liberty to lead evidence, varying, adding to or subtracting from the terms of the sale deed to prove the necessity or purpose for which the transfer was made or the amount of the consideration actually paid and such evidence is admissible notwithstanding anything contained in the Evidence Act—*Fuljahari Devi v State of West Bengal*, 85 CWN 967. It will be expedient and material to consider some provision of Indian Evidence Act (1 of 1872) relating to documents.

*Section 59 : Proof of facts by oral evidence.*—All facts, except the contents of documents or electronic records, may be proved by oral evidence.

*Note :—*This section is rather badly drafted. Certainly, contents of document can be proved by oral evidence when evidence of their contents is admissible as secondary evidence. A fact or title of a deed even, can be proved by oral evidence, if the same is worthy of credit and is sufficient, although no documentary evidence is produced.

*Section 61 : Of documentary evidence.*—Proof of contents of documents.

The contents of documents may be proved either by primary or by secondary evidence.

*Section 62 : Primary evidence.*—Primary evidence means the document itself produced for the inspection of the Court.

*Section 63 :—Secondary evidence.*—Secondary evidence means and includes,—

- (1) Certified copies.
- (2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.
- (3) Copies made from or compared with the original.
- (4) Counterparts of documents as against the parties who did not execute them.

(5) Oral account of the contents of a document given by some person who has himself seen it.

*Section 91 : Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.* When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

*Section 92 : Exclusion of evidence of oral agreement.* When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

The principles of law underlying this section is that when a transaction has been put into writing by the agreement of the parties or by requirement of law, no outside evidence is admissible either to prove the transaction independently or to contradict, vary, add to, or subtract from, the terms of the document. The contents of such document may however be proved by primary or by secondary evidence. It was contended before the Hon'ble Court, Calcutta that the Indian Evidence Act was a Central Act made by the Indian Parliament and provisions of sub-section 4(5) of the present Act was contrary and adverse to the provisions of law of Indian Evidence Act, a Central Act and so the sub-section 4(5) of the present Act should be obliterated. In *Chittaranjan Ghosh v State of West Bengal*, (1976)2 CLJ 180 such contentions about the purported repugnancy to Indian Evidence Act was advanced. The judgment passed by His Lordship, Mr. Justice Mukherjee, was of the following manner as reproduced below :

"The question of repugnancy arises in a case where the law made by the Parliament and law of other cases made by the State Legislature occupy the same field. Sub-section (5) of section 4 is not repugnant to section 61 of the Evidence Act which lays down that the contents of a document may be proved either by primary or by secondary evidence. Sub-section (5) of section 4 of the Act provides that apart from primary evidence, secondary evidence may be adduced by the transferor varying, adding to or subtracting from, the terms of the sale deed to prove the necessity or purpose for which the transfer was made or the amount of consideration actually paid by the transferee to the transferor and such evidence shall be admitted. Secondary evidence enumerated in that sub-section has no general operation to all sale deeds but it is restricted only to those transfers



which fall within the purview of the said Act. Therefore, the said provisions are ancillary to the exercise of legislative power in respect of Entry 18 of List II and not repugnant to the Central Act, viz., the Evidence Act”.

It has been further decided by the said judgment that “Alienation is the act of transferring of ownership of one to another. By alienation person’s right in land is transferred to another. Restoration means bring back to a thing in its previous position.”

On a close reading of different sub-sections of section 4 of the Act as well as section 5 of the Act, it will be evident that only restoration has been dealt with under the different schemes of the Act and not alienation. Section 4(6)(a) of the Act provides that where the Special Officer makes an order for payment under sub-section (4), he shall direct where such land has been sold before or after such order is made, in execution of a decree or of a certificate under the Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913) against the transferee the whole of the amount payable under the said order, or such part of it as may then remain due, shall become due and payable at once. Upon such payment, sale in execution of the decree or the certificate shall be set aside and the amount paid shall be applied towards satisfaction of the decree or the certificate, as the case may be. It will be therefore evident that there is no scope of granting of instalments under sub-section 4(6)(a) and the whole of the amount shall be due and payable at once. The Special Officer shall accordingly pass out directions for payment of dues, at once.

**36. Scope of sections 4(6)(b) and 4(6)(c).**—Section 4(6)(b) of the Act provides that when the Special Officer makes an order for payment under sub-section (4), he shall direct that in the case where such land has been alienated by the transferee before the date of such order by means of a *bona fide* lease for valuable consideration or a usufructuary mortgage, such payment shall be made to the transferee and the person in possession of such land as a result of such transfer in such proportion and in such manner as may be determined by the Special Officer and specified in the order. So, proportionate payment to the transferee and the person in possession has been prescribed under section 4(6)(b) of the Act.

