

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1696 OF 2012

Vishram Khimji and Sons	}	
Through its Partner Devji	}	
Vishram Patel, Adult of	}	
Mumbai Indian Inhabitant,	}	
Residing at Gangawadi,	}	
Jawahar Nagar, LBS Marg,	}	
Ghatkopar (West), Mumbai.	}	Petitioner
versus		
1. The State of Maharashtra	}	
Through Urban Development	}	
Dept., Mantralaya, Mumbai.	}	
2. Competent Authority	}	
and Deputy Collector (ULC),	}	
Administrative Building,	}	
Mumbai Suburban District,	}	
Bandra (East), Mumbai.	}	Respondents

Mr. Rahul Walvekar for the petitioner.

Ms. Geeta Shastri - AGP for the
respondents.

CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.

Reserved on :- January 28, 2016
Pronounced on :- May 4, 2016

JUDGMENT:- (Per S. C. Dharmadhikari, J.)

PREFACE

1. This writ petition is one more in a series of matters where the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India is invoked not by rightful owners but by builders and developers to reclaim vacant lands in excess of

ceiling limits, when these have already vested in the State. The surplus land holders and owners of these lands know all too well that their fate is sealed, for they stand divested of their right, title and interest in these lands by due process of law. However, they are put up by builders and developers with ulterior motives to file such petitions by relying on the repeal of the Urban Land (Ceiling and Regulation) Act, 1976 (Principal Act) in the State of Maharashtra with effect from 29th November, 2007. Though physical possession of these lands is with the State, and this was not challenged by the owners and surplus vacant land holders at the relevant time, they raise such challenges only now and it appears to us that these litigations are clearly financed by builders and developers. These builders and developers generally have no locus or right in law to raise a challenge; they do so before us on the strength of irrevocable powers of attorney from the erstwhile or so-called 'owners'. The builders and developers put forward pleas which their principals have never raised. Such litigants are encouraged sometimes by inaction of the State officials in maintaining and preserving proper records, and sometimes the State machinery deliberately assists them by keeping back crucial and important documents.

2. Whatever may be the cause, this court's precious time is wasted in not only scrutinising the original records, but in considering the prolonged arguments. All this because even one square foot of land in a city like Mumbai commands a huge market price. In case after case, vacant lands that have not been fenced or protected are the subject matter of such litigations.

Since the State is seemingly unaware of the extent of the land it owns, there is a tendency to file these cases and to take a chance with this Court.

3. The present case is one more instance of builders and developers coming to court after the surplus land holders and owners have accepted the correctness and validity of the State's action. As Judges we hardly have any choice, particularly when such petitions are admitted.

B. FACTUAL

4. By this petition under Article 226 of the Constitution of India, the petitioner is challenging the notifications issued under section 10(3) dated 15th December, 2005 and section 10(5) dated 22nd June, 2006 in respect of his land being CTS Nos. 53 and 53/2 to 9 situate at village Hariyali, Taluka Kurla, Mumbai Suburban District.

5. The petitioner is claiming a declaration that the above proceedings were under the repealed Act, namely, Urban Land (Ceiling and Regulation) Act, 1976 (for short referred to as "**the ULC Act/Principal Act**"). The foundation of Mr. Walvekar's arguments for the Petitioner is that in view of the adoption of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short referred to as "**the Repeal Act**") in the State of Maharashtra, with effect from 29th November 2007, these lands should revert to the petitioner and be restored accordingly.

6. It is undisputed that the petitioner claims ownership of this vacant land in excess of the ceiling limit, admeasuring 497.7 square meters. It is the claim of the petitioner that he owns this land and he had constructed one building on the plot adjacent to the said land and that there was a co-operative housing society formed of the flat owners of this building known as Mohatta Nagar Co-operative Housing Society Limited. The said society erroneously claimed ownership of the remaining plot. Hence, the petitioner filed a suit in the City Civil Court at Mumbai, being Suit No. 3204 of 1970. That suit was decreed in favour of the petitioner on 29th April, 1988. The society, being aggrieved by the judgment and decree, preferred a first appeal in this court being First Appeal No. 1018 of 1989. That appeal was admitted and the execution and enforcement of the decree was stayed.

