

(2015) 02 AHC CK 0128

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 54062 of 2013

Jagat Narain and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 09-02-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Specific Relief Act, 1963 — Section 40(2)

Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 29-C

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 117, 122-A, 122-A(1), 122B, 122-B

Citation : (2015) 3 ADJ 466 : (2015) 4 ALJ 420 : (2015) 3 AWC 2579 : (2015) 127 RD 615

Hon'ble Judges : D.Y. Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Ajay Srivastava and Anil Tiwari, for the Appellant; Ashish Kumar Srivastava, C.B. Yadav, A.A.G., Shashank Shekhar Singh, A.C.S.C., Advocates for the Respondent

Judgement

Dr. D.Y. Chandrachud, C.J.—The reference to the Division Bench has been occasioned by an order dated 1 October 2013 of a learned Single Judge while dealing with the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (Act of 1950). The learned Single Judge noticed several judgments of coordinate Benches dealing with the provisions of Section 122-B. In some of the judgments, learned Single Judges had held that in certain circumstances, while deciding a challenge to an order of eviction under Section 122B, this Court, in the exercise of its power of judicial review under Article 226 of the Constitution, had the jurisdiction to direct the settlement of the land in favour of an individual found to be in unauthorized occupation by substituting an order for the payment of damages in lieu of the order of eviction. These judgments were delivered in:

"(i) Ajanta Udyog Mandal Vidyalay Vs. State of U.P. and Others, (2005) 2 AWC 1745 ;

(ii) Budhaee Vs. Collector, Assistant Collector/Tahsildar Khaga, Gram Sabha Sanwat and State of U.P., (2005) 3 AWC 2447 : (2005) 98 RD 741 : (2005) 1 RD 741 ;

(iii) Sukhdeo Vs. The Collector, The Assistant Collector Ist Class/Tahsildar, Gaon Sabha Amlikaur, (2007) 5 AWC 5107 : (2007) 102 RD 83

(iv) Kishore Singh v. Additional Collector, Agra, 2007(1) ADJ 679 (decided on 21 November, 2006)

(v) Siya Ram v. Additional Commissioner (Administration), Kanpur Division, Kanpur, 2007(7) ADJ 451.

(vi) Ram Charan v. Additional Collector (Prashashan), Firozabad, Agra, Civil Misc. Writ Petition No. 4775 of 1983 (decided on 9 March, 2007)."

2. The learned Single Judge noted that taking a contrary view in Pratap Singh Shishodia Vs. Board of Revenue and Others, (2008) 1 AWC 380 : (2008) 104 RD 15 , another learned Single Judge had, however, taken the view that it would not be permissible to allow a person, who had grabbed public property by a back-door process, to claim settlement of the property and to have his occupation legalised. The learned Single Judge held that the tendency of encroachment on public land and property was increasing and it was not appropriate to place a premium on a wrong and void act unless it is permitted in law.

3. Noticing this conflict, the learned Single Judge has referred the following questions for adjudication by the Division Bench:

"1. Whether the law laid down by the learned Single Judge in the cases of Ajanta Udyog Mandal Vidyalay (supra), Budhaee (supra), Sukhdeo (supra), Kishore Singh (supra) and Siya Ram (supra), are in direct conflict with the view taken by another learned Single Judge in the case of Pratap Singh Shishodia (supra) and consequently;

2. As to which of the said decisions lay down the law correctly keeping in view the provisions referred to hereinabove of the U.P.Z.A. and L.R. Act, 1950;

3. Whether the view expressed in the case of Sukhdeo (supra) on the issue of limitation runs counter to the view taken in the case of Rakshpal Singh (supra)."

