

Neutral Citation No. - 2023:AHC:199092

Judgment Reserved on 27.9.2023

Delivered on 16.10.2023.

Court No. - 48

Case :- WRIT - B No. - 636 of 1980

Petitioner :- Ram Ajour

Respondent :- D.D.C.And Others

**Counsel for Petitioner :- S.P. Tripathi,Ashok
Tripathi,P.K.Mishra**

Counsel for Respondent :- S.C.,K.B.L. Gaur

Hon'ble Saurabh Shyam Shamshery,J.

1. Heard Sri Ashok Tripathi, learned counsel for the petitioner and Sri A.K.Rai, learned Additional Chief Standing Counsel. Despite service none appeared on behalf of contesting respondents.
2. Present writ petition was filed in year 1980.
3. The petitioner being dissatisfied by orders dated 16.6.1973, 4.11.1974 and 15.10.1979 passed by Consolidation Officer, Settlement Officer Consolidation and Deputy Director of Consolidation respectively, has approached this Court, after losing before all three authorities under the Uttar Pradesh Consolidation of holdings Act, 1953 (hereinafter referred to as the "Act of 1953") and that there are concurrent findings of 3 authorities on law and facts against him.
4. It is well settled position of law that this Court under writ jurisdiction would interfere or issue a writ of certiorari only when concurrent findings are perverse or beyond jurisdiction, therefore, learned counsel for petitioner has an uphill legal battle to meet above referred requirements to achieve the relief sought.
- 5 In support of above reference, relevant part of two judgments of Supreme Court would be relevant, to quote hereinafter:-

(a). Central Council for Research in Ayurvedic Sciences and another vs. Bikartan Das and others, 2023 SCC Online SC 996 -:

"65. Thus, from the various decisions referred to above, we have no hesitation in reaching to the conclusion that a writ of certiorari is a high prerogative writ and should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course. To put it pithily, certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when in the exercise of undoubted jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. By its exercise, only a patent error can be corrected but not also a wrong decision. It should be well remembered at the cost of repetition that certiorari is not appellate but only supervisory.

66. A writ of certiorari, being a high prerogative writ, is issued by a superior court in respect of the exercise of judicial or quasi-judicial functions by another authority when the contention is that the exercising authority had no jurisdiction or exceeded the jurisdiction. It cannot be denied that the tribunals or the authorities concerned in this batch of appeals had the jurisdiction to deal with the matter. However, the argument would be that the tribunals had acted arbitrarily and illegally and that they had failed to give proper findings on the facts and circumstances of the case. We may only say that while adjudicating a writ-application for a writ of certiorari, the court is not sitting as a court of appeal against the order of the tribunals to test the legality thereof with a view to reach a different conclusion. If there is any evidence, the court will not examine whether the right conclusion is drawn from it or not. It is a well-established principle of law that a writ of certiorari will not lie where the order or decision of a tribunal or authority is wrong in matter of facts or on merits. (See : King v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (PC))"

(Emphasis Supplied)

(b). Krishnanand (dead) through LRs and others vs. Deputy Director of Consolidation and others, (2015) 1 SCC 553 -:

"12. The High Court has committed an error in reversing the findings of fact arrived at by the authorities below in coming to the conclusion that there was a partition. No doubt, the High Court did so in exercise of its jurisdiction under Article 226 of the Constitution. It is a settled law that such a jurisdiction cannot be exercised for re-appreciating the evidence and arrival of findings of facts unless the authority which passed the impugned order does not have jurisdiction to render the finding or has acted in excess of its jurisdiction or the finding is patently perverse. In the present case, though the High Court reversed the concurrent findings of the authorities below and came to the opposite conclusion on matter of facts, the High Court did not do so on the ground that the authorities below acted in excess of their jurisdiction or without jurisdiction or that the finding is vitiated by perversity.

13. We are of the view that the High Court ought not to have entered into re-appreciation of evidence and reversed the findings of fact arrived at by the three authorities below, especially since, the authorities had neither exceeded their jurisdiction nor acted perversely. The High Court has nowhere stated that it was of the view that there is any perversity, much less the High Court failed to demonstrate any such circumstances."

(Emphasis Supplied)

6. The disputed plots are being plot No.306 of area .21 decimals and Plot No.629 area 18 decimal of Village Sarya Tappa Haveli Pargana Unwal Tehsil- Bans Gaon District-Gorakhpur.

7. Proceedings were commenced during consolidation when rival objections were filed under Section 9A of 'Act of 1953'. Basic year entry was recorded in name of Ori and Yagya Dutta sons of Siddu, Gorakh son of Muni. After death of Ori, his legal heir Satyadeo was recorded during consolidation proceedings.

8. Original petitioner has set up a case that both disputed plots were his ancestral sir khudkhasht land. Father of original petitioner had mortgaged land in dispute to Siddu (ancestor of respondent no. 4 to 8) through a mortgage deed dated 29.7.1926. It was further claimed that mortgage was redeemed on 30.11.1947, after payment

of amount and thereafter original petitioner was in possession of land in dispute. The respondents have no right over the land in dispute and revenue entry in their favor was wrong and liable to be expunged.

9. The respondents have denied above referred claim. They denied execution and redemption of the mortgage and they have asserted their right on land in dispute on basis of revenue entry (Zaman 8) recorded in their favor and claimed Sirdari rights.