7. In the meanwhile, the 2nd respondent, the competent authority under the Principal Act, initiated proceedings under the said Act and held that the land in possession and ownership of the petitioner is vacant land in excess of the ceiling limits. An order under section 8(4) of the ULC Act was passed holding that out of the total land admeasuring 1997.7 square meters, the portion to the extent of 497.7 square meters is surplus or in excess of the ceiling limits.

8. The petitioner made a representation/application for exempting this land in excess of the ceiling limits by invoking the powers of the State Government under section 20 of the Principal Act. An order of exemption was passed on 20th March 1989 with

certain terms and conditions, one of which was to commence construction of a building within one year and to complete it within three years thereafter. The construction could not commence on account of the pendency of legal proceedings in this court. Since the construction could not commence, notice was issued by the competent authority calling upon the petitioner to commence and complete the work, failing which the exemption would be revoked.

9. The petitioner replied to this notice on 18th June 1990. The petitioner then states that on 17th September 1993, the appeal of the co-operative housing society, filed in this court, was dismissed. A Letters Patent appeal was preferred being Letters Patent Appeal No. 23 of 1994. That was allowed and a remand order was passed on 30th November 2001. After the order of remand, the Trial Court once again heard the suit and decreed it on 4th February 2002. The society once again preferred an appeal in this court being Appeal No. 555 of 2002, which was admitted on 15th April 2002. The pendency of the proceedings under the ULC Act was, unfortunately, not brought to the notice of this court at the time of admission of this appeal. Hence, the competent authority once again called upon the petitioner to commence construction, else the exemption would be withdrawn. The competent authority was informed by a reply to this notice about the pending legal proceedings. Still, the exemption order came to be withdrawn on 15th March 2005. Upon the withdrawal of exemption, further proceedings under the Principal Act were initiated and that is how notifications under section 10(1) and

section 10(3) came to be published in the Government gazette. Following these, a notice was issued under section 10(5) and the petitioner was called upon to hand over possession of the surplus vacant land. After issuance of the notice under section 10(5), the petitioner approached this court by a writ petition being Writ Petition No. 2570 of 2006, which was admitted and an interim order was passed. Later, on 21st November 2011, that writ petition was allowed to be withdrawn with liberty to file a fresh writ petition. Yet, in pursuance of the notice under section 10(5) of the Principal Act dated 22nd June 2006, the competent authority claims to have taken possession on 20th July 2006.

C. RIVAL SUBMISSIONS

10. Mr. Walvekar submits that this is a “paper possession”. Such possession is not saved by section 3(1)(a) of the Repeal Act. He, therefore, submits that in terms of the law laid down by this court in the case of *M/s. Johnson and Johnson and Anr. vs. State of Maharashtra and Anr.*¹, decided on 9th November 2011, the relief claimed in the petition be granted.

11. Mr. Walvekar fairly invites our attention to the two judgments of the Hon’ble Supreme Court of India in the case of *State of Uttar Pradesh vs. Hari Ram*² and the later judgment in the case of *State of Assam vs. Bhaskar Jyoti Sharma and Ors.*³.

1 Writ Petition No. 1461 of 2009

2 AIR 2013 SC 1793

3 (2015) 5 SCC 321

12. On the other hand, Ms. Shastri, learned AGP appearing for the State would submit that the affidavit in reply that has been filed on 23rd October 2015, and to which there is as yet no Rejoinder, indicates that all steps taken were lawful, and that the Repeal Act does not apply. She would, therefore, submit that the petition be dismissed.

D. FINDINGS

13. Having heard both sides and perusing the petition, its annexures and the affidavit in reply, we find that there is no substance in any of the contentions of Mr. Walvekar. In the affidavit in reply, it has been stated that the notice under section 10(5) was issued on 22nd June 2006, calling upon the declarant to hand over possession of the land admeasuring 497.7 square meters being in excess of the ceiling limits. On 15th July 2006, the petitioner addressed a letter acknowledging receipt of this notice and stated that some legal proceedings are pending in this court. Thus, a notice under section 10(5) giving 30 days' clear time was issued, duly served and in pursuance thereof, possession was taken on 20th July 2006. The documents that are annexed clearly evidence the taking of possession.