4. On behalf of the petitioners, it has been submitted that

"(i) The constitutional goal of shelter to all is a fundamental right under Article 21 of the Constitution and it is the duty of the State to take all necessary steps for realizing the constitutional goal and purpose;

(ii) If the decisions of the learned Single Judges are properly construed, there is no conflict between the views expressed in those decisions;

(iii) The Act of 1950 contains a specific provision for regularization of occupation in respect of certain categories or classes, just as it makes a provision for

allotment of land for specified categories of persons;

(iv) There is no provision prohibiting regularization in those cases which do not fall within the categories specifically spelt out in the statute, which leaves open an area for the exercise of judicial discretion in an appropriate case;

(v) In Budhaee's case (supra) and those which have followed it, the learned Single Judges have correctly exercised their equitable jurisdiction under Article 226 of the Constitution by directing that the land be settled in favour of the individual against whom an order under Section 122-B has been passed on payment of damages in lieu of an order of eviction."

5. On the other hand, the learned Additional Advocate General has submitted that

"(i) The Act of 1950 is a complete Code in regard to the allotment of lands to persons, inter alia, belonging to the Scheduled Castes, Scheduled Tribes as well as to homeless labourers, artisans and even to persons belonging to the general category living below the poverty line;

(ii) The present case does not deal with those categories in which the legislature has expressly contemplated allotment or, as the case may be, regularization in favour of specified legislative categories and the issue is whether a person, who is an encroacher on public property/land, is entitled to protection in exercise of the power of judicial review under Article 226 of the Constitution;

(iii) Sub-section (4-F) of Section 122-B is the only area in which, notwithstanding anything contained in the foregoing sub-sections, a protection against eviction has been granted by the legislature and any person outside the scope and purview of sub-section (4-F) of Section 122-B would not be entitled to such protection;

(iv) Under Section 122-A of the Act of 1950, superintendence, management and control of land, which has been vested in the Gaon Sabha under Section 117 of the Act of 1950, is vested with the Land Management Committee. Where the State Legislature, in pursuance of the legislative goal, considers it appropriate to allow allotments of land or regularization thereof in favour of a specified category of persons, provisions in that regard have been made. Having due regard to the U.P. Zamindari Abolition and Land Reforms Rules, 1952 (Rules of 1952), which have been framed under the Act of 1950, including Rules 115-C, 115-D, 115-L, 115-M and 115-O, an order for regularization would be impermissible in law in a case which is not covered by a specific statutory provision. There being no provision for regularization, equity, it was submitted, cannot prevail over law and the Court would not in exercise of its power of judicial review have the power to virtually grant rights of a tenorial nature in substitution of an order of eviction passed by the competent authority."

6. The Act of 1950 was enacted to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to

reform the law relating to land tenure consequent upon such abolition and acquisition. Under Section 117 of the Act of 1950, upon the publication of a notification referred to in Section 4, the State Government was empowered to declare that as from a date to be specified in this behalf, lands falling in the categories described in clauses (i) to (vi) which had vested in the State under the Act, shall vest in a Gaon Sabha or any other local authority established for the whole or part of the village. Clauses (i) to (vi) are as follows:

"(i) lands, whether cultivable or otherwise, except lands for the time being comprised in any holding or grove;

(ii) forests;

(iii) trees, other than trees in a holding on the boundary of a holding or in a grove or abadi;

(iv) fisheries;

(v) hats, bazars and melas, except hats, bazars and melas held on lands to which the provisions of Clauses (a) to (c) of sub-section (1) of Section 18 apply or on sites and areas referred to in Section 9; and

(vi) tanks, ponds, private ferries, water channels, pathways and abadi site."

7. Section 122-A of the Act of 1950 provides that subject to the provisions of the Act, the Land Management Committee shall be charged, for and on behalf of the Gaon Sabha, with the general superintendence, management, preservation and control of all the lands, forests within village boundaries, trees (other than trees in a holding, grove or abadi), fisheries, tanks, ponds, water channels, pathways, abadi sites and hats, bazars and melas vested in the Gaon Sabha under Section 117. Section 122-B provides as follows:

"122-B. Powers of the Land Management Committee and the Collector.--(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or local authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show-cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show-cause within the time specified in the notice or within such extended time not exceeding [thirty days] from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order, prefer a revision before the Collector on the grounds mentioned in clauses (a) to (e) of Section 333.

