

(2017) 05 AHC CK 0086
In the Allahabad High Court
Case No : 52717 of 2013

Ram Briksha And Another

APPELLANT

Vs

Dy. Director Of Consolidation And Others

RESPONDENT

Date of Decision : 16-05-2017

Acts Referred:

Constitution of India, Article 300A - Persons not to be deprived of property save by authority of law
Transfer of Property Act, 1882, Section 59, Section 9, Section 5, Section 43, Section 54, Section 58, Section 107, Section 156(2) - Mortgage when to be by assurance - Oral transfer - "Transfer of Property" defined - Transfer by unauthorised person who subsequently acquires Interest in prop- erty transferred - "Sale defined" - "Mortgage", "mortgagor", "mortgagee", "mortgage-money", and "mortgage- deed" defined - Leases how made
Registration Act, 1908, Section 17(1) - Documents of which registration is compulsory
Uttar Pradesh Consolidation of Holdings Act, 1953, Section 49, Section 49, Section 9 A(2) -
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Section 21, Section 4, Section 6, Section 19, Section 14, Section 23, Section 20, Section 16, Section 10, Section 11, Section 13, Section 9, Section 18, Section 5, Section 7, Section 164, Section 17, Section 12, Section 129, Section 158

Citation : (2017) 05 AHC CK 0086

Hon'ble Judges : V.K. Shukla, Mahesh Chandra Tripathi

Bench : Division Bench

Advocate : Sushma Devi, D.S.P. Singh,A.P. Tiwari, S.S. Tripathi

Judgement

1. Brief background of the present reference in brief is that in Writ Petition No.52717 of 2013 (Ram Briksha and another vs. Dy. Director of Consolidation and others) name of petitioner stood recorded over the land in dispute since 1359 Fasli and in previous consolidation Ram Belash did not file any objection, claiming his rights and accordingly objection came forward that his objection in subsequent consolidation proceedings under Section 9 A(2) of U.P. Consolidation of Holdings Act 1953, claiming right over the said land was barred under Section 49 of U.P. Consolidation of Holdings Act, 1953.

2. The said objection in question was resisted by contending that Ram Vilas was the real brother of petitioner and was a co-sharer alongwith them as such bar contained under Section 49 of the Act would not apply.

3. Faced with this situation, the Learned Single Judge, as important point of law has been raised that would affect the public at large, made request for matter being placed before the Larger Bench and Hon"ble the Chief Justice was requested for formation of Bench. The reference in question contains following questions:-

"(i) Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection under Section 9 of the Act for separation of his share?

(ii) Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution?

(iii) Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?"

4. This Bench thereafter has been constituted by the order of Hon"ble the Chief Justice to answer the issues raised.

5. Heard Shri Anupam Kulshrestha, Advocate; Shri D.S.P. Singh, Advocate; Shri Abhijeet Mukherji, Advocate; Shri C.B. Yadav, Senior Advocate assisted by Shri Shashank Sekhar Singh, Advocate representing State; Shri A.P. Tiwari, Advocate; Shri Vinai Khare, Advocate; and all of them with the best of preparation came forward to assist the Court so that correct preposition of law is settled in reference of Section 49-Bar to Civil Courts Jurisdiction."

6. Right of tenure-holders in the State of U.P. is governed under the provisions of U.P. Zamindari Abolition and Land Reforms Act. The U.P. Act No. I of 1951 was enacted with the following object:-

"An Act to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in the Uttar Pradesh and for the acquisition of their rights, title and interest & to reform the law relating to land tenure consequent upon such abolition & acquisition & to made provision for other matters connected therewith.

Whereas it is expedient to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in the Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent on such abolition and acquisition and to make provision for other matters connected therewith."

7. On the enforcement of the U.P. Zamindari Abolition and Land Reforms Act, 1950, Chapter II deals with acquisition of interests of intermediaries and its consequences. Section 4 deals with vesting of estates in the State. The same reads as follows:-

"4. Vesting of estates in the State:

(1) As soon as may be after the commencement of this Act, the State Government may, by notification, declare that, as from a date to be specified, all estate situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified (hereinafter called the date of vesting) all such estate shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances.

(2) It shall be lawful for the State Government, if it so considers necessary, to issue, from time to time, the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of sub-section (1) shall be applicable to and in the case of every such notification."

8. Section 5 deals with notification to be published in the Gazette. The same reads as follows:-

"5. Notifications to be published in the Gazette:-

The notification referred to in section 4 shall be published in the Gazette and such publication shall be conclusive proof of the due publication thereof."

9. Section 6 deals with consequences of the vesting of an estate in the State. The same reads as follows:-

"6. Consequences of the vesting of an estate in the State:-

When the notification under section 4 has been published in the Gazette then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the

consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensue in the area to which the notification relates, namely--

(a) all rights, title and interest of all the intermediaries--

(i) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries, trees (other than trees in village abadi, holding or grove), fisheries, tanks, ponds, water-channels, fernes, pathways, abadi sites, hats, bazars and meals other than hats, bazars and melas held upon land to which clauses (a) to (c) of sub-section (1) of Section 18 apply, and

(ii) in all sub-soil in such estates including rights, if any in mines and minerals, whether being worked or not;

shall "cease and be vested in the State of Uttar Pradesh free from all encumbrances;;

(b) all grants and confirmation of title of or to land in any estate so acquired, or of or to any right or privilege in respect of such land or its land revenue shall, whether liable to resumption or not, determine;

(c) (i) all rents, cesses, local rates and sayar in respect of any estate or holding therein for any period after the date of vesting and which, but for the acquisition, would be payable to an intermediary, vested in and be payable to the State Government and not to the intermediary; and any payment made in contravention of this clause shall not be valid discharge of the person liable to pay the same;

(ii) where under an agreement or contract made before the date of vesting any rent, cess, local rate or sayar for any period after that date had been paid to or compounded or released by an intermediary, the same, notwithstanding the agreement or the contract, be recoverable by the State Government from the intermediary, and may without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III.