Section 4(6)(c) of the Act provides cases other than cases under sections 4(6)(a) and 4(6)(b). The same provides that in other cases, such payment shall be made to the transferee :

Provided that if such land is subject to a *bona fide* mortgage other than a usufructuary mortgage and such mortgage was executed after the transfer of such land referred to in sub-section (1), the Special Officer shall direct that such instalments shall first be paid to the mortgagee until the amount due under the mortgage as determined by the Special Officer is paid off and that thereafter any instalments or part thereof still remaining due shall be paid in the manner provided in clause (a), clause (b) or clause (c) of sub-section 4(6), as the case may be.

The proviso under sub-section 4(6)(c) deals with *bona fide* mortgage other than a usufructuary mortgage. Instalments can be allowed in such cases and the Special Officer shall follow the principles of law as stipulated in the proviso. He shall direct that instalments shall first be paid to the mortgagee until the amount due under the mortgage is paid off. The proviso deals with *bona fide* mortgage only and not sham mortgage. The mortgage must not be a usufructuary mortgage. The meaning and purport of the word *bona fide* is to be considered at this juncture. The word *bona fide* means in good faith or genuinely. It conveys absence of intent to deceive—*Subhadram Devi v Sunder Dass*, AIR 1965 Punjab 188.

According to Wharton’s *Law Lexicon*, *bona fide* means with good faith, implying the absence of all fraud or unfair dealing or acting, whether it consists in simulation or dissimulation.

Chapter IV of the Transfer of Property Act, 1882 deals with the terms mortgage, mortgagor, mortgagee, mortgage-money, mortgage-deed in section 58(a) of the said Act, which are reproduced below :

*Mortgage :*

A mortgage is the transfer of specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

‘Mortgagor’ means the person who makes the mortgage. It includes a subsequent transferee of the mortgaged property under section 59A of the Transfer of Property Act, references to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively. The definition of the word ‘mortgage-deed’ under Indian Stamp Act, 1882 may be considered, now, under section 2(17) of Indian Stamp Act, 1899, a mortgage-deed includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property. The word “engagement” is not defined in the Stamp Act or in the Contract Act, but it must mean “a contract” as defined in section 2 of the Contract Act. The word “engagement” occurring in section 2(17) cannot, therefore, be equated to a mere assurance or undertaking. It is to be taken to mean a binding and enforceable contract, when the context is considered. There is fundamental difference between a simple mortgage and a usufructuary mortgage.

Section 58(b) of Transfer of Property Act defines simple mortgage as:—

Where, without delivering possession of the mortgaged property, the mortgagor finds himself personally to pay the mortgage-money, and agrees,

expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgage a simple mortgagee.

*Usufructuary mortgage* has been defined under section 58(d) of the Act, as follows :—

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lien of interest, or in payment of the mortgage-money, or partly in lien of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee. It will be evident that in simple mortgage there is no delivery of possession of the mortgaged property but in case of usufructuary mortgage, the mortgagor has to deliver possession or has to bind himself to deliver possession of the mortgaged property to the mortgagee. Section 4(7) of the Act provides that the amount ordered to be paid by instalments under sub-section 4(4) shall be a charge on the land in respect of which the order under the said sub-section was passed. So, in case of non-payment of instalments, there is provision for enforcement by way of a charge eventually by way of sale.

Charge has been defined under section 100 of the T.P. Act as follows :—

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

**37. Difference between “Charge” and “Mortgage”.**—There is of course, fundamental difference between a “charge” and a “mortgage”. Whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property—*Shiva Prasad v Beni Madhab*, AIR 1922 Patna 529; *D.S.Mote v A.C. Datar*, (1974)2 SCC 799.

A charge may be created by act of parties or by operation of law. But, a mortgage can be created only by act of parties.

A mortgage is a security for the payment of debt. A charge is a security for payment of money. The creation of mortgage always implies the existence of a debt. The creation of charge does not necessarily imply the existence of a debt.

In case of a mortgage there may be a covenant to pay but in case of a charge, there is no covenant to pay. A mortgage may be a security for the performance of an engagement giving rise to a pecuniary liability; such is not the case with that of a charge.

A mortgage includes a transfer of an interest in specific immovable property. A charge does not operate to transfer to the charge-holder any interest in property. It merely provides the charge-holder the right to have a claim satisfied out of a particular property without transferring that property to him. Only under a decree for sale an interest in the property is transferred in the case of a charge.