(4-B) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this section -

(i) every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final,

(ii) every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) Any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a Court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

Explanation.-For the purposes of this section, the expression "Collector" means the officer appointed as "Collector" under the provisions of the U.P. Land Revenue Act, 1901 and includes an Additional Collector.

(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before May 13, 2007 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management

Committee or the Collector against such labourers, and [he shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land."

(5) Rules 115-C to 115-H of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, shall be and be always deemed to have been made under the U.P. Zamindari Abolition and Land Reforms Act, 1950 as amended by the Uttar Pradesh Land Laws (Second Amendment) Act, 1961, as if this section has been in force on all material dates and shall accordingly continue in force until altered or repealed or amended in accordance with the provisions of this Act."

8. Sub-section (1) of Section 122-B casts a duty upon the Land Management Committee to inform the Assistant Collector in every case where a property, which is vested in a Gaon Sabha, is damaged or misappropriated or where the Gaon Sabha is entitled to take or retain possession of any land under the provisions of the Act and such land is occupied otherwise than in accordance with those provisions. Sub-section (2) of Section 122-B casts a duty upon the Assistant Collector, upon receipt of information under Sub-section (1) or otherwise where he is satisfied that such property has been damaged or misappropriated or any person is in occupation of any land in contravention of the provisions of the Act, to issue notice to the person concerned to show-cause why compensation for damage, misappropriation or wrongful occupation be not recovered or, as the case may be, why the person concerned should not be evicted from such land. Sub-sections (3), (4), (4-A), (4-B), (4-C) and (4-D) provide the procedure which is thereafter to be followed, including the remedies available. Subsection (4-F) of Section 122-B commences with a non-obstante provision. Sub-section (4-F) of Section 122-B carves out an exception in those cases where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before 13 May 2007 so long as the land so occupied together with the land, if any, held by him from before the said date as bhumidhar, sirdar or asami does not exceed 1.26 hectares. In such a case, no action can be taken by the Land Management Committee or the Collector against such labourer and such a person has to be admitted as bhumidhar with non-transferable rights in respect of that land. Such a person would not be required to institute a suit for declaration of rights as bhumidhar.

9. Other provisions of the Act of 1950 similarly contemplate the allotment of lands inter alia for housing sites for persons falling in specified categories. Among them, under Section 122-C, the Assistant Collector, on his own motion or on the resolution of the Land Management Committee, may earmark certain classes of land for the provision of abadi sites for members of the Scheduled Castes, Scheduled Tribes, the Other Backward Classes and persons of general category living below the poverty line and agricultural labourers and village

artisans. Sub-section (2) of Section 122-C similarly confers power on the Land Management Committee, with previous approval of the Assistant Collector, to allot land for the purpose of building houses to persons referred to in sub-section (3). Sub-section (3) provides for an order of preference. Under Section 123-B, the legislature has provided for the prosecution of a person, who occupies land without lawful authority, after having been evicted under the Act from any land which is vested in the Gaon Sabha.

10. Rule 115-C (1) of the Rules of 1952 casts an affirmative duty on the Land Management Committee to preserve or protect from damage, misappropriation and wrongful occupation, all properties vested in it under Section 117, including vacant land and land over which it is entitled to take possession under the Act and to manage and maintain all such property and land in its possession. The Collector is empowered by Rule 115-D to take action, inter alia, to remove a person from wrongful occupation and to require him to pay damages where the Land Management Committee or the local authority, as the case may be, has failed to take action under Section 122-B. The Collector is empowered to do so even on facts otherwise coming to his notice. Rule 115-L empowers the Assistant Collector, wherever the land which has been earmarked for the extension of abadi for Harijans and any other land of abadi site vested in Gaon Sabha is insufficient to meet the housing requirements of persons referred to in Sub-section (3) of Section 122-C, to proceed to earmark land for abadi sites. Similarly, under Rule 115-M, abadi sites other than those referred to in Rule 115-L and vested in a Goan Sabha may be allotted for construction of buildings for residential or charitable purposes or for purposes of cottage industry in order of preference referred to therein. Rule 115-O provides that the maximum area of allotment under Rule 115-L or Rule 115-M shall not exceed 250 square metres.