(d) all arrears of revenue, cesses or other dues in respect of any estate so acquired and due from the intermediary [or an arrear on account of tax on agricultural income assessed under the U.P. Agricultural Income Tax Act, 1948] for any period prior to the date of vesting shall continue to be recoverable from such intermediary and may, without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III:

(e) All amounts ordered to be paid by an intermediary to the State Government under sections 27 and 28 of the U.P. Encumbered Estates Act, 1934, and all amounts due from him under the Land Improvement Loans Act, 1883, or the Agricultural Loans Act, 1884, shall notwithstanding anything contained in the said

enactments, become due forthwith and may, without prejudice to any other mode of recovery provided therefore, be realised by deducting the amount from the compensation money payable to such intermediary under Chapter III.

(f) the interest of the intermediary so acquired in any estate shall not be liable to attachment or sale in execution of any decree or other process of any court, civil or revenue, and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of section 73 of the Transfer of Property Act, 1882, cease to be in force;

(g) (i) every mortgage with possession existing on any estate or part of an estate on the date immediately preceding the date of vesting shall, to the extent of the amount secured on such estate or part, be deemed, without prejudice to the rights of the State Government under section 4, to have been substituted by a simple mortgage;

(ii) notwithstanding anything contained in the mortgage deed or any other agreement, the amount declared due on a simple mortgage substituted under sub-clause (i) shall carry such rate of interest and from such date as may be prescribed.

(h) no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or is secured by a mortgage of such estate or part thereof was, except as provided in 73 of the Transfer of Property Act, be enforceable against his interest, in the estate.

(i) all suits and proceedings of the nature to be prescribed pending in any court at the date of vesting and all proceedings upto any, decree or order passed in any such suitor proceeding previous to the date of vesting were stayed.

(j) all mahals and their subdivisions existing on the date immediately preceding the date of vesting and all engagements for the payment of land revenue or rent by a proprietor, under-proprietor, sub-proprietor co-sharer, or lambardar as such determined and ceased to be in force.

10. Section 7 deals with saving in respect of certain rights. The same reads as follows:-

"7. Saving in respect of certain rights:-

Nothing contained in this Chapter shall in any way affect the right of any person:-

(a) to continue to work any mines comprised in any estate hereinbefore acquired which shall be governed by the law for the time being in force;

(aa) being a a bhumidhar, sirdar, adhivasi or asami of any land to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enjoying on the date immediately preceding the date of vesting;

(b) to recover any arrears of rent, cesses, sayar or other dues which accrued before the date of vesting, and the same shall notwithstanding anything

contained in this Act, be recoverable as heretofore by the person entitled thereto:

Provided that no decree for an arrear of rent or order for ejectment in default of an arrear of rent shall be executed by ejectment of the judgment-debtor from this holding:

Provided further that rent, cesses, local rates, sayar or other dues as aforesaid which are payable by an intermediary, whose interest in the estate in respect of which the arrear is due has been acquired under the provisions of this Act, may, in addition to any other remedy open to the person entitled, be realized from or paid out of the compensation money payable to such intermediary.

11. Section 9 deals with saving in respect of certain rights. The same reads as follows:-

"9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof:-

[All wells,] trees in abadi, and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

12. Section 10 deals with tenants of sir. The same reads as follows:-

10. Tenants of sir:-

(1) Every tenant of land recorded as sir of an intermediary who on the date immediately preceding the date of vesting is assessed in Uttar Pradesh to a land revenue of more than Rs.250 annually, or where no land revenue is assessed, is assessed to a larger amount of local rate than would be payable on a land revenue of Rs.250 annually, [or in the case of an under proprietary, sub-proprietor or permanent tenureholder, the rent payable by him is more than Rs.250 annually] shall be deemed to be hereditary tenant thereof at the rate of the rent payable by him on the said date, and such land shall not for the purpose of section 18 be deemed to be sir.

(1A) Where the land is a joint sir of two or more intermediaries some of whom only belong to the class mentioned in sub-section (1), the tenant shall be deemed to be hereditary tenant in respect of such part of the land as is proportionate to the share of the intermediaries mentioned in sub-section (1) in such land;

(2) Nothing in sub-sections (1) and (1A) shall apply to a tenant of sir, if his landholder was-

(I) a woman,

- (ii) a minor,
- (iii) a lunatic,
- (iv) an idiot,
- (v) a person incapable of cultivation by reason of blindness or other physical infirmity, or
- (vi) a person in military, naval or air force of Indian Union, both at the commencement of tenancy and on the date of vesting.

13. Section 11 deals with sir or khudkasht allotted in lieu of maintenance allowance. The same reads as follows:-

11. Sir or khudkasht allotted in lieu of maintenance allowance:-

Notwithstanding anything contained in section 10, where sir or khudkasht has been allotted by the sir or khudkasht holder thereof to a person in lieu of maintenance allowance, such person shall be deemed to be the asami thereof entitled to hold the land for so long as the right of maintenance allowance subsists.

14. Section 12 deals with thekedars to be hereditary tenants in certain circumstances. The same reads as follows:-

"12. Thekedars to be hereditary tenants in certain circumstances :-

(1) Where any land was in the personal cultivation of a person on the 1st day of May, 1950, as a thekedar thereof and the theka was made with a view to the cultivation of the land by such thekedar personally, then notwithstanding anything in any law, document or order of court, he shall be deemed to be a hereditary tenant thereof entitled to hold, and when he has been ejected from the land after the said date, to regain possession as a hereditary tenant thereof liable to pay rent at hereditary rates.

(2) The fact that the land comprised in the theka has been in the personal cultivation of the thekedar since the commencement of the theka shall, notwithstanding anything contained in section 91 and 92 of the Indian Evidence Act, 1872 (I of 1872), be receivable in evidence for showing that the theka was of the nature referred to in sub-section (1)"

15. Section 13 deals with estate in possession of thekedar. The same reads as follows:-

13. Estate in possession of thekedar:-

(1) Subject to the provisions of Section 12 and sub-section (2) of this section a thekedar of an estate or share therein shall, with effect from the date of vesting, cease to have any right to or possess as such any land in such estate.