10. The Consolidation Officer has rejected original petitioner's claim by order dated 16.6.1973. The sole issue framed and finding returned by Consolidation Officer on it, is mentioned hereinafter:-

" विद्वान अधिवक्ता गण के तर्क सुने जाने है। राम अजोर के विद्वान अधिवक्ता ने यह जोरदार तर्क प्रस्तुत किया है कि वाद ग्रस्त भूमि उनके पूर्वजों के रेहन के समय सीखदार खुं काश्त थी। रेहन छुड़ाने के बाद वे काबिज हो गये। इसके लिये यदि कभी कोई प्रविष्ट की गयी है तो यह सर्वथा यादत के हक में अशुद्ध की गई रेहन नामा २० साल पुराना है तथा कानून सहादत के तहत सर्वथा मान्य है।

विरोधी ने यह जोरदार तर्क प्रस्तुत किया है कि गाटा ६२९ फ० में जम्मन ८ मुद्दत ३ साल से अंकित है। इस प्रकार तो निश्चित है कि बन्दोबस्त रेहन के फर्क होने के बाद जमीन्दारों के द्वारा किया गया है। जहां तक गाटा ३०६ का प्रश्न है ऐसा कोई कागज नहीं है जिससे यह प्रमाणित किया जा सके कि यह आराजी कभी सीर व खुद काश्त की रही है। अतः इस पर धारा १४ जमीन्दारी उन्मूलन लागू नहीं हो सकता है। रेहननामा की बात मानने को तैयार भी नहीं है। इतना ही नहीं इस रेहन नामा के अन्तर्गत इन दोनों नम्बरों को छोड़ कर और भी नम्बरान है। जिसकी स्थिति वर्तमान काल में क्या है नहीं दिखाई गई है। यह आपत्ति राम अजोर ने केवल अपना भाग्य आजमाने के लिये कर लिया है वरना १९४७ के रेहन अदायगी का कागज रखते हुए अब तक राम अजोर सोये नहीं रहते।

उक्त तर्कों को सुनने के पश्चात यह नहीं निश्चित हो सका है कि राम अजोर रेहन के अदायगी से लाभ चाहते हैं अथवा धारा १४ उ० प्र० जमीन्दारी उन्मूलन भूमि सुधार अधिनियम का लाभ चाहते हैं। गाटा ३०६ के सीर व खुदकाश्त की आराजी होना निश्चित नहीं है तथा रेहन के रखते हुए १३५९ फ० में जम्मन ८ विरोधी पक्ष के नाम है। गाटा सं० ६२९ रेहन अदायगी होने के बाद जम्मन ८, १३५६ फ० में ३ साल मुद्दत के साथ अंकित है इस प्रकार से कभी भी राम अजोर को असल काश्तकार मानने को तैयार नहीं हूँ जहां तक रिमार्क को लाभ के प्रविष्टियों के स्थापन का प्रश्न है वह नियमानुसार नहीं है। १३७४ फ० के बाद भी कोई खसरा अभिलेख नहीं है। अतः मैं हर एक प्रकार से राम अजोर के वाद को तथ्य हीन समझता हूँ। तदैव वाद पद नकारात्मक रूप में निर्णित है।

(Emphasis Supplied)

11. The appeal filed by original petitioner was also dismissed by Settlement Officer Consolidation by order dated 4.11.1974. Relevant part of the order is mentioned hereinafter:-

" गाटा सं० ६२९ अपील कर्ता की सिर थी जो रेहन नामा और खुद रेहनी सही मान ली जाय तो सन् ४७ ई० में यानी सन् ५५ फ० में अपील कर्ता के कब्जे में आयी इस

गाटे पर अपने कब्जे के समर्थन में अपील कर्ता ने कोई सबूत तहरीरी जो सबूत उत्तर वादी ने दाखिल किया है उसके अनुसार १३५९ फ० नहीं दाखिल किया में यह अराजी उत्तर वादी और ज़ादत और मुन्नी के नाम ३ साल थी। मुद्दत से १० अमे सालाना लगान पर मौरूसी श्रेणी में दर्ज थी। १३५६ फ० खतौनी का काश्तकार का पूर्वजो दस गुना जमा करने के लिए जारी किया गया था। मूलतः दाखिल किया गया है उसमें गाटा सं० ३०६, १० अमे सालाना लगान पर उत्तर वादी और ज़ादत व मुन्नी के पिता के नाम श्रेणी ८ में दर्ज है यह इन्दराज आज तक वदस्तूर चला जाता है। ५६ से चले आ रहे हम इन्दराज को महज इसलिए फर्जी नहीं माना जा सकता कि अपील कर्ता के अनुसार यह अराजी उसकी सीर थी। उत्तर वादी के यहां देखली थी जो उसने १९४७ में छुड़ा ली अगर यह होता है कि रेहन छुड़ाने के बाद अराजी जमींदार ने उत्तर वादी के नाम मौरूसी कर दिया। अपीलकर्ता का यह कहना कि उत्तरवादी ज़ादत गांव में पटवारी और वादी में कानूनगो भी रहा हमें कि यह अपने नाम का फर्जी इन्दराज कर लिया इसलिये काबिज के इत्मीनान नहीं है कि अपील कर्ता ने जो १३६३ में ७४ फ० के खसरे की नकल पेश की है उसमें गाटा सं० ३०६ जो उत्तर वादी के नाम का उस पर साल व साल अपील कर्ता का कब्जा लिखा गया है यदि उत्तरवादी खुद अपने खेत पर अपील कर्ता लिख सकता है। कि यह कैसे कहा जा सकता है कि वह अपीलकर्ता के खिलाफ रंजिश रहता है। इसी आधार पर उसने अपील कर्ता के सिरे की अराजी अपने नाम लिख दी मुझे यह आरोप कई झूठा लगता है। उत्तर वादी ने बहुत सीद माल गुजारी लिया कि दाखिल थी लेकिन अराजी का नम्बर दर्ज न होने के कारण विवादित अराजी का कब्जा साबित करने के लिये बिल्कुल निरर्थक है इस प्रकार गाटा सं० ६२६ के सम्बन्ध में भी अपील कर्ता का दवा साबित नहीं है विद्वान चक्रवर्ती अधिकारी ने सही खारिज किया।"