11. These provisions are indicative of the fact that the legislature, while enacting the provisions of law, has taken care to provide for allotment in favour of certain categories of persons in furtherance of the social object which was sought to be achieved in enacting the law. Similarly, even in the matter of eviction of persons who are found to be in unauthorised occupation, the legislature has carved out an exception in sub-section (4-F) of Section 122-B.

12. The issue, in essence, before the Court is whether the Court, while exercising its power of judicial review against an order under Section 122-B, would be justified in expanding the limit of the exception carved out by the legislature and by directing the settlement of land in favour of an unauthorised occupant who does not fall within the exception carved out in the legislation.

13. In certain judgments of the learned Single Judges of this Court, a view was taken to the effect that in a petition challenging an order of ejectment and recovery of damages under Section 122-B, the Court has power to substitute a direction for the payment of a quantified amount in lieu of the order of eviction.

14. In *Ajanta Udyog Mandal Vidyalaya* (supra), proceedings were initiated under

Section 122-B and an order was passed on 27 August 2004 in respect of a School which had been established on the land in dispute allegedly in 1964. The learned Single Judge, relying upon an earlier decision in *Ram Shanker Vs. Mahatma Gandhi Higher Secondary School, Jonihan and Another*, AIR 1979 All 184 (decided on 1 March, 1979), supported the view that in some rare cases instead of giving relief of ejectment, award of damages may be the proper relief. The learned Single Judge held that the establishment of a school for imparting education also serves a public purpose and since the land was not stated to be reserved for any other public purpose, it would be extremely unjust to demolish the school building standing thereon. Accordingly, while setting aside the order of ejectment, the learned Single Judge directed that an amount of Rs. 1,75,000/-be deposited with the Collector, to be retained in the consolidated Gaon Sabha fund. Upon this, the learned Single Judge directed that the land in dispute shall stand settled with the petitioner.

15. In taking the aforesaid view, the learned Single Judge in *Ajanta Udyog Mandal Vidyalay* (supra) relied upon an earlier decision in *Ram Shankar* (supra) as noted above. The decision in *Ram Shankar* (supra) was on a second appeal arising out of a suit for demolition of a wall. The suit had been decreed by the trial Court which had held that the plaintiff was the owner of the land in suit and that the defendants had failed to prove that they acquired any title by adverse possession. The lower appellate Court reversed the decree holding that the plaintiff had failed to establish his ownership with regard to the land in suit. In a second appeal, this Court held that the lower appellate Court misdirected itself in holding that the land in dispute did not belong to the plaintiff and that the case of adverse possession had not been established. However, while disposing of the second appeal, the learned Single Judge held that though the plaintiff may be the owner of the land in dispute, yet he had made no use of it for several years and would suffer no irreparable loss even if he were to part with a small portion thereof. Hence, this was held to be a fit case where instead of ordering demolition of the construction, the plaintiff may be permitted to claim damages by an amendment of the plaint under Section 40(2) of the Specific Relief Act, 1963. The suit was, accordingly, remanded to the trial Court for determination in that regard. It was this judgment which was followed in *Ajanta Udyog Mandal Vidyalay* (supra).

16. The next decision of a learned Single Judge to be noticed is that in *Budhaee* (supra). That was a case where it was alleged that the petitioner had encroached on Gaon Sabha land ad-measuring about .006 hectare (55 to 64 Sq. meters). The petitioner had constructed his house over the land in dispute which, in the revenue record, had been entered as land reserved for a basic school. The learned Single Judge held that if, on a small portion of land ad-measuring 100 to 200 Sq. meters belonging to a Gaon Sabha which was not reserved for some important public purpose such as a pond, rasta etc., a person had constructed his house, which was in existence for a long time, it was not proper to direct demolition of the house and eviction of the occupant thereof. In such a situation,

reasonable damages (it was held) would serve the public purpose better. The learned Single Judge held that the following factors are to be borne in mind:

"4.... (1) What is the status of owner. (2) What is the status of unauthorised occupant. (3) For what purpose owner was using the land in dispute before unauthorised occupation and for what purpose owner is likely to use the land if it is handed back to the owner. (4) For what purpose the unauthorised occupant is using the land in dispute. (5) Area of the encroached land. (6) Period of unauthorised occupation. (7) Reason of silence or inaction of the owner at the time of unauthorised occupation. (8) The reason of delay on the part of the owner to initiate proceedings for ejectment if such proceedings are initiated after a long time from the date of unauthorised occupation. (9) Interest of justice. (10) Balance of convenience and irreparable loss and injury.

Gaon Sabha holds the land for the benefit of the residents of the village. Gaon Sabha is permitted rather required to allot land for abadi purposes. User of the land reserved for several other purposes may be converted into Abadi site and then it may be allotted by Gaon Sabha for constructing houses. Unauthorised occupation of scheduled caste and now of other backward classes or persons of general category living below poverty line before a particular cut off date is regularized under Section 123 of U.P. Z.A. and L.R. Act. Initially the cut off dates were June 1985 and June 1995. The latest cut off date is 1-5-2002 (vide Sections 122-A(1) and (2)(a), (e), 122-B, 122-C and 123 of U.P.Z.A. and L.R. Act and Section 29-C of the U.P. Consolidation of Holdings Act.).

5. In view of all these provisions, I am of the opinion that if on a small portion of 100 to 200 Sq. meters of land belonging to Gaon Sabha which is not reserved for some important public purpose like pond, rasta etc. a person has constructed his house and the house is in existence for a long time then it is not proper to direct demolition of the house and eviction of the occupant thereof. In such situation reasonable damages will serve the public purpose better. After all Gaon Sabha holds the land for the benefit of the public. If the occupant is a poor person and Gaon Sabha does not start eviction proceedings immediately after occupation and construction of the house then the order of eviction would be extremely unjust. Of course no such concession can be granted if the land is reserved for pond or, road or some other important public purpose. This concession also does not mean that any person is authorized to encroach upon the Gaon Sabha land and construct the house. However, Gaon Sabha should be vigilant and start eviction proceedings immediately."

Accordingly, an order was passed directing the payment of Rs. 6000/- as damages in lieu of an order of eviction.

17. Sukhdeo v. Collector, Banda (supra) was decided by the learned Single Judge on 6 November 2006. In that case, the property in dispute comprised of an area of two bighas and thirteen biswas and was Gaon Sabha land. The petitioner had been in adverse possession from 1958 to 1988 as an unauthorised occupant and

there was a finding that he had been unable to produce a valid allotment in his favour. The learned Single Judge followed his earlier view in *Budhaee (supra)* and held as follows:

"There are some authorities of this Court which have held that there is no limitation to initiate the proceedings by Gaon Sabha for eviction of persons who are in unauthorised occupation of its land. Still silence of Gaon Sabha for about 30 years was very strange. Even if there is no limitation for starting the eviction proceedings still delay of about 30 years is sufficient to refuse to pass the order of eviction. In certain cases even if possession of some one is unauthorised still eviction is not necessary or proper relief and award of damages in lieu of eviction is the appropriate relief. In respect of small pieces of land of Gaon Sabha over which the occupants have constructed their houses since long I have held that award of damages is the proper remedy in lieu of eviction vide *Budhaee Vs. Collector, Assistant Collector/Tahsildar Khaga, Gram Sabha Sanwat and State of U.P.*, (2005) 3 AWC 2447 : (2005) 98 RD 741 : (2005) 1 RD 741 . Gaon Sabha is required to allot the land to the needy persons in accordance with preference and proceedings provided under Section 195/198 U.P.Z.A. and L.R. Act. Accordingly, if a person is in possession for more than 12 years, instead of eviction award of damage is the appropriate relief. In view of this, even though I agree that valid allotment was not fully proved by the petitioner still due to inordinate delay of 30 years in initiating the proceedings for eviction, award of the damages is the appropriate relief instead of eviction. The amount of Rs. 11,400 awarded as damages by the impugned order will be more than the market value of the land at the time of occupation i.e. either 1958 or 1961."