(2) Where any such land was in the personal cultivation of the thekedar on the

date immediately preceding the date of vesting, the same shall-

(a) if it was sir or khudkasht of the lessor on the date of the grant of the theka, be deemed for purposes of Section 18, to be the sir or khudkasht of the lessor on the date immediately preceding the date of vesting and the thekedar shall, with effect from the date of vesting, become the asami thereof liable to pay rent at hereditary rates applicable on the date immediately preceding the date of vesting and entitled to hold the land as such for the unexpired period of the theka or for a period of five years from the date of vesting whichever is less;

(b) if it was not sir or khudkasht of the lessor on the date of the grant of the theka and-

(i) its area does not exceed thirty acres, be deemed for purposes of Section 19 to have been held by the thekedar as a hereditary tenant liable to pay rent which shall be equal to the rent calculated at hereditary rates applicable on the date immediately preceding the date of vesting.

(ii) its area exceeds thirty acres, be deemed to the extent of thirty acres for purposes of Section 19 to have been held as a hereditary tenant as aforesaid and the remainder shall be deemed to be vacant land and the thekedar shall be liable to ejectment therefrom in accordance with the provisions of Section 209.

(3) Notwithstanding any restriction contained in clauses (a) and (b) of sub-section (2), the Collector may, on the application of the thekedar and after such inquiry as may be prescribed, and if he is satisfied that it is in the interest of efficient and successful working of an existing agricultural farm, permit the thekedar to retain land-

(a) if it is land falling under clause (a) of sub-section (2), for a longer period than five years, and

(b) if it is land falling under clause (b) of the said sub-section, in excess of thirty acres:

Provided that the thekedar shall not be entitled to retain the land so allowed beyond the term of the theka and he shall, in the case of any area in excess of thirty acres allowed to him under clause (b) , be an asami thereof on behalf of the Gaon Sabha and liable to pay rent at hereditary rate applicable on the date immediately preceding the date of vesting.

(4) To every application under sub-section (3) the lessor and the Gaon Sabha concerned shall be made parties.

16. Section 14 deals with estate in possession of a mortgage with possession. The same reads as follows:-

14. Estate in possession of a mortgage with possession:-

(1) Subject to the provisions of Section (2), a mortgagor in possession of an estate or share therein shall, with effect from the date of vesting, cease to have

any right to hold or possess as such any land in such estate.

(2) Where any such land was in the personal cultivation of the mortgagee on the date immediately preceding the date of vesting:

(a) if it was sir or khudkasht of the mortgagor at the date of the mortgage, the same shall, for purposes of Section 18, be deemed to be the sir or khudkasht of the mortgagor or his legal representative;

(b) if it was not sir or khudkasht of the mortgagor on the date of the mortgage, the mortgagee shall, subject to his paying to the State Government, within six months from the date of vesting an amount equal to five times the rent calculated at hereditary rates applicable on the date immediately preceding the date of vesting, be deemed, for purposes of Section 19, to have held such land at the date aforesaid as a hereditary tenant thereof at the said rate of rent:

Provided that if the mortgagee fails to pay the amount aforesaid within the time allowed, he shall thereupon lose all rights in such land which shall be deemed to be vacant land and he shall be liable to ejectment on the suit of the Gaon Sabha or the Collector under Section 209 as if he were a person in possession thereof otherwise than in accordance with the provisions of this Act.

Explanation I. For the purposes of this section a mortgagee in possession includes a thekadar of his rights as mortgagee in the land.

Explanation II. Where any land has been mortgaged with possession and the mortgagor makes a second or subsequent mortgage of such land in favour of the same, or a different person, the expression "on the date of the mortgage" shall mean the date of the mortgage in pursuance of which the mortgagor first transferred possession to mortgagee."

17. Section 16 deals with occupant of land in which no superior rights exist to be a hereditary tenant. The same reads as follows:-

16. Occupant of land in which no superior rights exist to be a hereditary tenant :-

(1) In a record under Chapter IV of the United Provinces Land Revenue Act, 1901, or corrected by an officer specially appointed by the State Government for the correction of annual registers in any tract and who, on the date immediately preceding the date of vesting, was in possession of the land or was entitled to regain possession thereof under clause (c) of sub-section (1) of section 27 of the United Provinces Tenancy (Amendment) Act, 1947, or

(ii) in the record of rights prepared under clause (e) of section 32 of the United Provinces Land Revenue Act, 1901, for the year 1356 Fasli and who, on the date aforesaid, was in possession of the land shall be deemed to be a hereditary tenant of the land liable to pay rent on the said date at rates applicable to such tenants..

Explanation - For the purposes of this section the term "land" does not include-

(I) land recorded as sir and land recorded as khudkasht but which had, under the provisions of the United Provinces Tenancy Act, 1939, acquired the character of sir, of-

(a) an intermediary paying Rs.250 or less annually as land revenue, or where no land revenue is assessed in whole or part, is assessed to a local rate which would be payable on a land revenue not exceeding Rs.250 annually [or an under proprietor, sub-proprietor or permanent tenure-holder paying Rs.250 or less annually as rent] or

(b) an intermediary who, on the date of vesting, was a person belonging to any of the classes specified in clauses (i) to (vi) of sub-section (2) of section 10;

(ii) land recorded as grove land, or

(iii) land included in the holding of-

(a) a person referred to in clauses (i) to (vii) of section 19,

(b) a fixed-rate tenant, or

(c) a rent-free grantee, or

(d) a tenant on Patta Dawami or Istamrari referred to in section 17.

18. Section 17 deals with sir land held by tenant on Patta Dawami or Istamrari. The same reads as follows:-

17. Sir land held by tenant on Patta Dawami or Istamrari :-

Any land which was sir of an intermediary on the date immediately preceding the date of vesting but was held on the said date by a tenant on Patta Dawami Istamrari shall not, for the purpose of section 18 [***] be deemed to be the sir of such intermediary.

19. Section 18 deals with settlement of certain lands with intermediaries or cultivators as bhumidhar. The same reads as follows:-

18. Settlement of certain lands with intermediaries or cultivators as bhumidhar :-

(1) Subject to the provisions of sections 10, 15, 16 and 17, all lands-

(a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove;

(b) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh,

(c) held by a fixed-rate tenant or a rent-free grantee as such, or

(d) held as such by-

(i) an occupancy tenant |

- (ii) a hereditary tenant, | possessing the right to
 - (iii) a tenant on Patta Dawami | transfer the holding by
- or Istamrari referred to in | sale.