14. Even the prior steps in pursuance of the Principal Act would denote that the land is admittedly in excess of the ceiling limits. The panchanama indicates that none was present at site to hand over possession. The possession receipt also demonstrates as to how maintenance surveyor Mr. S. D. Pawar visited the site and

took possession of the same on 20th July 2006 at 11.30 a.m. It is evident that there was no impediment in proceeding and taking possession of this land and which was admittedly in excess of the ceiling limits and covered by an exemption order. The terms and conditions of the exemption order were not complied. The exemption order, thus, came to be cancelled. The petitioner's claim in the present petition that he had no knowledge of the possession being taken prior to the Repeal Act coming into force is baseless. The notifications under section 10(1) and 10(3) of the Principal Act were published in the official gazette. The petitioner had complete knowledge of these.

15. Secondly, Mr. Walvekar's contentions overlook the fact that there was a serious dispute with regard to the petitioner's claim of ownership. On the petitioner's own showing, the land was claimed by the Mohatta Nagar Co-operative Housing Society Limited. There was a building constructed on the plot adjacent to this land, according to the petitioner and therefore, Mohatta Nagar Co-operative Housing Society had no right, title or interest in the land not covered by their building or appurtenant thereto. Thus, the title to the vacant land in excess of the ceiling limits was an issue pending between the petitioner and the society. The pendency thereof reveals that the petitioner cannot assert his absolute title as an owner in the vacant land, which is in excess of the ceiling limits. At the instance of such a petitioner, who is facing continuous legal proceedings and right up to this court so also when the second round is pending, we cannot entertain the present petition.

16. Even otherwise, we have already dealt with such an issue and controversy recently. In a Division Bench judgment delivered in Writ Petition No. 1468 of 2009 decided on 22nd April 2016, we considered somewhat identical questions, and while distinguishing the judgments in the case of *Hari Ram* (supra) and in the case of *Johnson and Johnson* (supra), we held as under:-

“175) On the aspect of applicability of section 3(1)(a) of the Repeal Act, Mr. Chidambaram's reliance on the judgment of this court and that of the Hon'ble Supreme Court of India is entirely misplaced.

176) In the case of *Bank of Baroda Employees Arunoday Co-operative Housing Society Ltd. vs. State of Maharashtra*⁴ decided on 21st November, 2011, the State and the competent authority claimed that possession of the land declared as surplus vacant land was taken on 14th November, 2006, whereas, the petitioner asserted otherwise. The facts have been noted in para 2 of the order of the Division Bench and it found that the State/competent authority took possession on the above date pursuant to a notification under section 10(5) of the Principal Act dated 30th June, 2006. The Division Bench noted the case of the petitioner that as on 30th October, 2006, when the notice under section 10(5) was issued, it was the petitioner society who was in possession of the land and the building and therefore, the act of the State in taking possession without

issuing notice to it is illegal. Then, they questioned the contents of the possession receipt and which states that the person to whom notice was issued is not willing to handover possession. It is in these circumstances that the Division Bench held that the provisions of the Repeal Act would come into play, meaning thereby, the proceedings under the Principal Act lapse. It is in the above factual background and peculiar to the petitioner's case that all findings in para 5 have been rendered. We do not see, therefore, any assistance can be derived from the said observations, findings and conclusions. Notice under section 10(5) may have been held to be mandatory. The notice also must set out the period and in terms of the sub section so as to enable the person in possession to surrender or deliver possession of the vacant land vesting in the State to the State Government or to any person duly authorised by the State. He should be, therefore, put to notice in writing and which should contain the direction to surrender or deliver possession within 30 days of the service of the notice. We do not see as to how this principle and which also has been laid down in the judgment of this court in the case of *M/s. Johnson and Johnson Ltd. and Anr. vs. State of Maharashtra and Anr.*⁵ decided on 9th November, 2011 would have any application to the facts of this case.

177) Then comes the reliance on the judgment in

the case of *State of Uttar Pradesh vs. Hari Ram*⁶. In this case, one should not forget that respondent Hari Ram was holding excess land admeasuring 52,513.30 square meters. An order under section 8(4) of the Principal Act was passed by the competent authority on 29th June, 1981. The notification under section 10(1) of that Act was issued on 12th June, 1982 and published in the Government gazette. The notification under section 10(3) was published on 22nd November, 1997. On 10th June, 1999, the surplus vacant land stood vested in the State in terms of the entry in the Revenue records. On 19th June, 1999, a notice under section 10(5) directing Hari Ram to handover possession of the land declared surplus was issued. Aggrieved by that, Hari Ram preferred Appeal No. 29 of 1999 before the District Judge, Varanasi under section 33 of the Principal Act, but what he impugned in that appeal was important. He challenged the order under section 8(4) of the Act and urged that before that order was passed, no notice, as contemplated under section 8(3) of that Act, was served on him. That appeal was allowed and the order dated 29th June, 1981 under section 8(4) of the Act was set aside on 14th December, 1999. Aggrieved by that order, the State of Uttar Pradesh filed a writ petition in the High Court of Allahabad and the High Court, after elaborately considering various contentions, took a view that for taking