(emphasis supplied)

The learned Single Judge, while setting aside the order of eviction, substituted it with an order of damages of Rs. 11,400/-. The same view was followed by the learned Single Judge in the judgments delivered in *Kishore Singh (supra)* and *Siya Ram (supra)*.

18. In *Siya Ram (supra)*, the learned Single Judge also observed that the impugned order had been passed without furnishing to the petitioner an opportunity of being heard. The writ petition was disposed of by granting liberty to the petitioner to file a regular suit for declaration of his rights. However, the learned Single Judge held that if it is found that the petitioner or any other person, who is a party in the suit, has constructed his house over a small portion of the land in dispute admeasuring about 200 or 300 sq. mtrs. And the house is in existence for about ten years, the Court, where the suit is filed, may consider to settle the land over which a house is constructed with the occupant on payment of market value of the land at the time of occupation. In taking this view, reliance was placed on the earlier decision in *Budhaee (supra)*.

19. Several of the earlier decisions were cited before the learned Single Judge of this Court in *Pratap Singh Shishodia (supra)*. In that case, the land was of the

Gaon Sabha on which, the petitioner had raised a construction. An allotment had been approved by the Sub-Divisional Magistrate on 28 February 1980 which was cancelled after complying with the principles of natural justice by the Additional Collector on 13 January 1982. The learned Single Judge observed that the allotment had been made merely on taking an application from the petitioner without following due process of law. The earlier decisions were distinguished on the ground that in those cases action against the unauthorised occupants have been taken after a long lapse of time, whereas that was not so in the said case. The learned Single Judge observed as follows:

"Otherwise also if this kind of tactic is permitted, then it will be very easy for a mighty person to grab public property by back door process in an illegal manner and then to claim its settlement to get it legalised. This will be clearly arbitrary and discriminatory and in violation of principle of natural justice to the public at large. The benefit to which, large number of eligible persons may be entitled cannot be permitted to be given to an individual in a secret manner without any opportunity of participation to all eligibles. It has been repeatedly said by the Apex Court and this Court that in the matter of public settlement, it has to be after opportunity of participation to public at large and in the manner so provided. Thus, this Court has to reject the claim of petitioner for settling the land on premium basis as that will be in violation of principle of natural justice as others are to suffer and that will be laying a bad precedent of granting premium to wrong acts certifying the slogan that "might is right". We can take judicial notice of the fact that now-a-days, tendency of encroachment of public land/property is increasing day by day and thus that has to be checked although on its beginning itself and if for any reason that could not come to notice at its start then as and when, it comes to the notice of a person authorized/capable to take action in accordance with law. There cannot be any licence/premium to a wrong and void act unless it is permitted in law or it could get protection in law."

20. The submission which has been urged on behalf of the petitioners is that there is really no conflict between the view which was adopted by Hon"ble S.U. Khan, J. in the earlier line of cases and the decision of Hon"ble S.K. Singh, J. in *Pratap Singh Shishodia* (supra). In this submission, it is urged that the earlier decisions were distinguished in *Pratap Singh Shishodia* (supra) on the ground that those were cases where the action to evict an unauthorised occupant had been adopted after a lapse of time, whereas in *Pratap Singh Shishodia* (supra), the action had been promptly pursued. Now, it may be true, on a reading of the judgment in *Pratap Singh Shishodia* (supra), that the earlier decisions were sought to be distinguished on facts. That was because the learned Single Judge, as a coordinate Bench, was bound by the earlier decisions of another learned Single Judge on the subject. But the most important aspect of the matter is the principle of law laid down in *Pratap Singh Shishodia* (supra). The decision emphasises that there is an increasing tendency to encroach on public land and property. Unless these tendencies are dealt with, it would encourage individuals with might and power by a process of back door entry to grab public land and

then after an order of eviction, to claim its settlement for legalizing unauthorised occupation. We are of the view that this concern of the learned Single Judge is entirely justified.