12. The revision titled by original petitioner was also dismissed by Deputy Director of Consolidation vide order dated 15.10.1979. Relevant part of order is mentioned hereinafter:

" विवादित गाटा सं० ३०६ का पूर्व नं० २५३ व ६२९ का पूर्वा नं० ५३६/१ है जो फ़ावली पर उपलब्ध है मुताबिक से स्पष्ट है। १३२३ फ० की खतौनी उद्घरण फ़ावली पर है। इसमें गाटा सं० ६२९ विश्वनाथ के नाम सीर करके अंक्ति है। गाटा सं० ३०६ के सम्बन्ध में १३२३ फ० का कोई उद्घरण नहीं है। १३३३ फ० की खतौनी उद्घरण में विश्वनाथ का नाम खाता सं० ४८।१६ पर श्रेणी २० में गाटा ३०६ पर अंक्ति है मुद्दत काश्त ५ साल अंक्ति है जो यह स्पष्ट करता है कि १३४ फ० में विश्वनाथ राम का नाम श्रेणी २० में अंक्ति है। निगरानी कर्ता का कहना है कि दोनों गाटे उसके सीर व खुदकाश्त के थे और प्रतिपक्षी के पूर्वज के यहां रहे थे। दिनांक १०.११.१९४७ को रेहन छुड़ा लिया यह बराबर १३५५ फ० के है।

प्रतिपक्षी के वि० अभिप्राय का तर्क है, कि निगरानी कर्ता के पिता के नाम जो भूमि श्रेणी २० में १३५३ फ० में ५ साल की मुद्दत से अंक्ति थी उसका रेहन कैसे हुआ और उसको रेहन करने का क्या अधिकार निगरानी कर्ता के पिता को था और १९४७ में जो उसने रेहन छुड़ाया यह कैसे सम्भव हुआ क्योंकि निगरानी कर्ता बतौर असल काश्तकार गाटा सं० ३०६ पर अंक्ति ही नहीं था और श्रेणी २० की भूमि को रेहन करने का कोई अधिकार नहीं है। फ़ावली पर १३३ फ० की खतौनी है इसमें गाटा सं० ३०६ सिधू बनिया के नाम अंक्ति है और इसमें मारफ़्त राम अजोर राम तिवारी लिखा है। प्रतिपक्षी नम्बर १ ज़ादत के पिता का नाम सिधू था उक्त दोनों ही खतौनी उद्घरण से यह स्पष्ट होता है कि गाटा सं० ३०६ प्रतिपक्षी गण के नाम था और गाटा सं० ६२९ निगरानी कर्ता की सीर १९२३ में अंक्ति थी। यदि कभी भी गाटा सं० ३०६ निगरानी कर्ता की पूर्वज की खुदकाश्त थी तो वह १९३६ से पूर्व समाप्त हो चुकी थी। फ़ावली पर १३६३-७४ फ० की खसरा उद्घरण है। १३६३, १३६४, १३६६, १३६८ व १३७३ फ० में निगरानी कर्ता का कब्जा खाना

कैफियत में अंक्ति है मगर पं० १० का कोई उल्लेख नहीं है और न ही गिरदावर कानूनगो का कोई अहेश हुआ कि निगरानी कर्ता का नाम श्रेणी ९ में अध्यासीन करके अंक्ति किया जावे। १३७४-७७ फ० का कोई खतौनी उद्धरण दाखिल नहीं किया गया है आधार वर्ष के खसरे में भी निगरानी कर्ता के कब्जे का कोई इन्द्राज नहीं है। इस प्रकार जहां तक गाटा सं० ३०६ का सम्बन्ध है यह निगरानी कर्ता की न सीर थी और न खुदकाश्त। प्रतिपक्षी के पूर्वज इसके काश्तकार थे मारफत इन्द्राज से किसी को कोई स्वत्व नहीं प्राप्त हो जाता। जमीन्दारी विनाश अधिनियम के बाद के जो कब्जे के इन्द्राज हैं वे पेरा ए-८०, ए-८१, ए-८२ व ०२ सी० मु० अभिलेख नियमावली के अनुसार नहीं हैं अतएव इनका कोई लाभ निगरानी कर्ता को नहीं दिया जा सकता जब तक कि यह प्रमाणित न हो कि गाटा सं० ३०६ कभी भी निगरानी कर्ता की खुदकाश्त व सीर थी।

जहां तक गाटा सं० ६२९ का सम्बन्ध है यह निगरानी कर्ता के पिता के नाम १३२३ फ० में अंक्ति थी। निगरानी कर्ता का कहना है कि यह गाटा प्रतिपक्षी के पूर्वज के यहां रहन था। यह १०-११-४७ यानी १३५५ फ० में छुड़ा लिया गया। पंजीकृत रहन नामा दिनांक २९.०७.१९२६ का निगरानी कर्ता की ओर से दाखिल किया गया है। इसमें अन्य बहुत से गाटों के साथ गाटा सं० ६२९ जिसका पूर्व नं० ५४१।१ था, अन्य बहुत से गाटों के साथ जिन्में वर्तमान विवादित गाटा ३०६ का पूर्व नं० २५३ भी शामिल है, विश्वनाथ राम ने रहन रखा था, मूल रहननामा पत्रावली पर है और इस पर २०.०५.४७ का एन्डोर्समेंट भी है जेरे रहन का रूपया पाकर अराजी का तर कर दिया। इस पर हस्ताक्षर औरी व मुन्नी के हैं। औरी का पुत्र सत्यदेव और मुन्नी का पुत्र गोरख प्रतिपक्षी है। इससे स्पष्ट होता है कि १९४७ में रहन समाप्त हो गया और यदि उसके बाद प्रतिपक्षी का कब्जा रहा होता तो यह या तो उनका अनाधिकृत कब्जा था या उनके हक में नये सिरे से इन्तजाम। जमीन्दारी विनाश अधिनियम से पूर्व उक्त गाटों पर अपने कब्जों के समर्थन में निगरानी कर्ता की ओर से कोई लेख्य साक्ष्य नहीं प्रस्तुत किया गया है। १३५९ फ० की खतौनी उद्धरण प्रतिपक्षी की ओर से प्रस्तुत किया गया है। इसमें गाटा सं० ६२९ खता संख्या १९६ पर औरी, जादत और मुन्नी के नाम तीन साल की मुद्दत से श्रेणी ८ में अंक्ति है जो यह स्पष्ट करता है कि १३५८ फ० में उनका नाम श्रेणी ८ में अंक्ति है जो यह स्पष्ट करता है कि १३५७ फ० में उनका नाम श्रेणी ८ में अंक्ति हुआ। १३५७ फ० बराबर १९५०-५१ के हुआ। इस प्रकार १९४७ में रहन छूट जाने के बाद भी प्रतिपक्षी का नाम श्रेणी ८ में अंक्ति रहा। जहां तक गाटा सं० ३०६ का सम्बन्ध है वह १३५६ फ० में भी प्रतिपक्षी के नाम अंक्ति रहा। इस प्रकार दोनों ही विवादित गाटों पर प्रतिपक्षी का ही नाम जमीन्दारी विनाश अधिनियम के पूर्व से ही अंक्ति चला आ रहा है।