A mortgagee can follow his security into whatever hands it goes but a charge-holder cannot do the same. Defence of purchase for value without notice is wholly untenable against a mortgage but the same is a good defence in respect of a charge. A mortgagee can follow a *bona fide* purchaser for value without notice, but a charge-holder cannot do so. No particular form or manner of words is necessary to create a charge. Intention is to be gathered from the document itself—*M.C. Chacko v State Bank of Travancore*, AIR 1970 SC 504.

**38. Scope of sub-section (8) of section 4.**—Sub-section (8) thereof provides that where any land in respect of which an order under sub-section (4) is made, is, after the date on which such order takes effect under sub-section (1) of section 5, sold in execution of a decree or of a certificate filed under the Bengal Public Demands Recovery Act, 1913, against the transferor to whom restoration had been made, or otherwise transferred by him, the whole of the amount payable under such order then falling due shall at once become due and payable. Section 8A, which was inserted by section 2 of the W.B. Restoration of Alienated Land (Amendment) Act, 1976 (W.B. Act XX of 1976) provides stay of payments which is significant to be noted. The Special Officer shall have to consider that in terms of section 8A of the Act from 16.10.1975 till two (2) years therefrom, the transferors shall not be required to make any payment for obtaining restoration of possession of his land by way of instalments. The Special Officer will have to determine, however, the amount of recoverable money as per rules. He will have to write in his order that payment of money recoverable by way of instalments will remain stayed till 15.10.1977. The order for return of land shall however, as a matter of course remain in force, as usual.

The Special Officer acting under section 4(4) of the Act will direct the transferor to pay the amount of consideration money which was actually paid by the transferee to the transferor together with interest thereon. The manner of actual payment of instalments by the transferors to the transferee has not been reproduced in the Act. Normally, such payment of instalments could

have been made in person by exchange of receipt or by way of money order. But, the Act itself, is silent over the same. As the Special Officer is not a full-fledged court, there may not be any provisions for depositing money with such tribunal i.e. with that of the office of the Special Officer.

**39. Homestead on non-agricultural land does not come within the meaning of land and cannot fulfil the requirement of section 4 of the Act.**—The Act is directed to provide relief to the people engaged in agricultural land in the matter of distress sale or similar end. Land has been strictly defined to agricultural lands within the ambit of definitions clause. The West Bengal Restoration of Alienated Land Act, 1973 does not intend to reopen all transfers of all properties. The term “homestead” when included towards the meaning of the term “land” means the homestead of an agriculturist. It does not mean any and every structure on non-agricultural land—*Kumar Dhara v Kamala Kanta Dikshit*, (1982)2 Cal HN 1.

**40. Proviso to section 4(5) of the Act, evidence against recital in the deed, effect.**—Notwithstanding the provisions in section 4(5) of the Act, if an application stood rejected by the Special Officer only in consideration of the written recital about the purpose of transfer recorded in the sale deed overlooking the evidence adduced by the transferor, the proviso to the said section gives liberty to the transferor to make a fresh application within the prescribed period and upon such application, the Special Officer shall re-hear the matter and consider such evidence as may be adduced by the transferor and the transferee before passing a fresh order. On the construction of the provision of the said section and the proviso thereto the court held that the recital in the deed should not be taken to be as sacrosanct and that the parties have the liberty to adduce evidence to the contrary from what has been given out by way of recital in the deed—*In re Atul Chandra Ghosh*, 90 CWN 711.

In another subsequent case it was held that, no doubt the amended Act entitles the transferor to adduce evidence in variation with the recital in the deed of transfer, yet the different purpose must be established. The purpose of sale as recited in the disputed deeds must be found not to be the real purpose only after rejection of the said contrary evidence, but till it is done the findings in the matter remain vulnerable—*Gobinda Chandra Manna v Paresh Chandra Paramanik*, 92 CWN 1014.

**41. Power of Special Officer to take evidence—Special Officer if a court within the meaning of Evidence Act.**—On the question of the powers and duties of a Special Officer of receiving evidence, administering oaths, enforcing the attendance of witness and compelling the production of documents it was held that a Special Officer while exercising his jurisdiction under the Act has all the powers as that of a court and the proceedings before him u/s. 4 of the said Act being thus a judicial proceeding, the provisions of the Evidence Act would become applicable to such proceedings—*Yakub Sheikh (dead) represented by his heirs Anwar Begum v Hasina Khatun*, 92 CWN 307.

**S. 5. Effect of order of restoration of land.**—(1) When the Special Officer makes an order under sub-section (4) of section 4 restoring any land to the transferor, such order shall have effect on the 1st day of *Baisakh* next following the date of the order.