Section 17, |

[(e) held by a grove-holder,]

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, [lessee, tenant, grantee or grove-holder,] as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession as a bhumidhar thereof.

(2) Every person belonging to the class mentioned in [section 3 or sub-section (2) of section 3-A] of the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949, who has been granted the declaration referred to in section 6 of the said Act in respect of any holding or share thereof shall, unless the declaration is subsequently set aside, be deemed to be the bhumidhar of the holding or the share in respect of which the declaration has been made and continues in force.

(3) Notwithstanding anything contained in the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949, any declaration granted under section 6 of the said Act, in favour of a tenant to whom sub-section (2) of section 10 applies shall be and is hereby cancelled and the amount deposited by him under section 3 or 6 of the said Act shall, after deducting the amount which might have been paid or be payable by the State Government to his landholder under sections 7 and 8 of the said Act, be refunded to the person entitled in such manner as may be prescribed."

20. Section 19 deals with land in the holding to be settled with the tenants thereof as sirdar. The same reads as follows:-

19. Land in the holding to be settled with the tenants thereof as sirdar :-

All land held or deemed to have been held on the date immediately preceding the date of vesting by any person as-

- (i) a tenant holding on special terms in Avadh,
- (ii) an ex-proprietor tenant,
- (iii) an occupancy tenant,
- (iv) a hereditary tenant,
- (v) a grantee at favourable rate of rent,
- (vi) a non-occupancy tenant of tea estates notified as such in a notification issued under sub-section (5) of section 30 of the United Provinces Tenancy Act,

1939,

(vii) a sub-tenant referred to in sub-section (4) of section 47 of the United Provinces Tenancy Act, 1939, (and)

(viii) (***)

(ix) all land referred to in section 17 held on the said date by any person on Patta Dawami or Istamrari, shall, save in cases provided for in clause (d) of sub-section (1) of section 18, be deemed to be settled by the State Government with such person, who shall subject to the provisions of this Act, be entitled, except as provided in sub-section (2) of section 18, to take or retain possession as a sirdar thereof.

21. Section 20 provides as follows:-

20. Every person who- (a) on the date immediate preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act-

(i) except as provided in (sub-clause (i) of clause (b) a tenant of sir [other than a tenant referred to in clause (ix) of section 19 [or in whose favour hereditary rights accrue in accordance with the provisions of section 10], or,

(ii) except as provided in [sub-clause (I) clause (b) a su-tenant other than a sub-tenant referred to in proviso to sub-section (3) of section 27 of the United Provinces Tenancy (Amendment) Act, 1947, or in sub-section (4) of section 47 of the United Provinces Tenancy Act, 1939 of any land other than grove-land.

(b) was recorded as occupant-

(i) of any land (other than grove land or land to which section 16 applies) in the khasra or khatauni of 1356 F prepared under sections 28 and [33] respectively of the U.P. Land Revenue Act, 1901, or who was, on the date immediately preceding the date of vesting, entitled to regain possession thereof under clause (c) of sub-section (1) of section 27 of the United Provinces Tenancy (Amendment) Act, 1947, or

(ii) of any land to which section 16 applies, in the [khasra or khatauni of 1356 F, prepared under sections 28 and 33 respectively of] the United Provinces Land Revenue Act, 1901, but who was not in possession in the year 1359 F., shall, unless he has become a bhumidhar of the land under sub-section (2) of section 18 or an asami under clause (h) of section 21, be called adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof.

Explanation I- Where a person referred to in clause (b) was evicted from the land after June 30, 1948, he shall, notwithstanding anything in any order or decree, be deemed to be a person entitled to regain possession of the land.

Explanation II-Where any entry in the records referred to in Clause (b) has been corrected before the date of vesting under or in accordance with the provisions of

the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901), the entry so corrected shall for the purposes of the said clause, prevail]

Explanation III- For the purposes of Explanation II an entry shall be deemed to have been corrected before the date of vesting if an order or decree of a competent Court requiring any correction in records had been made before the said date and had become final even though the correction may not have been incorporated in the record.

Explanation IV- For purposes of this section "occupant" as respects any land does not include a person who was entitled as an intermediary to the land or any share therein the year 1356 Fasli.]

22. Section 21 deals with non-occupancy tenants, sub-tenants of grove lands and tenant's mortgagees to be asamis. The same reads as follows:-

21. Non-occupancy tenants, sub-tenants of grove lands and tenant's mortgagees to be asamis :-

(a) a non-occupancy tenant of an intermediary's grove-land,

(b) a sub-tenant of a grove-land,

(c) a sub-tenant referred to in the proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947),

(d) (a mortgagee in actual possession) from a person belonging, to any of the classes mentioned in [clauses (b) to (e)] of sub-section (1) of section 18 or clauses [(i) to (vii) and (ix)] of Section 19;

(e) a non-occupancy tenant of pasture land or of land covered by water and used for the purpose of growing singhara or other produce or of land in the bed of a river and used for casual or occasional cultivation.

(f) a non-occupancy tenant of land declared by the State Government, by notification in the Gazette, to be intended or set apart for taungya plantation, or

(g) a tenant of land, which the State Government has, by a notification in the Gazette, declared to be part of tract of shifting or unstable cultivation.

(h) a tenant of sir land referred to in sub-clause (a) of clause (I) of the Explanation under Section 16, a sub-tenant referred to in sub-clause (ii) of clause (a) of Section 20 or an occupant referred to in sub-clause (I) of clause (b) of the said section where the land holder or if there are more than one land-holders all of them were person or persons belonging-

(a) if the land was let out or occupied prior to the ninth day of April, 1946, both on the date of letting or occupation, as the case may be, and on the ninth day of April, 1946 and

(b) if the land was let out or occupied on or after the ninth day of April, 1946, on

the date of letting or occupation, to any one or more of the classes mentioned in sub-section (1) of Section 157;

shall be deemed to be asami thereof.