निगरानी कर्ता के वि० अधिकार का तर्क है कि गाटा सं० ६२९ उनकी सीर अंक्ति थी, सीर के अधिकार समाप्त नहीं हो सकते। प्रतिपक्षी के नाम १३५९ फ० में श्रेणी ८ का इन्द्राज गलत है। गाटा सं० ३०६ के सम्बन्ध में भी उनका कहना है कि यह गाटा श्रेणी ८ में २१ साल की मुद्दत से अंक्ति है १३५९ फ० में यानी १३३९ फ० में प्रतिपक्षी का नाम आया। उस समय १९२६ का एक्ट लागू था मौसूरी काश्तकार नहीं होते थे, इस प्रकार वे भी इन्द्राज वेकर थे। वि० अधिकार का तर्क है कि १३५५-५८ फ० में गाटा सं० ३०६ पर विश्वनाथ राम का नाम श्रेणी २० में अंक्ति है। इस प्रकार १३५६ फ० के वे लिखित आव्यूफेंट हो गये व १३५९ फ० में काबिज दखील थे अतः उन्हें अधिवासी। सीरदारी अधिकार प्राप्त हो गये। वि० अधिकार ने आर०डी० १०७१ पृष्ठ ११ पर दी गई व्यवस्था को पढ़कर सुनाया।

प्रार्थी की ओर से कहा गया कि जो पंजीकृत रहननामा प्रस्तुत किया गया है इसमें ६ गाटों का उल्लेख है, विवाद केवल दो ही गाटों के सम्बन्ध में है, शेष गाटों के नाम अंक्ति हुये और, और कहा गया, इसका कोई भी स्पष्टीकरण ही है। यदि निगरानी कर्ता के पिता को जमीन्दार माना जावे तो श्रेणी २० का इन्द्राज भी जमीन्दार के हक में नहीं हो सकता। वि० अधिकार का तर्क है कि स्वयं निगरानी कर्ता के अनुसार १०.११.४७ यानी १३५५ फ० में रहन छुड़ा लिया गया। १३५३ फ० में जो ५ साल की मुद्दत श्रेणी २० में गाटा सं० ३०६ पर लिखी है वह गलत हो जाती

है। वि० अधिवक्ता का यह भी कहना है कि १३६९ फ० में गाटा सं० ३०६ शामिल गाटा सं० ३१४ लिखा है। गाटा सं० ३१४ किसका लिखा है यह फत्रावली में स्पष्ट नहीं है और न ही गाटा सं० २१४ पर कोई अधिकार मांगे गये। ३०.१०.५४ यानी १३६२ फ० में निगरानी कर्ता का विवादित भूमि पर कब्जा था, इसका कोई साक्ष्य नहीं है, अतः निगरानी कर्ता को अधिवासी सीस्वारी अधिकार नहीं प्राप्त होते हैं।

मौखिक साक्ष्य में राम अजोर ने बयान दिया है और एक गवाह राजाराम पेश किया है जब कि प्रतिपक्षी की ओर से सत्यदेव ने बयान दिया है और लखन व सुरेश को बतौर साक्षी पेश किया है।

फत्रावली पर उपलब्ध लेख्य एवं मौखिक साक्ष्य के विवेचन से मैं इस निष्कर्ष पर पहुंचता हूँ कि विवादित भूमि प्रतिपक्षीगण की है और वे कब्जिज दखील है निगरानी कर्ता न तो इस पर कब्जिज दखील है और न ही अपना स्वत्व प्रमाणित करने में सफल रहे,

अतः दोनों अवर न्यायालयों के आदेश सही हैं उनमें किसी हस्तक्षेप की आवश्यकता नहीं है।

अतः आदेश हुआ कि निगरानी निराधार है, फलस्वरूप निस्स्त की गई फत्रावली वाद अमल दरामद सूचित की जावे।

आदेश सुनाया गया।"

13. Shri. Ashok Tripathi Learned counsel for original petitioner has submitted following submissions:

(i) That present proceedings under Section 9A(2) of Uttar Pradesh Consolidation of Holding Act was initiated in Village Sarya, Tappa Haveli, Pargana Unwal, Tehsil Bansgan, District Gorakhpur.

(ii) That petitioner filed objection under Section 9A(2) of Uttar Pradesh Consolidation of Holding Act in respect of Plot No. 306 area 21 Decimal and Plot N.629 area 18 decimal. The basic year entry was in the name of Ori and Yagya Dutt, Sons of Siddhu and Gorakh Son of Munni.