21. Land which has been vested in the Gaon Sabha under Section 117 has to be utilised for the purposes for which the vesting has taken place. The Act of 1950, which is an enactment with a social purpose, has taken due care of the need to allot lands to marginalized sections of society. Provisions have been made, as already noted in the earlier part of this judgment for the allotment of land as abadi sites for members of the Scheduled Castes and Scheduled Tribes as well as for the Other Backward Classes, besides persons belonging to the general category living below the poverty line, agricultural labourers and village artisans. Sub-section (4-F) of Section 122-B specifically contemplates that a person in occupation of land belonging to Gaon Sabha under Section 117 before a cut off date would be admitted as a bhumidhar, sirdar or, as the case may, asami provided such a person is an agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe and the total extent of the holding does not exceed 1.26 hectares. The legislature, being cognizant of the hardship which may be caused to an unauthorised occupant to a specified category, has carved out an exception in sub-section (4-F) of Section 122-B, which operates as an overriding provision over the other preceding sub-sections. Hence, in order to seek protection against an order under Section 122-B, an individual who falls within one of the categories mentioned in sub-section (4-F) has been recognised by the legislature. In our view, it would not be open to the Court, while exercising its power under Article 226 of the Constitution, to expand the ambit of the exemption which has been granted in sub-section (4-F) of Section 122-B. This would clearly be a matter of legislative judgment and policy. Such an exercise cannot be carried out by the Court, because to do so, would be to re-write the law and to substitute new categories by expanding the area of protection which has been conferred by the legislature.

21-A. The danger in the Court in doing so, is clear on a reading of the decisions of the learned Single Judges. The first decision in Ajanta Udyog Mandal Vidyalay (supra) was based on a decision in a second appeal rendered in Ram Shankar (supra) which was relied upon as a precedent, holding that in some rare instances, instead of granting relief of ejectment, an award of damages may be the proper relief. Ram Shanker (supra) was a dispute, plain and simple between two private parties, one of whom sought eviction on the ground that the other had made an encroachment on his land. There was no element of public interest directly involved. In Budhaee (supra), the learned Single Judge was of the view that if the land is not reserved for an important public purpose, such as pond, rasta etc. and a "small portion" of 100 to 200 sq. metres of Gram Sabha land has been encroached upon, an order of eviction could be substituted by an order of payment of damages. In Sukhdeo (supra), the area in occupation was as much as 2 bighas and 13 biswas. This only indicates that if the Courts were to take up a plea for regularisation on a case to case basis what area of

unauthorised occupation is regarded as a "small portion" would be a subjective assessment which may vary from case to case and from Judge to Judge. In Sukhdeo (supra), the area under unauthorised occupation was 2 bighas and 13 biswas. The learned Judge held that if a person is in occupation for more than 12 years, instead of eviction, an award of damages is the appropriate relief. We are affirmatively of the view that this would not reflect the correct position in law. Even in the case of a plea of adverse possession, where such a plea is available, mere possession over a particular period is not sufficient to sustain or establish a plea since such possession has to be open, hostile and to the knowledge of the owner.

22. In a matter relating to an order of eviction under Section 122-B, the Court ought not to place a premium on illegal attempts to grab land belonging to the Gaon Sabha. If such attempts were to be permitted in cases which do not fall within the purview of the exception which has been carved out by the legislature, this would only result in a situation where persons with muscle and clout would be encouraged to take the law in their own hands. The mere silence of the Gram Pradhan over a long period of time would be construed as an entitlement to resist efforts to evict an unauthorised occupant. Such a consequence would be contrary to public interest and cannot be countenanced.

23. In the judgment of the Supreme Court in Jagpal Singh and Others Vs. State of Punjab and Others, AIR 2011 SC 1123 : (2011) 112 CLT 130 : (2011) 1 RCR(Civil) 912 : (2011) 2 SCALE 42 : (2011) 11 SCC 396 : (2011) 2 SCR 250 : (2012) AIRSCW 2574 : (2011) AIRSCW 990 : (2011) 1 Supreme 641 , the manner in which Gram Sabha's lands are being encroached upon has been taken due cognizance of. The Supreme Court observed as follows:

"13. ...The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularisation of possession of these unauthorised occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorised occupation has subsisted for many years."