Explanation- The expression "taungya plantation" means the system of afforestation in which the plantation of trees, is, in the earlier stages, done simultaneously with the cultivation of agricultural crops which ceases when the trees so planted begin to form a canopy rendering the cultivation of agricultural crops impossible.

(2) Occupants of grove land- Every person, who, on the date immediately preceding the date of vesting was a person recorded, in the manner stated in clause (b) of section 20, as occupant of any grove-land, shall be called an asami of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof] [as an asami from year to year].

23. Section 23 deals with transfers by way of sale or gift not to be recognized. The same reads as follows:-

23. Transfers by way of sale or gift not to be recognized :-

(1) Notwithstanding anything contained in any law, no transfer, by way of sale or gift, of any estate or part thereof-

(a) made on or after the first day of July, 1948, shall be recognised for the purpose of assessing the amount of rehabilitation grant payable to the intermediary,

(b) [***] (2) Nothing in sub-section (1) shall apply to-

(a) any sale made under order of a court in execution of any decree or order for payment of money, or

(b) any sale or gift made in favour of a waqf, trust, endowment or society established wholly for charitable purposes unless the State Government in any particular case directs otherwise.

Explanation- For the purposes of sub-section (2) "society" means a society registered under the Societies Registration Act, 1860.

24. The provisions quoted above would go to show that a full-fledged mechanism has been set in place for the abolition of zamindari system for tiller of the soil in the State of Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land consequent upon such acquisition, the way and manner in which the land in question was to be settled has clearly been mentioned therein be it bhumidhar, be it sirdar, be it adivashi or assami of any land and to continue to enjoy the land, and the way and manner in which bhumidhari rights would accrue alongwith right to sell and with no right to sell has also been extensively dealt with. Apart from this U.P. Zamindari Abolition and Land Reforms Act. 1950 (hereinafter referred to as the Act) contains provisions

with heading "transfers" from Sections 152 to 168. Section 152 of the Act provides that interest of a bhumidhar with transferable rights shall, subject to the conditions hereinafter contained, be transferable. Section 153 provides that interest of an asami shall not be transferable. Section 154 contains restriction that no bhumidhar shall have the right to transfer by sale or gift, any land other than tea gardens to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares in Uttar Pradesh. Section 155 provides that no bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced. The section contains prohibition that no bhumidhar shall have the right to mortgage any land with possession. Section 156 contains provision with letting of land. Section 157 pertains to lease by disabled person. Sections 157A and 157AA contain provisions regarding restrictions on transfer of land by members of Scheduled Castes. With regard to registration of lease. Section 158 contains following provisions :

"158. Registration of a lease.--Notwithstanding anything contained in the Transfer of Property Act, 1882 (Act IV of 1882) or the Indian Registration Act, 1908 (Act XVI of 1908), a lease for a term exceeding one year or from year to year may be made either by a registered instrument or in the prescribed manner."

The opening word of Section 164 provides, "Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose ..,....." The section uses word transfer of any holding. The word transfer has not been defined in U.P. Zamindari Abolition and Land Reforms Act or the Rules framed thereunder. The word holding has also not been defined under the U.P. Zamindari Abolition and Land Reforms Act but it adopts the definition of holding as given in U.P. Tenancy Act, 1939. by virtue of Section 3 (26) of U.P. Zamindari Abolition and Land Reforms Act. The word holding has been defined in Section 3 (7) of U.P. Tenancy Act, 1939, as follows :

"holding" means a parcel or parcels of land held under one lease, engagement or grant, or in the absence of such lease, engagement or grant under one tenure and in the case of a "thekadar includes the theka area ;"

25. Section 129 of U.P. Zamindari Abolition and Land Reforms Act defines tenure which includes bhumidhar with transferable rights and bhumidhar with non-transferable rights. The concept of transferable rights is attached with tenures. As noted above, Sections 152 to 167 relate to transfers and are provisions given under heading of word transfers. The words mortgage, sale, gift have been referred to as Incidence of transfers in provisions of Sections 152 to 167. When the word transfer has not been defined under the U.P.Z.A. and L.R. Act what is the importance and meaning of word transfer has to be looked into. Section 156 (2) "provides that word lease and its cognate expression have the meaning

assigned to them in the Transfer of Property Act. 1882. Section 156 (2) is quoted below :

"156 (2) In this Chapter, the word "Lease" and its cognate expression have the meaning assigned to them in the Transfer of Property Act, 1882 (IV of 1882)."

26. U.P. Zamindari Abolition and Land Reforms Act, which is a special Act, in itself does not give any special definition or meaning of word transfer, the word transfer as defined in Transfer of Property Act has to be looked into. Section 5 of Transfer of Property Act. 1882. defines transfer of property. Section 5 of Transfer of Property Act is quoted below :

"5. "Transfer of properly" defined.--In the following sections "transfer of properly" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons ; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not. but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

27. Transfer of holding as contemplated in U.P. Zamindari Abolition and Land Reforms Act is transfer of property. A parcel of land or part of land or land included in a tenure is undoubtedly a property. Section 5 of Transfer of Property Act uses word "convey". The word convey has been defined in P. Ramanatha Aiyar's Law Lexicon 2nd edition as :

"Convey" defined by Act 27 of 1866, Section 2.

CONVEY, to carry ; to bear ; to conduct ; to import ; to take to or from ; to transport ; to carry or transport the thing to another person or place ; to assure ; to grant ; to pass ; to pass a thing from one person to another as by deed, assignment or otherwise ; to transfer ; to transfer title of property.

1. To transport ; to take from one place to another (Section 282. I.P.C.) : 2. transfer property by means of instrument and other formalities ; 3. to transport ; to communicate."

28. Section 9 of Transfer of Property Act relates to oral transfer which provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 54 of Transfer of Property Act defines tangible immovable property of the value of Rs. 100 and upwards that can be made only by registered instruments. Section 54 is quoted as below :

"54. "Sale" defined.--"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.--Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other

intangible thing, can be made only by a registered Instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.--A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any Interest in or charge on such property."