(iii) That the petitioner claimed that the disputed plots were his ancestral property and sir khudkashta and on 29.7.1926 father of the petitioner namely Vishwanath Ram Tiwari mortgaged the disputed plots to Siddhu (ancestor of respondent nos. 4 to 8). On 30.11.1947 mortgage was redeemed and the petitioner was in possession over the plots in question i.e. Plot No. 306 and 629 area 21 decimal and 18 decimal respectively.

(iv) That the petitioner filed Fard Mutabikat (comparative chart) 1323 Fasli, registered mortgage deed, receipt of redemption dated 20.5.1947 written by Ori, Yagya Dutt and Munni Lal. 253. According to Fard Mutabikat, Plot No.15253- 306- 629 an 541/1 in

Khatauni 1323 Fasli, Plot No. 629 was sir of petitioner's father.

(v) That no evidence on record was available showing that the plots were resettled with the respondents, nor there better right was proved through adverse possession or ouster. Entry made in the name of respondents Zanam-8 in 1359 Fasli for a period of 21 years is forged. In 1336 Fasli the name of Siddhu (ancestor of respondent no. 4 to 8) was recorded through marfat Ram Ajor Ram Tripathi, then it became permissible possession. The petitioner continued over Plot No.305 since 1947.

(vi) That Plot No. 629 is sir plot. The Consolidation Officer has not considered the evidence of petitioner and without discussing evidence, a wrong conclusion was given, as such, no reason was assigned with regard to findings given by the consolidation court.

(vii) That the respondents have never proved their claim, although admitted with regard to mortgage and their redemption.

14. Initially respondent nos. 4 to 8 were represented by their Advocates and a counter affidavit was also filed, however, thereafter none appeared and some of respondents died and their legal heirs were brought on record. Service was finally effected through publication still, none appeared. Present matter being an ancient matter, therefore, heard finally. In order to appreciate stand of respondent, it would be relevant to refer paragraph Nos.3 to 8 of counter affidavit:

"(3) That paras 3 to 7 refer to the cases of parties and since the case is discussed in the judgements which would be referred at the time of arguments it is not necessary to enter in controversy with regards the same.

(4) That with regards to contents of paras 8 to 11, 14 and 25 it is submitted that there is no evidence on record to show that plot to no. 306 was ever Sir or Khudkasht to the contrary it was always recorded as tenancy plot. The plot No.629 which was recorded as Sir was re-settled with the

respondents after redemption and the petitioner started receiving Lagan and issued receipts which are on the record of the case. The respondents as such continued to be in possession from before Zamindari Abolition as tenants and are in possession ever now the allegations and suggestions to the contrary are wrong and denied.

(5) That suggestions contained in paras 12 and 13 are denied and being argumentative would be replied at the time of arguments.

(6) That paras 15 to 19 being argumentative would be replied at the time of arguments.

(7) that paras 20 to 24 refers to the proceedings before the authorities and their judgements which having been filled would be referred to at the time of arguments. However the judgments are well reasoned and correct.

(8) That with regard to contents of paras 26 and 27 are denied and it is submitted that the writ petition has no merits and there is no question of entering into possession as the respondents are in possession as also found by the three authorities."

15. Heard learned counsel for petitioner perused records and written submission.

16. I have carefully perused the impugned orders passed by three authorities and the concurrent findings in regard to Gata No.629 and Gata No.306 in brief are mentioned hereinafter:-

(i) Gata No.629

The land in dispute was mortgaged and later on redeemed also. The Authorities have acknowledged the mortgaged deed dated 29.7.1926 and endorsement of redemption dated 20.5.1947 with signature of parties,

however, even after in revenue records name of respondents continued under Category 8 even after 3 years of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, (hereinafter referred to as ("Act of 1950")). The revenue records of 1357F (1950-51) and thereafter name of respondents was recorded under category 8 for at least 21 years. The name of father of petitioner was recorded under category 20, but it would not give right of Zamindar over Gata No.629. The petitioner or his ancestor has not taken any proceedings to dispossess the respondents.

(ii) **Gata No.306.**

Name of respondents were recorded over Gata No.306 in basic year (1356F) i.e. name was continued before the Act of 1950 came into force. Evidence on record was also considered by all three Authorities have returned findings that evidence was shown to prove any right of petitioner over land in dispute.

17. This Court has considered law of mortgage and limitation of redemption after Act of 1950 came into force in **Babau Ram and Ors. v. Deputy Director of Consolidation and Ors, 2023:AHC:185998** and relevant paragraphs thereof are mentioned hereinafter:-

"14. Before considering the rival submissions following two judgments of Full Bench of this Court and one judgment of Supreme Court, wherein judgments of Full Bench on issue of limitation on redemption of mortgage, were referred, affirmed and approved, would be appropriate to refer hereinafter:

(I) Mahabal Singh and another vs. Ram Raj and others, 1950 SCC OnLine All 138 (Paragraphs 9, 10 and 22):

"9. In the second Full Bench case of Ghassu v. Babu Ram (A.I.R. (31) 1944 All. 25 : I.L.R. (1944) All. 166 (F.B.), the question arose as to the legal effect of a mortgage of an occupancy holding and the relief which in certain circumstance is open to the mortgagor in

relation to a such a mortgage. There being conflict upon that question, the case was referred to the Full Bench. Dar, J., who delivered the judgment of the Full Bench, laid down several propositions which may be summarised as follows:

(1) That the usufructuary mortgage of an occupancy holding by a tenant is void and not voidable.

(2) That a mortgagor after giving possession to the mortgagee cannot recover possession of the holding without paying the money which lie (sic, he) had taken from the mortgagee.