(2) From the date on which an order under sub-section (4) of section 4 takes effect under sub-section (1) of this section, the right, title and interest in the land accruing to the transferee or the person in possession as a result of the transfer referred to in sub-section (1) of section 4 shall, subject to the provisions of sub-section (7) of that section, be deemed to have vested in the transferor free from all encumbrances, if any, which have been created after the date of such transfer.

(3) <sup>1</sup>If on or before the date on which an order made under sub-section (4) of section 4 takes effect under sub-section (1) of this section, the person in possession of the land as a result of the transfer referred to in sub-section (1) of section 4 has not delivered possession of such land to the transferor, the Special Officer may of his own motion, and shall, on the application of the transferor, execute the order in such manner as he considers expedient, and may,—

<sup>2</sup>(a) if he is an Executive Magistrate, enforce the delivery of possession of such land to the transferor with the help of the police, or

<sup>2</sup>(b) if he is not an Executive Magistrate, apply to an Executive Magistrate having jurisdiction and thereupon such Magistrate shall enforce the delivery of possession of such land to the transferor with the help of the police.

#### NOTES

**1. Scope of the section.**—In section 5 of the W.B. Alienated Land Act, 1973, the result of order in respect of restoration of land has been provided. Whenever the Special Officer passes an order of restoration of any land to the transferor the said order shall be effective on the 1st day of *Baisakh*, next following the date of the order i.e. the order will come into force from the first day of *Baisakh* of the next Bengali year. The same will have to be mentioned in the order passed by the Special Officer. Sub-section 5(2) of the Act provides that as a result of order passed as to restoration of land, right, title and interest in the land accruing to the transferee or the person in possession as a result of transfer referred to in sub-section (1) of section 4 should be deemed to have vested in the transferor from the date on which an order under sub-section (4) of section 4 takes effect under sub-section (1) of the said section 4 of the Act. The vesting of right, title and interest in the land in

1. Sub-section (3) of section 5 had been substituted by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980 (Act LVI of 1980), coming into effect from 20.8.1981. In view of the Scheme and object of the West Bengal Restoration of Alienated Land Act, 1973, a liberal interpretation of the term “land” should be adopted. Land as defined in section 2(2) of the said Act means agricultural land and includes homesteads, tanks and water-channel—*Fuljahari Devi v State of West Bengal*, 85 CWN 967.

2. Added, *ibid*



favour of the transfer will be, of course, free from all kinds of encumbrances. An encumbrance, if it is created, after the date of transfer, the same will be merged with the right of obtaining transfer.

Under sub-section 5(3) of the Act, if the person in possession of the land does not deliver possession to the transferor in favour of whom an order of restoration of land has been passed and to whom the right, title and interest in the land has been vested by virtue of such order of the Special Officer, the Special Officer may, out of his own motion, eject such person and put such transferor in possession of the land in question. The person aggrieved who may not get possession of the land i.e. the transferors can also file a petition before the Special Officer seeking possession of restored land and on getting such petition, the Special Officer shall, as a matter of course, eject such person in illegal possession and shall place such transferor in possession of such land in respect of whom an order of restoration was passed. It appears that upon the application of the transferor for obtaining restoration, the Special Officer cannot by any means whatsoever, deny affording of possession to the transferors. He shall have to place the transferor in possession of such land. There cannot be any question of refusal by the Special Officer, upon such application. A Special Officer may be an Executive Magistrate himself. In such case, he shall himself enforce the delivery of possession. If necessary, he can proceed with the provisions of section 145, Cr.C.P.; rule 14 of the West Bengal Land Reforms Rules, 1965 runs as follows:

A Revenue Officer shall, in executing a final order under sub-section (5) of section 14C follow, as far as possible, the procedure laid down in the Code of Civil Procedure, 1908, relating to execution of decrees. It is not clear from the Act itself, as to what procedure will have to be adopted if the person in possession does not want to vacate or to deliver possession to the transferor. No prescribed manner of ejectment and affording possession to the transferors has been made out in the Act itself. Section 8 of the Act provides that the Special Officer shall have all the powers of a civil court under the Code of Civil Procedure, 1908, for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents. In *Sudhangshu Kumar Aich v Kangal Chandra Maity*, 69 CWN 908, it has been decided that the Special Officer is neither a court nor a civil court and provisions of Civil Procedure Code, in general do not apply to the present Act. In *Kanailal Chattopadhyay v Satyendra Nath Mazumder*, (1977)1 CLJ 23, it has been held that Special Officer is a quasi-judicial officer. In *Asoke Kumar Mazumdar v State of West Bengal*, 80 CWN 388-393, it has been held that a tribunal cannot exercise the inherent power of a civil court.