29. Section 58 of Transfer of Property Act defines mortgage, Section 58(a) defines as under :

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.--(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

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

30. Section 59 provides that where principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor. Section 59 is quoted as below :

"59. Mortgage when to be by assurance.--Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

31. This Court in several decisions had applied the provisions of Transfer of Property Act with regard to transfers made by bhumidhar under provisions of U.P. Zamindari Abolition and Land Reforms Act. In Jagat Narain v. Laljee and others, 1964 RD 331, question arose as to whether provisions of Section 43 of Transfer of Property Act will be applicable to a transfer made by sirdar when subsequently he acquired bhumidhari rights. This Court applied the provisions of Section 43 of Transfer of Property Act in the aforesaid case. It was held in the

aforesaid case that :

"It must, therefore, be held that if a person professed to transfer the interest of a bhumidhar in a land in which he had only the non-transferable interest of a sirdar but he subsequently acquires in the land the interest of a bhumidhar, the benefit of the subsequent acquisition would go to the transferee, under Section 43 of the Transfer of Property Act, and the subsequently acquired interest of a bhumidhar will be deemed as having passed to the transferee under the transfer in his favour. Section 6 of the Transfer of Property Act cannot stand in the way of the applicability of Section 43 of the Transfer of Property Act because these two provisions have different spheres of operation and the question of conflict between them does not arise."

32. Thus, it is clear that the provisions of Transfer of Property Act are fully applicable while effecting a transfer of holding by bhumidhar. In the Act, wherever it is mentioned that particular meaning given in Transfer of Property Act or Indian Registration Act be not given to a transaction, specific provision has been made in U.P. Zamindari Abolition and Land Reforms Act. Reference has been made to Section 158 of U.P. Zamindari Abolition and Land Reforms Act which provides that lease for a term exceeding one year or from year to year may be made either by a registered instrument or in the prescribed manner. Section 158 of U.P. Zamindari Abolition and Land Reforms Act has overriding effects to the provisions of Transfer of Property Act and Indian Registration Act whereas Section 107 of Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year can be made only by the registered instrument. Section 158 clearly contemplates that applicability of Transfer of Property Act as well as Indian Registration Act is not ruled out in application to U.P. Zamindari Abolition and Land Reforms Act and the provisions are overridden in specific case. Apart from Section 59 of Transfer of Property Act, Section 17 of Indian Registration Act also provides that registration of instruments to value of more than 100 rupees or more of immovable property is required when such an instrument purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent. Section 17(1) of Indian Registration Act is quoted below :

17. Documents of which registration is compulsory.--(1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1964, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

(a) instruments of gift of immovable property ;

(b) other non-testamentary instruments which purport or operate, to create, declare, assign, limit or extinguish, whether in present or in future, any right,

title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property ;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ; and

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare assign, limit or extinguish, whether in present or in further, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

Provided that the State Government may, by order published in the Official Gazette, except from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees."

33. From the above discussions, it is clear that any transfer of any holding regarding an amount of Rs. 100 or more can be only executed by registered documents. "Any transfer of any holding" referred to under Section 164 of U.P. Zamindari Abolition and Land Reforms Act refers to transfer of any interest in any holding if the value is more than 100 rupees of immovable property, the transfer has to be effected in accordance with law. No right or interest can pass in immovable property in a manner contrary to provisions of Transfer of Property Act and Indian Registration Act. The Division Bench of this Court in Mohd. Fasih v. Munir Khan, 1987 ALJ 617, considered the scope and ambit of Section 164 of U.P. Zamindari Abolition and Land Reforms Act. The Division Bench held in paragraph 16 :

"16. Counsel for the respondents in this connection urged that in view of Section 164, U.P. Zamindari Abolition and Land Reforms Act, the agreement in question would be deemed to be a transfer inasmuch as it was admitted therein that possession over the property in suit had been delivered to the respondents in pursuance of the said agreement. According to him since possession over the property had been transferred to the respondents in pursuance of the said agreement the agreement was for all purposes a sale of the property. This submission also is on the face of it untenable. Section 164, U.P. Zamindari Abolition and Land Reforms Act. deals with transfer with possession by a bhumidhar. It contemplates transfer of any holding or any part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money referred to in the said section. On the face of it for the application of Section 164 transfer of possession alone is not sufficient. What is required by the section is transfer of possession made in pursuance of transfer of any holding or part thereof. Since an agreement of sale does not have

the effect of transferring any holding or part thereof even if possession was transferred of the holding in pursuance of the said agreement it cannot be said that the agreement amounted to a sale under Section 164. Moreover, Section 164 contemplates transfer by a bhumidhar."

34. The entire scheme detailed out above shows the property interest of a person in property alongwith right conferred to transfer property.

35. The U.P. Consolidation of Holdings Act, 1953 has been introduced with the objective to allot a compact area to the tenure holders in place of their scattered plots with the view of land reforms so that tenure holders may have their private source of irrigation at one place and also to save crops etc. from boundary disputes.

36. Under U.P. Consolidation of Holdings Act 1953, Consolidation means re-arrangement of holding in a unit amongst several tenure-holders in such a way as to make their respective holding more compact. Holding means a parcel or parcels of land held by one tenure by a tenure holder singly or jointly with other tenure holders. Land means land held or occupied for purposes connected with agriculture, horticulture and animal husbandry (including pisciculture and poultry farming) and includes-(i) the site being part of holding, of a house or other similar structure; and (ii) trees, wells and other improvements existing on the plots forming the holding. Tenure holder means a bhumidhar with transferable rights or bhumidhar with non-transferable rights and includes (a) an assami (b) a Government lessee or Government Grantee or (c) a co-operative farming society satisfying such conditions as may be prescribed.