(3) That a mortgagee of an occupancy holding by remaining in possession for over 12 years does not extinguish the rights of the mortgagor to redeem him and by such possession the mortgagee only prescribes for mortgages rights.

(4) That it is open to the mortgagor to seek possession of the holding by tendering the consideration which he had received and he may do so by a redemption suit.

(5) The relationship which comes into existence as a result of the mortgage of an occupancy holding and its possession being transferred to the mortgagee, though not strictly speaking that of a mortgagor and a mortgagee, is analogous to that relationship, and the action which is raised by the mortgagor to recover possession of the holding on payment of the money due to the mortgagee, though not strictly in the nature of a redemption, is analogous to a redemption suit.

10. A large number of authorities are referred to in support of these conclusions. It follows that upon the question whether the mortgage of an occupancy holding is void, there is no conflict between the Avadh and the Allahabad cases. The only conflict is that while the Avadh Chief Court has consistently held that a mortgagor can recover possession of the occupancy holding without being called upon to return the consideration money he had received from the mortgagee, save where the consideration can be proved independently of the mortgage, the Allahabad High Court has equally consistently held that the mortgagor is not entitled to recover possession without being called upon to return the consideration. The following are some of the cases (sic, cases) in which possession was decreed at the instance of the mortgagor on return of the money received by him on principles of equity: Bahoran Upadhyaya v. Uttamgir, 8 All L.J. 931 : (33 All. 779), Durga Chowdhuri v. Jagroop,

A.I.R. (10) 1923 All. 191 : (79 I.C. 232), Bisheshar Pathak v. Rup Narain Singh, 26 A.L.J. 401 : (A.I.R. (15) 1928 All. 286), Mt. Raj Rani v. Gulab, A.I.R. (15) 1928 All. 552 : (117 I.C. 831), Mt. Dukhi v. Inderman Ahir, A.I.R. (21) 1934 All. 656 : (153 I.C. 903)."

"22. According to the view of law enunciated above, it is clear that the mortgagors are entitled to recover possession subject to the payment of the money received from the mortgagees and no question of limitation arises in the case. The possession of the mortgagees was a permissive possession and the only right they have is to be allowed to claim the money which the mortgagors had received. The plaint as framed, however, does not justify the granting of this relief to the plaintiffs in the two cases. Both the cases conveniently ignored the mortgage transactions and the plaintiffs put themselves forward as hereditary tenants of the land and treated the mortgagees as trespassers. They sued not only for possession but damages also. The cause of action was also wrongly stated. The plaintiffs did not offer to restore the benefit which they had received from the mortgagees as a condition precedent to their obtaining the relief for possession. Upon the present allegations in the two plaints, it is not possible to grant the relief for possession to the plaintiffs against the defendants. The cases will, therefore, go back to the trial Court and the plaintiffs of the two cases will be allowed to amend their plaint in the light of the above observation. The defendants will be allowed to raise such pleas in defence as may be open to them, and the parties will be entitled to produce such additional evidence as may appear necessary. The Court will then pass a proper decree according to law."

(Emphasis Supplied)

(II) Balwant and others vs. Deputy Director of Consolidation, 1975 SCC OnLine All 69 (Paragraphs 6, 58, 73, 74, 83, 86, 87, 88 and 89):

" 6. In order to resolve this conflict, the following questions of law have been referred to a Full Bench:—

"(1) Whether the possession of the mortgagee whose rights have extinguished under Sec. 14(1) of the U.P. Zamindari Abolition and Land Reforms Act is on or after the date of vesting per se adverse or permissive?

(2) Does the period of limitation for a suit under Sec. 209 of the U.P. Zamindari Abolition and Land Reforms Act commence to run from the date of vesting or on the

date of demand of possession?”.

"58.N.D. Ojha, J.:— I have gone through the opinion of brother Satish Chandra but I regret my inability to agree with the conclusion reached by him. The necessary facts are contained in the opinion of brother Satish Chandra and as such without repeating them here I propose to deal with the questions of law straightaway."

"73. As already seen above, there is nothing in the Act as a result of which the possession of the mortgagee could be said to have by operation of law per se become, on the date of vesting, without the consent of the mortgagor. Consequently, unless it was established that the mortgagee had clearly and unequivocally repudiated the permissive character of his possession to the knowledge of the mortgagor, his possession would continue to be permissive and with the consent of the mortgagor till such consent was revoked.

74. From the above discussion it also follows that the period of limitation for a suit under Sec. 209 of the Act will commence to run from the date of demand for possession and not from the date of vesting."

"83. If an occupancy tenant was ejected or died without leaving any heir or surrendered the holding he ceased to have any interest whatsoever in the land and no question of his subtenant or licensee continuing in possession with his consent could naturally arise. He was completely obliterated from the scene. The same is not the position of a usufructuary mortgagee as is clear from the foregoing discussion. The status of the mortgagee is, substituted from usufructuary mortgagee to simple mortgagee subject of course to the statutory restrictions created by Sec. 6(h) He continues to be a secured creditor. His continuance in possession even after the date of vesting is not dis-favoured by the Legislature, except that his possession will not be as usufructuary mortgagee. Even the mortgagor who had given his consent is not completely obliterated from the scene so that he ceases to have any interest in the land as is the case will an occupancy tenant, after his being ejected or dying without leaving any heir or surrendering the holding. Here fresh rights of bhumidhar are created in favour of the mortgagor in that very land in place of the earlier rights which vested in the State and the mortgagor gets a simultaneous right—so to speak without any hiatus to take or retain possession over that very land as bhumidrar over which the usufructuary mortgagee was in possession as such

till the date of vesting and continues in possession even thereafter even though not "as such". It is in this context that the nature of his possession after the date of vesting has to be considered and on such consideration it does not appear that his possession becomes per se adverse after the date of vesting."