**2. Procedure for effecting restoration of possession under the West Bengal Restoration of Alienated Land Act, 1973.**—[Government of West Bengal Land Utilisation and Reform and Land and Land Revenue Department. Land Reforms Branch Memo. No. 2734 (18) L.Ref., dated 11.7.1978.]

It has been laid down in section 5 of the Act that the order of restoration passed by the Special Officer under sub-section (4) of section 4 shall have effect on the 1st day of Baisakh next following the date of the order. Under sub-section (2) of section 5 of the Act, from the 1st day of Baisakh next following the date of the order, the right, title and interest of the land shall be deemed to have vested in the transferor free from all encumbrances. According to sub-section (3) of section 5 of the said Act, the Special Officer may, of his own motion and shall, on the application of the transferor, eject the transferee and place the transferor in possession of the land, if delivery of possession of the land has not been made to the transferor by the transferee on or before the 1st day of Baisakh next following the date of the order.

2. From the above, it is clear that right, title and interest in the land automatically vests in the transferor, subject to appeal under section 7, on the 1st day of Baisakh next following the date of order. If possession remains undelivered on the 1st day of Baisakh, the Special Officer has been authorised to eject the transferee and to place the transferor in possession of the land. If the Special Officer is an Executive Magistrate, he shall enforce the delivery of possession and if he is not, he shall apply to an Executive Magistrate and each Magistrate shall enforce the delivery of possession of such land to the transferor.

3. Necessary injunctions may accordingly be given to all concerned. (Amendment—Section 5 has similarity with such Circular.)

**3. Encumbrance—its meaning.**—‘Encumbrance’ means a claim, lien or liability attached to property, as a mortgage, a registered judgment etc. (*Wharton’s Law Lexicon*).

‘Encumbrance’ means burden or charge upon property—*Brijnandan Singh v Jamuna Prasad*, AIR 1958 Patna 589.

Section 2 (6A) of the West Bengal Land Reforms Act, 1955 defines “encumbrance” as any lien, easement or other right or interest created by a raiyat on his holding or in limitation of his own interest therein, but does not include the right of the bargadar to cultivate the land of the holding. The word “encumbrance” in section 16 of Land Acquisition Act means interests in respect of which a compensation can be claimed—*Collector of Bombay v Nasserwonji*, AIR 1955 SC 298.

According to section 2(h) of the West Bengal Estates Acquisition Act, 1953, “encumbrance” in relation to estates and rights of intermediaries therein does not include the rights of a raiyat or of an under raiyat or of a non-agricultural tenant but shall, except in the case of land allowed to be retained by an intermediary under the provisions of section 6, include all rights or interests of whatever nature, belonging to intermediaries or other persons, which relate to lands comprised in estates or the produce thereof.

“Encumbrance” as defined under section 161 of the Bengal Tenancy Act, 1885 runs as follows :—

The term used with reference to a tenancy, means lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest. Ingredients of "encumbrance" under Bengal Tenancy Act are the following :

- (1) It is a lien, sub-tenancy, easement or some other similar right or interest.
- (2) It is a creation of the tenant.
- (3) The right or interest in question must be created on the tenure or holding.
- (4) It must be in limitation of the tenants' right.
- (5) It must not be a protect interest.

—*T.Khatau v S. Kumar*, AIR 1932 Cal 165.

**S. 6. Recovery of sums due under an order under sub-section (4) of section 4 as a public demand.**—<sup>1</sup>(1) Any sum payable under an order made under sub-section (4) of section 4 shall be recoverable as a public demand:

<sup>2</sup> Provided that no action shall be taken under the Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913) unless a requisition is made by the transferee for recovery of any sum payable under sub-section (4) of section 4 and the requisition before being forwarded to the Certificate Officer with or without any modification, as the case may be, is countersigned by the Special Officer.

<sup>3</sup>(2) On receipt of a requisition under the proviso to sub-section (1), the Special Officer shall, if he is satisfied that the transferee had refused to accept any of the instalments provided in the order under sub-section (4) of section 4, which was duly tendered by the transferor within the date specified in the said order, award, in consideration of the harassment suffered by the transferor, such compensation to him as the Special Officer thinks fit. The Special Officer shall adjust the amount awarded as compensation against the amount claimed in the requisition and shall modify the requisition accordingly before countersignature.

#### NOTES

Definition of Public Demand under section 3(6) of the Bengal Public Demands Recovery Act, 1913: "Public demand" means arrear or money mentioned or referred to in Schedule I, and includes any interest which may, by law, be chargeable there up to the date on which a certificate is signed under Part II.