physical possession of the land, proceedings under section 10(5) have to be followed. On facts also the Division Bench found no reason to interfere with the order of the District Judge.. The State's writ petition was dismissed. That is how the State approached the Hon'ble Supreme Court against the decision of the High Court of Allahabad in Hari Ram's case and following Hari Ram in other cases. The arguments have been noted in paras 6 and 7 and we must not forget that the Hon'ble Supreme Court was concerned with the primary submission that under the Principal Act, though there is a vesting of the land in terms of sub-section (3) of section 10, upon publication of the notification, what one finds is that by virtue of sub-sections (4) and (5) of section 10 so also sub-section (6) thereof, after such vesting, the physical possession has to be taken and obtained by recourse to these provisions. It is in examining the scope of sub-sections (3), (4) as well as sub-sections (5) and (6) of section 10 that all the further conclusions of the Hon'ble Supreme Court are rendered. It is then apparent that by vesting alone, it would not be permissible to hold that possession follows. Possession would follow only upon recourse to these sub sections and that is how all the paragraphs, namely paragraphs 33 to 37 would have to be seen. The requirement of notice is only under sub-sections (5) and (6) and that is held to be mandatory.

178) We do not see how our view in the present

case, is in any way contrary to *Hari Ram's* decision (supra). We have not held in the present case that notice need not be issued. The controversy before us was whether notice issued was served on the co-owners. On facts, we have found that not only such a notice was served, but copy thereof was pasted on site. That was after it was endorsed in the register that the noticees were not found at the stated address. That is how the competent authority directed the City Survey Officer to cause a notice to be displayed at site. It was accordingly displayed. Once we find that the notice was issued, though that notice stated that the possession would be taken on 9th March, 2007, the record indicates that it was not taken on that date, meaning thereby within 30 days, but on 28th March, 2007. Therefore, it is not as if before the 30 days period expired from 27th February, 2007 that the possession was taken. Secondly, we find that the distinguishing feature in the present case is that the arguments do not rest on the issuance of notice and its service alone. The legality and validity of the notice and the act of taking possession before 30 days' period is also raised. It is therefore clear that diverse pleas are set out to claim benefit of the Repeal Act. However, that cannot be extended to the petitioners in the present case. We are of the firm opinion view that no assistance can, therefore, be derived from the principles laid down in the case of *Hari Ram* (supra) in the present facts and circumstances. The legal

principles are indeed binding on us, but on facts their application is a matter with which we are really concerned. More so, when the petitioners also challenge the correctness and validity of the possession receipt, panchanama etc. Once there is a record of the physical possession having been taken well before 29th November, 2007 (reckoned as the date of coming into force of the Repeal Act in Maharashtra), then, we do not see how we can apply the Repeal Act to the present facts.

179) There is one more reason because we have already found that the petitioners alone do not claim to be in physical possession, but state that the physical possession of the land would have to be obtained from the Court Receiver. They claim that the property is *custodia legis* and hence notice to receiver ought to be issued. It is only when notice is issued to him or when the court's approval is obtained that the receiver can be dispossessed and not otherwise. Therefore, it is doubtful as to how the judgment in the case of *Hari Ram* (supra) and that in the case of *Vinayak Kashinath Shilkar vs. Deputy Collector and Competent Authority and Ors.*⁷ can have any application.

180) We cannot also take assistance as desired by Mr.Chidambaram from other judgments and which are essentially on the point of an order being non compliant with the principles of natural justice

and therefore nullity. On facts, we do not see any application of this principle to the present case.