"86. My answer to the two questions referred to above is, therefore, as follows:—

(1) The possession of the mortgagee whose right have extinguished under Sec. 14(1) of the Zamindari Abolition and Land Reforms Act on or after the date of vesting is not per se adverse but is permissive.

(2) The period of limitation for a suit under Sec. 209 of the U.P. Zamindari Abolition and Land Reforms Act would commence to run not from the date of vesting but from the date of demand for possession.

87.R.L. Gulati, J.:— I agree.

88.By the Court. In view of the majority opinion the questions referred to this Bench are answered as follows:—

(1) The possession of the mortgagee whose rights have extinguished under Sec. 14(1) of the Zamindari Abolition and Land Reforms Act on or after the date of vesting is not per se adverse but is permissive.

(2) The period of limitation for a suit under Sec. 209 of the U.P. Zamindari Abolition and Land Reforms Act would commence to run not from the date of vesting but from the date of demand for possession.

89.Questions answered."

(Emphasis Supplied)

(III) Pratap Singh alias Babu Ram and another vs. Deputy Director of Consolidation, Mainpuri and others, (2000) 4 SCC 614 :

"13. Section 14(1) purports to abolish all the rights of the mortgagee in possession of an estate or a share therein with effect from the date of vesting. It specifically provides that a mortgagee in possession shall cease to have any right to hold or possess land in such estate. Sub-section (1), however, operates subject to the provisions of sub-section (2) as is evident from the opening words of sub-section (1). Sub-section (2) provides that if the land, which was the subject-matter of the mortgage referred to in sub-section (1), was in the personal cultivation of the mortgagee on the date

immediately preceding the date of vesting, then, if such land was "sir" or "khudkasht" land of the mortgagor on the date of the mortgage, the said land shall be deemed to be "sir" or "khudkasht" of the mortgagor for purposes of Section 18. The implication of this provision is that even if the land was in the cultivatory possession of the mortgagee, on the date of vesting, it would be treated, fictionally, "sir" or "khudkasht" of the mortgagor, provided the land, on the date of the mortgage, was the "sir" or "khudkasht" of the mortgagor. The immediate effect of this deeming provision would be that the mortgagor would acquire "bhumidhari" rights in respect of that land under Section 18 of the Act. Thus, the overall effect of sub-sections (1) and (2) of Section 14 is that the rights of a mortgagee come to an end with effect from the date of vesting and the mortgagor becomes "bhumidhar" of that land under Section 18 of the Act. To put it differently, the encumbrance created by the mortgagor comes to an end as the land vests in the State free from encumbrance but the rights of the mortgagee to recover mortgage money is preserved as it is provided in Section 6(h) that it can be recovered from the "substituted security" under Section 73 of the Transfer of Property Act.

14. We may point out that "bhumidhari" rights, acquired by the mortgagor under Section 18, are new rights created under the Act after the land in which such rights have been acquired had vested in the State free from all encumbrances. This land, notwithstanding that it was the subject-matter of mortgage prior to the date of vesting, would not be treated as "substituted security" within the meaning of Section 73 of the Transfer of Property Act and a mortgage decree, if any, cannot be executed against that land. (See: Rana Sheo Ambar Singh v. Allahabad Bank Ltd. [AIR 1961 SC 1790 : (1962) 2 SCR 441])

15. The next and immediate question which crops up is the question relating to the status of the mortgagee in respect of that land. Even though the mortgagee was in cultivatory possession of the land on the date of vesting, his rights under the mortgage qua that land come to end as that land vests in the State subject to the condition that if the land, on the date of the mortgage was "sir" or "khudkasht" land of the mortgagor, the latter, namely the mortgagor would become a "bhumidhar" under Section 18.

16. If in these circumstances, the mortgagee continues

to remain in possession in spite of his rights having come to an end by the force of law, what would be the character of his possession; whether the possession would immediately become "hostile" to that of the mortgagor who has acquired "bhumidhari" rights under Section 18, or the mortgagee would be treated to be continuing in possession for and on behalf of the mortgagor. It is, at this stage, that the words used in Entry 30 relating to suits under Section 209 of the Act as set out in Appendix III to the Rules made under the ZA&LR Act become relevant. In column 3 meant for "Description of suit, application and other proceeding", the words used are: "Suit for ejectment of a person taking or retaining possession of the land unlawfully and for damages." These words contemplate a suit for ejectment of a person who has taken possession unlawfully or continues to retain that possession unlawfully. In the case of possessory or usufructuary mortgage, possession is delivered to the mortgagee. Delivery of possession to the mortgagee is a sine qua non of such a mortgage. It is delivered in terms of the mortgage by the mortgagor of his own volition to the mortgagee. The mortgagee gets possession over the land only because it has been delivered to him in terms of the mortgage deed which equally binds him. The entry into possession of the mortgagee in these circumstances cannot be said to be unlawful. Once the possession was delivered to the mortgagee lawfully by the mortgagor himself, the further retention of that possession by the mortgagee would obviously be with the consent of the mortgagor and the mortgagee shall be treated to be retaining the possession for and on behalf of the mortgagor till the mortgage is redeemed. The character of possession of the mortgagee who was lawfully inducted into possession by the mortgagor, does not change at any stage and it continues to be lawful possession.

17. A bare reading of the words of Entry 30 in Appendix III, relating to suits under Section 209 of the Act, makes it clear that the period of limitation would not run from the date of vesting, as the character of the mortgagee's possession remains "permissive" and does not become "adverse" to the interest of the mortgagor who after acquiring "bhumidhari" rights under Section 18, may still allow the mortgagee to continue in possession. As pointed out earlier, Entry 30 would apply to a suit where a person has obtained possession over land "unlawfully" and continues to retain that possession unlawfully. The period of limitation in the

case of a "permissive" possession would start running from the date the mortgagee, who is asked to deliver possession, refuses to do so. "Permissive possession" means that the mortgagee is in possession over the property in question with the leave of the owner, or to put it differently, of the "bhumidhar". If on being asked to deliver possession, the mortgagee refuses or declines to do so, it would give rise to a cause of action on the date on which possession is refused to be delivered and consequently the period of three years would start running from that date.