1. Section 6 (original) was renumbered as sub-section (1) of Section 6 by S.3 of the West Bengal Restoration of Alienated Land (Second Amendment) Act, 1975 (West Bengal Act XV of 1975).
2. This proviso was added by S.3 of the West Bengal Restoration of Alienated Land (Second Amendment) Act, 1975, the assent of the President in regard to the same was first published in *Calcutta Gazette*, Extraordinary, Part III, No. 287, dated 10.5.1975.
3. This sub-section (2) was added by S. 3(b) of the West Bengal Restoration of Alienated Land (Second Amendment) Act, 1975 (West Bengal Act XV of 1975).

Public demand is to be regarded as any arrear or money which is included in Schedule I and includes legal interest thereto up to the date of signing of the certificate. The definition of Certificate Officer, as stipulated in section 3(3) of the Bengal Public Demands Recovery Act, 1913, runs as follows:

'Certificate Officer' means a Collector, a Sub-divisional Officer, and any officer appointed by a Collector with the sanction of the Commissioner to perform the functions of a Certificate Officer under this Act.

It will be evident that a sum payable by the transferor under section 4(4) of the Act as ascertained and ordered by the Special Officer can be recovered as a public demand provided the transferee makes a requisition thereto. The requisition is to be forwarded to the Certificate Officer after the same is countersigned by the Special Officer.

If the transferee refuses to accept instalment money duly tendered to him by the transferor within the prescribed time, and if it is found by the Special Officer that the transferee has caused harassment, the Special Officer shall award proper compensation. Requisition as public demand, if any, will then have to be modified before the same is ultimately countersigned by the Special Officer.

**S. 7. Bar of Jurisdiction of High Court and Civil Courts.**—Save as otherwise provided in the Constitution of India, neither the High Court nor any Civil Court shall have jurisdiction in any matter which the Special Officer is empowered to dispose of under this Act:

<sup>1</sup>[... ..]

**S. <sup>2</sup>7A. Principles of 'res judicata' not to apply.**—Notwithstanding anything to the contrary contained in any other law or in any judgment, decree or order of any Court Tribunal or any other authority, the provisions of section 11 of the Code of Civil Procedure, 1908 (5 of 1908), shall not apply to any proceeding or appeal under this Act.

**S. <sup>2</sup>7B. Limitation.**—The provisions of section 5 of the Limitation Act, 1963 (36 of 1963) shall apply *mutatis mutandis* to all proceedings and appeals under this Act.

#### NOTES

**1. Notes of sections 7, 7A and 7B.**—Section 7 of the principal Act has been amended with the result that proviso thereto has been omitted by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980. The said proviso has been rejected substantially by new section 4A of the Act, 1980. After the amended section 7 of the principal Act, two sections 7A and 7B have been inserted stating that principles of *res judicata* shall not apply to any proceeding or appeal and that section 5 of the Limitation Act, 1963 shall apply *mutatis mutandis*. The above new insertions of sections 7A and 7B have been brought by the new W.B. Restoration of Alienated Land (Amendment) Act, 1980.

1. Proviso Omitted by W.B. Restoration of Alienated Land (Amendment) Act, 1980.
2. Inserted, *ibid*

**2. Important Notes.**—The power of High Court or of any civil court shall not extend in respect of any matter which the Special Officer is empowered to decide under the provisions of this Act. But it must be understood that the general power of superintendence conferred to High Court under Article 226 of the Constitution of India has not been abridged or curtailed in any way. Article 226 of the Constitution of India empowers the High Court to issue writs, directions or orders for (a) enforcement of rights conferred by Part II, and (b) for any other purposes. For infringement of fundamental rights and also for violation of legal rights, writs, orders or directions can be used by High Court under Article 226 of the Constitution of India. The manner of filing of appeal has been stipulated in Rule 8 of rules made under the Act. The time for obtaining copy of order will be excluded for the purpose of calculation of time-limit of thirty (30) days. The provisions of Indian Limitation Act, 1963 (36 of 1963) will generally apply, specially the provisions of section 29(2) of the Limitation Act, 1963, which runs as follows:

Section 29(2)—“Where any special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.”

Section 3(1) of the Limitation Act, 1963 provides:

Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is to be noted that even a time-barred appeal may be considered after the statutory prescribed period, if the appellant/ applicant makes out a sufficient cause for delay for not preferring the appeal within the prescribed time limit.

Section 5 of the Limitation Act, 1963, runs as follows:

“5. *Extension of prescribed period in certain cases.*—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period of limitation, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.”

In *Kanailal Chatterjee v Satyendra Nath Mazumder*, (1977)1 CLJ 25, it was held that—

(1) An order allowing an application under section 4(4) as also, an order rejecting an application, are both appealable orders.