181) We are also supported in our views and conclusions by the reliance placed by Mr. Samdani on the judgment of the Hon'ble Supreme Court of India in the case of *State of Assam vs. Bhaskar Jyoti Sarma and Ors.*⁸. This judgment distinguishes *Hari Ram's* case (supra) and we reproduce the following paragraphs of this judgment:-

"6. We have heard the learned counsel for the parties for a considerable length. The Urban Land (Ceiling and Regulation) Act, 1999 repealed the principal Act w.e.f. The date the State adopted the Repeal Act. In terms of a resolution passed under clause (2) Article 252 of the Constitution, the Repeal Act was adopted by the State of Assam w.e.f. 6-8-2003. We may at this stage usefully extract Sections 2 and 3 of the Repeal Act which have a direct bearing on the questions that arise for our determination:

2. Repeal of Act 33 of 1976. - *The Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the Principal Act), is hereby repealed.*

3. Saving. - (1) *The repeal of the principal Act shall not affect -*

(a) *the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;*

(b) *the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;*

(c) *any payment made to the State Government as a condition for granting exemption under sub-section (1) of section 20.*

(2) *Where -*

(a) *any land is deemed to have vested in the State Government under sub-section (3) of Section 10*

of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land.

Then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

7. A bare reading of Section 3 (*supra*) makes it clear that repeal of the principal Act does not affect the vesting of any vacant land under sub-section (3) of Section 10, possession whereof has been taken over by the State Government or any person duly authorised by the State Government in that behalf or by the competent authority. In the case at hand, the appellant claims to have taken over the possession of the surplus land on 7-12-1991. That claim is made entirely on the basis of a certificate of handing over/taking over of possession, relevant portion whereof reads as under:

"Certificate of handing over/taking over possession

Today on this 7th December, 1991, we took over possession of 70.32 ares of acquired land as scheduled below vide order of the Deputy Commissioner, Kamrup's ULC Case No. 343 dated 2-3-1991 and as per Assam Gazette Notification dated 1-1-1987 in Case No. ULC343/76.

Schedule of land

** * **

Received possession

(Taken over possession unilaterally)

sd/-

Illegible

Given

possession

Designation SK (G)

Designation

Dated 7-12-1991

Dated 7-12-1991

Countersigned

sd/-

Illegible

Circle Officer

Guwahati Revenue Circle"

8. Relying upon the above document it was strenuously argued on behalf of the appellant that actual physical possession was taken over from the erstwhile landowner as early as in December 1991, no matter relevant official record does not bear testimony to any notice having been

issued to the landowners in terms of Section 10 sub-section (5) of the Act. It was argued that so long as actual physical possession had been taken over by the competent authority title to the land so taken over stood vested absolutely in the State Government under Section 10(3) and could not be claimed back no matter the principal Act stood repealed after such vesting had taken place. In support of the contention that actual physical possession had been taken over by the competent authority, the appellant places heavy reliance upon the fact that challenge to the proceedings under the Act mounted in Writ Petition No. 2568 of 1992 by the purchasers of a part of the disputed land had failed right up to this Court and the allotment of a substantial part of the surplus land in favour of the 8 families affirmed. This, according to the appellant, proves that possession of the surplus land had indeed been taken over from the erstwhile owner in terms of proceedings held on 7-12-1991.

9. It was also contended that Bhabadeb Sarma, the erstwhile owner, had remained aloof even when he was a party to the writ petition filed by the purchasers who had questioned the validity of the order passed by the competent authority including the allotment of the surplus land in favour of third parties. It was argued that the Repeal Act would have no effect whatsoever even when the taking of possession was without notice to the erstwhile owner especially when the owner had failed to question any such takeover at the appropriate stage in appropriate proceedings. The challenge mounted by the legal heirs of the deceased erstwhile owner 13 years later was clearly untenable and an afterthought. Failure of the landowner to seek redressal against non-compliance with the statutory requirement of a notice before possession is taken would constitute abandonment of the right of the owner under Section 10(5) which cannot be resuscitated after lapse of such a long period only to take advantage of the Repeal Act. The question whether actual physical possession of the disputed land had been taken over is in any case a seriously disputed question of fact which could not be adjudicated or determined by the High Court in its writ jurisdiction.

10.

11. Section 3 of the Repeal Act postulates that vesting of any vacant land under sub-section (3) of Section 10 is subject to the condition that possession thereof has been taken over by the competent authority or by the State Government or any person duly authorised by the State Government. The expression "possession" used in Section 3 (supra) has been interpreted to mean "actual physical possession" of the surplus land and not just possession that

goes with the vesting of excess land in terms of Section 10(3) of the Act.