37. In the Act, as originally enacted, Section 12 made provision for filing of objections against the statement of plots and tenure-holders prepared by the consolidation authorities and in sub-section (4) of Section 12 it was prescribed that where the objection filed under subsection (1) involves a question of title and such question has not already been determined by a competent court, the Consolidation Officer shall refer the question for determination to the Arbitrator. Sub-section (5) of Section 12 provided that all suits or proceedings in the Court of first instance or appeal in which a question of title in relation to some land has been raised shall be stayed. Under subsection (6) Of Section 12 finality was given to the decision of the Arbitrator under sub-section (4). Similarly Section 20 made provision for filing of objections against statement of proposals prepared by the consolidation authorities under Section 19 of the Act. Section 22 prescribed that where any objection filed under Section 20 involves a question of title in or over land and such question has not already been finally determined by a competent court, the Consolidation Officer shall refer it to the Arbitrator for determination and all suits or proceedings of the first instance or appeal in which a question of title in relation to the same had been raised shall be stayed and the decision of the Arbitrator shall be final. There was a similar provision for reference to Arbitrator in Section 36. These provisions indicate that initially the Act envisaged that questions of title, if not finally determined by a competent

court, shall, instead of being decided by the Courts, be decided by an Arbitrator and the decision of the Arbitrator would be final. The inevitable conclusion was that the determination of questions of title was withdrawn from the jurisdiction of the Courts.

38. Extensive amendments were made in the Act by the U .P. Consolidation of Holdings (Amendment) Act, 1958 (U.P. Act No. 38 of 1958) whereby a number of sections including section 36, were deleted and various provisions, including , sections 5, 7 to 12 and 22, were substituted. As a result of these amendments the provisions with regard to Arbitration contained in Sections 12, 22 and 36 of the original Act were removed. In sub-clause (i) of Clause (b) of Section 5, as substituted, it was provided that all proceedings for correction of the records and all suits for declaration of rights and interests over land, or for possession of land or for partition, pending before any authority or court, whether of first instance, appeal, or reference, or revision, shall stand stayed, but without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said proceeding or suits before the consolidation authorities under and in accordance with the provisions of the Act and the Rules made thereunder. In sub-clause (ii) of Clause (b) it was further provided that the findings of consolidation authorities in proceedings under the Act in respect of such right or interest in the land, shall be acceptable to the authority or court before whom the proceeding or suit was pending which may, on communication thereof by the parties concerned, proceed with the proceeding or suit, as the case may be.

39. Section 7 of the Act relates to revision of village map with a view to facilitate the revision of records of each village or part thereof, and in the said direction the District Deputy Director of Consolidation is obligated to get revised the village maps of such unit before the provisional Consolidation Scheme for a unit is prepared. Sub-Section (1) of Section 8 deals with revision of field book and the correct annual register; determination of valuations and shares in joint holding. The Deputy Director of Consolidation, upon the revision of the map as envisaged under Section 7, subject to the provisions contained and subject to procedure prescribed is obligated to get:

- (i) revised, the field-book of the unit after field to field partial, and the current annual register after its test and verification,
- (ii) determined in consultation with Consolidation Committee, the valuation of (a) each plot after taking into consideration its productivity, location and availability of irrigation facility, if any; and (b) all trees, wells and other improvements existing in the plots for the purposes of computing compensation therefor;
- (iii) ascertained the share of each owner; if there be more owners than one, out of valuation determined under sub-clause (b) of clause (ii) and
- (iv) determined the shares of individual tenure holders in joint holding for the purpose of effecting partition to ensure proper consolidation.

40. Sub-Section (2) of Section 8 obligates District Deputy Director of Consolidation to get prepared a Khasra Chakbandi, in the form prescribed in respect of all the plots falling the unit as also statement showing the mistakes, undisputed cases of succession and disputes discovered during the test and verification of the annual register and in the course of field to field partial.

41. In Section 9 as substituted provision was made for issuing notice of the statement prepared under Section 8 of the Act to tenure- holders concerned and to persons interested calling upon them to file before him objections, if any, disputing the correctness or nature of the entries in the extracts and pointing out of any omission therefrom. In Section 10 of the Act provision was made for adjudication by the Consolidation Officer of the said objections in disputed cases. In Section 11 provision was made for appeal against the orders passed by the Assistant Consolidation Officer and the Consolidation Officer under Sections 9 and 10. Section 12, as substituted, prescribed that all matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under Section 1 1B for which a cause of action was non-existent when proceedings under Sections 7 to 10 were started or were in progress may be raised before the Assistant Consolidation Officer as and when they arise but not later than the date of notification under Section 52 or under sub-section (1) of Section 6 and that the provisions of Sections 7 to II shall mutatis mutandis, apply to the hearing and decision of any matter raised under Section (1) as if it were a matter raised under the aforesaid Sections. The scheme of the above-mentioned amendments introduced in the Act by the Amendment Act of 1958 was to empower the consolidation authorities to adjudicate on matters involving declaration of right and interests over land or for possession of land or for partition and suits or proceedings in that regard pending before any Court were to be stayed till such determination and after such determination. the Court was to proceed with the said proceedings in the light of the findings of the consolidation authorities. In other words the question as to title which were earlier required to be determined by arbitration were to be adjudicated upon by the consolidation authorities under the Act. From the Statement of Objects and Reasons for the Amendment Act of 1958 it appears that it become necessary to do away with the provisions for arbitration because it used to cause great delay and in order to inspire greater confidence in the people in the adjudication of rights of tenure- holders by consolidation authorities provision was made for a Second Appeal against orders passed by the Consolidation officer.

42. Further amendment was made in Section 5 of the Act by U.P. Act No. 21 of 1966 whereby clause (b) of sub-section (1) of Section 5, as renumbered, was omitted and sub-section (2) was added in Section 5. By clause (a) of the said sub- section (2) it has been provided that upon the publication of the notification under sub-section (2) of Section 4 every proceeding for the correction of the records and all suits and other proceedings in respect of declaration of rights and interests in any land lying in the area, or for declaration or adjudication of any

other right in regard to which proceedings can or ought to be taken under the Act, pending before any Court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending, stand abated. In clause (b) of sub-section (2) of Section 5 it is further provided that such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suit or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of the Act and the Rules made thereunder. As a result of the said amendment which has been introduced in Section 5 the right of the Courts to adjudicate in respect of declaration of rights or interest in any land lying in the area for which the notification has been issued under Section 4(2) or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act has been completely taken away and the adjudication of these rights is to be done by the consolidation authorities under and in accordance with the provisions of the Act and the Rules made thereunder. Section 49 of the Act which bars the jurisdiction of the civil and revenue Courts gives effect to the aforesaid provisions contained in Section 5(2) of the Act.