(2) Special Officer is a *persona designata* and in the matter of rejection of an application under section 4(4) of the Act, no question of his exercising inherent power arises.

(3) Provision for remand is not required to be conferred expressly upon the appellate authority in order to authorise issue of a direction upon Special Officer.

In *Chapalabala Adhikary v Monoranjan Das*, (1975) 2 CLJ 447, it was held that civil court's power is not brushed away by a special Tribunal. It was further decided that civil court will have jurisdiction to interfere if there is total disregard of fundamental principles of justice. It is yet to be seen if at all such principles of law can be invoked in any matter relating to provisions of the present Act.

**S. 8. Powers of the Special Officer.**—The Special Officer shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents.

#### NOTES

In *Abdus Sattar v Abdul Jalil*, (1979)2 CLJ 551, it has been decided that the Special Officer will have to act quasi-judicially. He will have to record at least substance of evidences while acting under sections 4(4) and 8 of the Act. Similarly in the said case it was held that the appellate authority will have to consider at least the summary of evidences, as recorded by Special Officer, otherwise the appeal becomes nugatory.

It was further held in *Sadhan Ch Koley v Dulali Devi*, (1978) 1 CLJ 233: 82 CWN 416 that the provisions of Civil Procedure Code do not strictly apply in regard to the provisions of the Act. It was held that parties who were not added as such initially, but who appeared before the Tribunal and deposed ultimately will not be discredited as objection as to non-joinder cannot be raised like that of a civil court.

In *Panchanan Singh v State of West Bengal*, (1977) 1 CLJ 345, it was decided that disputed question of title can only be decided by a civil court and not by any other competent authority.

In *Sudhangshu Kumar Aich v Kangal Chandra Maity*, 69 CWN 908, it was decided further that Special Officer is neither a court nor a civil court. If a suit was dismissed for default or decided *ex parte*, the Special Officer, a Special Tribunal acting under the Act has no power to restore the suit, as the provisions of Civil Procedure Code do not apply in general.

In *Asoke Kumar Mazumdar v State of West Bengal*, 80 CWN 388-393, it was decided that a Tribunal like that of under the present Act cannot exercise the inherent power of a civil court.

In *Sudhangshu Kumar Aich v Kangal Chandra Maity*, 69 CWN 908, it was further decided that a Special Officer has no power of review like that of a civil court and he cannot set aside an *ex parte* order made by him previously.



**S. 8A. Stay of Payments.**—(1) Notwithstanding anything contained elsewhere in this Act with effect from the date of commencement of the West Bengal Rural Indebtedness Relief Act, 1975 (West Ben. Act XXXVII of 1975), it shall not be necessary for a transferor to make any payment—

- (i) for obtaining restoration of possession of his land in accordance with the provisions of sub-section (4) of section 4, or
- (ii) where such possession has already been obtained in pursuance of an order made by the Special Officer, towards instalments under sub-section (4), or in lump amount under sub-section (6) or sub-section (8), of section 4, for a period of two years.

(2) The State Government may, by notification in the Official Gazette, extend the period referred to in sub-section (1) from time to time but such extension shall not exceed a period of one year at a time.

(3) A transferor shall not be liable to pay interest upon any amount the payment of which is stayed under this section.

#### NOTES

Section 8A was incorporated by section 2 of the West Bengal Restoration of Alienated Land (Amendment) Act, 1976 (West Bengal Act XX of 1976). Assent of the President of India was received in due course and the Amendment Act was published in the Calcutta Gazette, Extraordinary, Part III, No. 529, dated 1.4.1976. Before the amendment came into force, W.B. Restoration of Alienated Land (Amendment) Ordinance, 1976 was published in the Calcutta Gazette. Thereafter, corresponding bill i.e. W.B. Restoration of Alienated Land (Amendment) Bill, 1976 was published in the Calcutta Gazette, Extraordinary, after which this Amendment Act finally came into force after receiving assent of the President of India. The West Bengal Rural Indebtedness Relief Act, 1975 received the assent of the President which was first published in the Calcutta Gazette, Extraordinary on 16.10.1975.

Section 3 of the said Act which provides for relief of rural indebtedness in West Bengal, runs as follows:—

(1) *Stay of suits etc.*—Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, with effect from the date of commencement of this Act,—

- (i) no civil court shall entertain any suit, application or proceeding against a debtor in respect of any debt incurred by him;
- (ii) any suit, application or proceeding in relation to recovery of a debt pending before a civil court shall be stayed; and
- (iii) no decree of a civil court in relation to the recovery of a debt which was passed before the commencement of this Act shall be executed; for the period of two years.