18. The High Court has considered the question from another angle. It has noticed that a usufructuary mortgage stands converted into a simple mortgage. It then proceeded to consider the ingredients of a simple mortgage and ultimately came to the conclusion that if the matter is examined from that angle, then too, the possession of the mortgagee would be permissive in character and the period of limitation for filing a suit under Section 209 would commence from the date on which the mortgagee refuses to deliver possession.

19. In *Shri Ram v. Dhan Bahadur Singh* [AIR 1965 All 223] as also in *Mustafa Khan v. Dy. Director of Consolidation* [1972 All LJ 854 : AIR 1973 All 372] it was held that possession of the mortgagee is permissive in the sense that it is with the consent of the mortgagor. In *Mahabal Singh v. Ram Raj* [1950 All LJ 713 : AIR 1950 All 604 (FB)] which is a Full Bench decision of the High Court, it was held that possession of a mortgagee of tenancy land, whose transfer was forbidden by law, would be "permissive" in character. This decision has since been approved in *Raj Narain Pandey v. Sant Prasad Tewari* [(1973) 2 SCC 35 : AIR 1973 SC 291] in which this Court observed, *inter alia*, as under: (SCC pp. 38-39, paras 9-10)

"9. We are unable to accede to the above contention, because we find that the matter is covered by two Full Bench decisions of the Allahabad High Court. In a five-Judge decision of the Allahabad High Court in the case of *Mahabal Singh* [1950 All LJ 713 : AIR 1950 All 604 (FB)] the Court referred to the decision of a three-Judge Bench of that Court in the case of *Ghassu v. Babu Ram* [AIR 1944 All 25 : ILR 1944 All 166 (FB)] and found that the following five propositions had been laid down in the earlier case:

'(1) That the usufructuary mortgage of an occupancy holding by a tenant is void and not voidable.

(2) That a mortgagor after giving possession to the mortgagee cannot recover possession of the holding without paying the money which he had taken from the mortgagee.

(3) That a mortgagee of an occupancy holding by remaining in possession for over 12 years does not extinguish the rights of the mortgagor to redeem it and by such possession the mortgagee only prescribes for mortgagee rights.

(4) That it is open to the mortgagor to seek possession of the holding by tendering the consideration which he had received and he may do so by a redemption suit.

(5) The relationship which comes into existence as a result of the mortgage of an occupancy holding and its possession being transferred to the mortgagee, though not strictly speaking that of a mortgagor and a mortgagee, is analogous to that relationship, and the action which is raised by the mortgagor to recover possession of the holding on payment of the money due to the mortgagee, though not strictly in the nature of a redemption, is analogous to a redemption suit.'

10. It was also observed that to take a contrary view from the law laid down in those five propositions would have the effect of unsettling the law established for a number of years. Mr Agarwal has not questioned the correctness of the above-mentioned five propositions and, in our opinion, rightly so. In the matter of the interpretation of a local statute, the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of unsettling transactions which might have been entered into on the faith of those decisions. The doctrine of stare decisis can be aptly invoked in such a situation."

"21. In our opinion, the majority decision of the Full Bench lays down the correct law. The Full Bench decision has since been followed by Hon. R.M. Sahai, J. (as his Lordship then was) in Tribeni v. Chakauri [1982 All LJ 784 : 1982 RD 185] in which it was laid down that the rights of a mortgagee come to an end from the date of vesting and his possession was "permissive" in character and not adverse to the interest of the mortgagor."

15. The above referred position of law, squarely covers the issued of law raised in facts and circumstances of present case, against the submission of petitioners and

supports the view taken by Deputy Director of Consolidation.

16. The Supreme Court has held that, "the rights of a mortgagee come to an end from the date of vesting and his possession was "permissive" in character and not adverse to the interest of the mortgagor" as well as "permissible possession" means that the mortgagee is in possession over the property in question with the leave of the owner, or to put it differently, of the "bhumidhar". If on being asked to deliver possession, the mortgagee refuses or decline to do so, it would give rise to a cause of action on the date on which possession is refused to be delivered and consequently the period of three years would start running from that date."

(Emphasis Supplied)

18. As referred above, mortgage was redeemed on 20.5.1947, however, either mortgagee had refused to hand over land in dispute to mortgagor or land in dispute was resettled in their favour.

19. As referred in **Babau Ram and Ors. (supra)** in case after redemption, mortgagee fails to hand over land to its mortgagor, the mortgagor has to file a suit for execution of redemption and for that limitation is provided in Entry 30 in Appendix III which provides limitation to institute under Section 209 of Act of 1950 which was three years, however, admittedly petitioner has not taken any steps for execution of redemption by filing a suit within referred period.

20. The petitioner has allowed the respondents to carry on their possession for very long time including long period before *zamindari* was abolished and for long duration of 21 years even thereafter and were recorded under Category VIII of revenue records.

21. The petitioner has undisputedly not taken any steps to recover possession. There are revenue entry in favor of respondents for long duration under Class VIII in revenue records i.e. " अराजी जिस पर आसामी - मौरुसी काबिज हो" and entry of above nature would have its

legal consequence.

22. The concurrent finding recorded by three authorities are based on revenue records with their correct interpretation and counsel for petitioner has failed to point out any perversity therefore, in view of **Central Council for Research in Ayurvedic Sciences and another (supra) and Krishnanand (dead) through LRs and others (supra)**, no case is made out for interference.

23. Accordingly, writ petition is dismissed.

Order Date :-16.10.2023

SB