The Supreme Court further held as follows:

"22. ...Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a

justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases, e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

Thus, regularisation was contemplated only in exceptional cases where a lease has been granted under a Government notification to landless labourers or members of Scheduled Castes and Scheduled Tribes or where there is already a school, dispensary or other public utility land. The State Governments were directed to prepare schemes for eviction, for the removal of unauthorised occupants from the Gaon Sabha land.

24. In the present case, the Act of 1950 provides for those cases where the land of the Gaon Sabha can be allotted in the first instance to persons falling in specified categories. The Act also contains provisions, as we have noted, of sub-section (4-F) of Section 122-B, where a protection against eviction has been granted. In our opinion, having due regard to the observations of the Supreme Court in Jagpal Singh (*supra*), the long duration of an illegal occupation or expenditure in making constructions thereon cannot be regarded as a justification for condoning an illegal act or for regularising unlawful occupation. In fact under Rule 115-C of the Rules of 1952, it is the duty of the Land Management Committee to preserve or protect the land which has been vested in the Gaon Sabha under Section 117 from damages, misappropriation and wrongful occupation. Where the Land Management Committee fails to do so, the Collector is duly empowered by Rule 115-D to take necessary measures. The High Court in the exercise of its writ jurisdiction under Article 226 of the Constitution would not be justified in issuing a mandamus contrary to the provisions of law.

25. With respect, we find that the view of the learned Single Judge holding that an order for eviction can be substituted by an order for the payment of damages in lieu of eviction is not consistent with law. In Budhaee (*supra*), the learned Single Judge was of the opinion that if on a "small portion" of 100 to 200 sq. metres of land belonging to the Gaon Sabha, a person has constructed his house and the land is not reserved for any other public purpose and the house is in existence for long time, it would not be proper to direct eviction of the occupant. In Sukhdeo (*supra*), the learned Judge observed that if a person is in possession for more than 12 years, instead of eviction, an award of damages would be the appropriate relief. In Siya Ram (*supra*), the view of the learned Single Judge was that if the petitioner or any other person, who is a party to the proceedings, has constructed a house over a small portion of the land ad-measuring about 200 to 300 sq. mts. and the house is in existence for about 10 years, the Court may consider settling of the land over which the house is constructed by the occupant, on payment of market value of the land at the time of occupation. We have already indicated our reasons for disapproving this statement of law in the

judgments of the learned Single Judge. The Act has not contemplated any such period nor has the Act carved out any such category in sub-section (4-F) of Section 122-B.

26. For these reasons, we answer the reference as follows:

"(i) The law laid down by the learned Single Judge in the decisions in Ajanta Udyog Mandal Vidyalay (supra), Budhaee (supra), Sukhdeo (supra), Kishore Singh (supra) and Siya Ram (and other decisions following the same line) do not reflect the correct position in law and those decisions are hence overruled;

(ii) A person against whom an order of eviction has been passed under Section 122-B would not be entitled to a protection against eviction on the grounds which have weighed with the learned Single Judges in the above cases. Once the legislature has, by enacting a specific provision in Sub-section (4-F) of Section 122B, made a specific statutory provision which overrides the other preceding sub-sections of Section 122-B, it would not be open for the Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution, to create a new legislative category and to issue a mandamus contrary to law;

(iii) The decision in Sukhdeo (supra) to the effect that if a person is in possession for more than 12 years, instead of eviction, an award of damages would be the appropriate relief, does not express the correct position in law. No such provision has been made by the legislature and it would not be open for the Court to introduce a new legislative category or to introduce a period of limitation as was purported to be done in the decisions of the learned Single Judge noted above."

The reference to the Division Bench is, accordingly, answered. The writ petition shall now be placed before the regular Bench according to the roster of work for disposal in the light of the reference as answered.