(2) The State Government may, by notification in the Official Gazette, extend the period referred to in sub-section (1) from time to time but such extension shall not exceed a period of one year at a time.

Under the amended section 8A of the Act, with effect from the date of commencement of the West Bengal Rural Indebtedness Relief Act, 1975 (W.B. Act XXXVII of 1975) i.e. from 16.10.1975, it will not be necessary for a transferor to make any payment for obtaining restoration of possession of his land in accordance with the provisions of sub-section (4) of section 4 for a period of two years.

On a study of section 3 of the W.B. Rural Indebtedness Relief Act, 1975 with that of section 8A of the W.B. Restoration of Alienated Land Act, 1913, it will be evident that both the sections provide moratoria i.e. “periods when payments of debts are to be suspended by the effect of law”.

Section 8A(2) provides that the State Governments may extend the stay period of two years under section 8A(1)(ii) from time to time not exceeding a period of *one year* at a time by taking suitable notification in the Official Gazette. Sub-section 8A(3) provides that a transferor shall not be required to pay any interest upon any sum, the payment of which has been stayed under section 8A. It is to be noted, however, that the stay of payments under section 8A, shall not debar the transferor from obtaining restoration of possession of his land. The transferor may, at his own will, make payment of money, in spite of the provisions of sub-section 8A(1), if he so desires and no bar to the same kind of payment has been contemplated.

**S. 18B. Restriction on transfer.**—Notwithstanding anything contained in any law for the time being in force or in any contract, express or implied, or in any custom or usage, to the contrary, every transferor who obtains restoration of his land in pursuance of an order made under this Act, shall be debarred from alienating such land for a period of twelve years, except by way of a simple mortgage or a mortgage by deposit of title-deed in favour of a bank or a cooperative society or a local or statutory authority or the Life Insurance Corporation of India.

*Explanation.*—For the purposes of this section “bank” means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) and includes the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959) a corresponding new bank as defined in clause (d) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), a banking institution notified by the Central Government under section 51 of the Banking Regulation Act, 1949 and also includes any other financial institution which may be notified in this behalf by the State Government.

#### NOTES

The new section 8B contemplates that every transferor who gets restoration

1. Section 8B was inserted by section 2 of the West Bengal Restoration of Alienated Land (Amendment) Act, 1976 (West Bengal Act XX of 1976). Explanation to the section 8B was also incorporated by section 2 of the above W.B. Restoration of Alienated Land (Amendment) Act, 1976

of his land by way of an order under this Act, shall not be able to transfer his land for a period of twelve (12) years. Some kinds of mortgages can however be allowed. If however one transferor alienates land within a period of twelve (12) years, no penal measure has been provided in this Act. This appears to be a lacuna, for which further legislation may be necessary in future.

**Simple mortgage.**—This has been defined under section 58(b) of the Transfer of Property Act, 1882 as follows:

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called simple mortgage and the mortgagee a simple mortgagee.

Mortgage by deposit of title deeds has been defined in section 58(f) of the Transfer of Property Act, 1882 which runs as follows:

Where a person in any of the following towns, namely, the towns of Kolkata, Chennai and Mumbai, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

The term local or statutory authority as stipulated in section 8B, has not been described in the Act. From section 3(3) of the General Clauses Act, 1897, we find definition of “local authority” as:—

“Local authority” shall mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund. Section 49 of the West Bengal Land Reforms Act, 1955 deals with the principles of distribution of lands under certain conditions. Sub-section (1A) of the said section runs as follows:—

No person with whom any land is or has been settled under sub-section (1) shall be entitled to transfer such land except by deposit of title-deeds in favour of a scheduled bank, or a cooperative society or a corporation owned or controlled by the Central or State Government or both, and for the purpose of obtaining loan for the development of land or for the improvement of agricultural production or for the construction of a dwelling house. A Revenue Officer may annul settlement if transfer of land was made in contravention of the provisions of sub-section (1A) of section 49 of the West Bengal Land Reforms Act.

It is yet to be seen whether Special Officer should be vested with similar power or not.

An enlarged definition of “bank” has been provided in “explanation” to section 8B of the Act. Commercially, bank is a place where money is deposited for

the purpose of being let out to interest, returned by exchange, disposed of to profit, or to be drawn out again as the owner shall call for it.

Wharton's *Law Lexicon*, Regional Rural Banks established under section 3 of the Regional Rural Banks Act, 1976 were subsequently notified to be “other financial institutions” on behalf of the State Government.

**S. 9. Power to make rules.**—(1) The State Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

- (i) any matter which is required to be prescribed under this Act;
- (ii) the levy of any fees.