12. The question, however, is whether actual physical possession of the land in dispute has been taken over in the case at hand by the competent authority or by the State Government or an officer authorised in that behalf by the State Government.

13. The case of the appellant is that actual physical possession of the land was taken over on 7-12-1991 no matter unilaterally and without notice to the erstwhile landowner. That assertion is stoutly denied by the respondents giving rise to seriously disputed question of fact which may not be amenable to a satisfactory determination by the High Court in exercise of its writ jurisdiction. But assuming that any such determination is possible even in proceedings under Article 226 of the constitution, what needs examination is whether the failure of the government or the authorised officer or the competent authority to issue a notice to the landowners in terms of Section 10(5) would by itself mean that such dispossession is no dispossession in the eye of the law and hence insufficient to attract Section 3 of the Repeal Act. Our answer to that question is in the negative.

14. We say so because in the ordinary course actual physical possession can be taken from the person in occupation only after notice under Section 10(5) is issued to him to surrender such possession to the State Government, or the authorised officer or the competent authority. There is enough good sense in that procedure inasmuch as the need for using force to dispossess a person in possession should ordinarily arise only if the person concerned refuses to cooperate and surrender or deliver possession of the lands in question. That is the rationale behind Sections 10(5) and 10(6) of the Act. But what would be the position if for any reason the competent authority or the government or the authorised officer resorts to forcible dispossession of the erstwhile owner even without exploring the possibility of a voluntary surrender or delivery of such possession on demand? Could such use of force vitiate the dispossession itself or would it only amount to an irregularity that would give rise to a cause of action for the aggrieved owner or the person in possession to seek restoration only to be dispossessed again after issuing a notice to him? It is this aspect that has to an extent bothered us.

15. The High Court has held that the alleged dispossession was not preceded by any notice under Section 10(5) of the Act. Assuming that to be the case all that it would mean is that on 7-12-1991 when the erstwhile owner was dispossessed from the land in question, he could have

made a grievance based on Section 10(5) and even sought restoration of possession to him no matter he would upon such restoration once again be liable to be evicted under Sections 10(5) and 10(6) of the Act upon his failure to deliver or surrender such possession. In reality therefore unless there was something that was inherently wrong so as to affect the very process of taking over such as the identity of the land or the boundaries thereof or any other circumstance of a similar nature going to the root of the matter hence requiring an adjudication, a person who had lost his land by reason of the same being declared surplus under Section 10(3) would not consider it worthwhile to agitate the violation of Section 10(5) for he can well understand that even when the Court may uphold his contention that the procedure ought to be followed as prescribed, it may still be not enough for him to retain the land for the authorities could the very next day dispossess him from the same by simply serving a notice under Section 10(5). It would, in that view, be an academic exercise for any owner or person in possession to find fault with his dispossession on the ground that no notice under Section 10(5) had been served upon him.

16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile landowner on 7-12-1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.

17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram case ((2013) 4 SCC 280). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram case considering whether the word "may" appearing in Section 10(5) gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of

Section 10(5) and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of the law did not fall for consideration in that case. In our opinion, what Section 10(5) prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma, erstwhile owner, had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

18.

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr Sanatan Baishya. It was contended that said Mr Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7-12-1991 till the date the land in question was allowed to GMDA in December 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked the learned counsel for the parties whether they can, upon remand on the analogy of the decision in Gyanaba Dilavarsinh Jadega (2013) 11 SCC 486, adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the constitution no matter the High Court may in its discretion in certain situations enter upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."

182) We are of the opinion that the controversy before us stands fully covered by this judgment and it binds us.”

17. We do not find any prejudice to the petitioner being established and proved. The petitioner has whenever convenient maintained silence about the legal proceedings and whenever faced with a rival claim raised the plea about it to resist the action under the principal Act. This aspect besides a belated challenge and no real prejudice are enough reasons to deny relief to the petitioner in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. As a result of the above discussion, the writ petition is dismissed. There would be no order as to costs.

18. The original record shall be returned to the concerned Department of State through the Government Pleader.

(G.S.PATEL, J.)

(S.C.DHARMADHIKARI, J.)