43. In order to answer the issues we will have to consider the provision, the scope and ambit of section 49 of the Act. The same provides for as follows:-

"49. Bar to civil jurisdiction-Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure-holders in respect of land lying in an area, for which a notification has been issued under sub-section (2) of Section 4 or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no civil or revenue court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act."

44. From a bare perusal of the provisions of Section 49 of the Act it is evident that declaration and adjudication of rights of tenure-holders in respect of land lying in an area for which a notification has been issued under Section 4(2) and adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act, had to be done in accordance with the provisions of the Act only and the jurisdiction of the civil or revenue courts to entertain any suit or proceeding with respect to rights in such land or with respect to any other matter for which a proceeding could or ought to have been taken under the Act, has been taken away. The language used in Section 49 is of very wide amplitude and comprehensive. Declaration and adjudication of rights of tenure-holders in respect of land lying in the area covered by the notification under Section 4(2) of the Act and adjudication of any other right arising out of consolidation

proceedings and in regard to which a proceeding could or ought to have been taken under the Act, would, on its face value, cover adjudication of questions as to title in respect of the said lands. Such scheme of things also finds support from the other provisions of the Act and the amendments that have been introduced therein.

45. As a result of these amendments civil and revenue Courts have no role in the matter of determination of rights or interests in any land lying in the area for which notice has been issued under Section 4(2) of the Act or for the declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act.

46. The bar provided for under Section 49 of U.P. Consolidation of Holdings Act, 1953 has been subject matter of interpretation before the Apex Court time and again and in the case of Karbalai Begum vs. Mohd. Sayeed and another AIR 1981 SC 77, a suit by a co-sharer to challenge deletion of her name in joint Khewat in consolidation proceeding on the ground of fraud of other co-sharers in possession has been held to be not barred under Section 49 of the Act and suit has been held to be maintainable where dishonest cousins, looking after the lands of their brother's widow casted covetous eyes on their sister-in-law's share with deplorable design seeking to deprive her of her legal share.

47. Apex Court in the case of Sita Ram vs. Chotta Bhonde AIR 1991 SC 249 elaborately considered Section 49 of the Act 1953 and therein has held that the bar under Section 49 does not come into play in context of consolidation proceedings itself, rather after the amendment in question has been introduced declaration and adjudication of rights of tenure holders in respect of land lying in area wherein notification has been issued under section 4(2) and adjudication of any other rights arising out of consolidation proceedings in regard to which proceedings could or ought to have been undertaken under the Act has to be done in accordance with the provisions of the Act only and the jurisdiction of the Civil Courts or Revenue Courts to entertain any suit or proceedings with respect to the rights in such land or with respect to any other land in which proceedings could or ought to have been taken under the Act have been taken away. The claim set up by Respondent no.1 on the basis that he is the son of Chota, brother of Nanhu and that the lands were recorded in the name of Nanhu in representative capacity on behalf of himself and his other brothers fell within the ambit of Section 5(2) had to be adjudicated by consolidation authorities, since it was matter falling within the scope of adjudicatory functions assigned to consolidation authorities under the Act, the jurisdiction of Civil Court to entertain the suit in respect of said matter was expressly barred by Section 49 of the Act.

48. The language used in Section 49 is wide and comprehensive. Declaration and adjudication of rights of tenure holders in respect of land lying in the area covered by notification under Section 4(2) of the Act and adjudication of any other rights arising out of consolidation proceedings and in regard to which proceedings could or ought to have been taken under the Act and would cover

interpretation of questions as to title in respect of the said lands.

49. Apex Court in the case of Narendra Singh and others vs. Jai Bhagwan AIR 2005 SC 582, followed the dictum of Sita Ram (*supra*) while upholding the bar under Section 49 of U.P.C.H. Act by mentioning that land being exclusively recorded in the name of the father, the sons who claim joint ownership in the lands could and ought to have approached the authorities under the Act of 1953 for getting them jointly recorded in revenue papers. Such proceedings for recording them as joint owners having not been initiated under the 1953 Act, the High Court was right in invoking such a plea in the suit in accordance with Section 49 of the Act. The argument that revenue entry in the name of father should have been treated as in representative capacity for sons is misleading whether the father was Karta and Manager of family and as such could be recorded in representative capacity for all co-owners in the family was also a question of title which fell within exclusive jurisdiction of authorities under the Act.

50. The object primarily appears to be allotting a compact area to the tenure holders in place of their scattered plots and this much is also reflected that with the passage of time, the area of operation of the aforementioned Act in question has been enhanced by providing that all such issues that can be answered after notification has been issued under Section 4(2) in reference of adjudication of rights arising out of consolidation proceedings be dealt with at one forum and declaration and adjudication of rights of tenure holders in respect of land lying in the area covered by notification under Section 4(2) of the Act and for adjudication of any other right arising out of consolidation proceedings.

51. A Division Bench of our Court, in the case of Amar Singh vs. State of U.P. 2008 (104) RD 421, while consider the issue as to whether suit filed was barred under Section 49 of the Act, held as follows:-

"The bar contained in Section 49 contemplates bar of entertainment of suit by a civil or revenue court in respect of following:

- (a) the declaration and adjudication of rights of tenure holders,
- (b) adjudication of any other rights arising out of consolidation proceedings, and
- (c) adjudication of any right in regard to which a proceeding could or ought to have been taken under U.P. Consolidation of Holdings Act, 1953.

In view of the above, it is clear that any adjudication done with regard to land lying in the area in which a notification under Section 4(2) of the U.P. Consolidation of Holdings Act, 1953 has been issued operates a bar of reagitating in any other revenue or civil Court. Second limb of Section also creates a bar with regard to adjudication of any other right regarding which proceedings could or ought to have been taken under U.P. Consolidation of Holdings Act, 1953. The provision contains the principles of *res-judicata* as well as principles of constructive *res-judicata*.

This Court in the case of Smt. Sudama v. Hansraj reported in 1981 R.D. 116 has again reiterated the same view. The case of the appellant before the High Court was that defendant abused their position in getting their name recorded as sole tenure holder by practising fraud on the plaintiff by misrepresentation before the consolidation authorities. The court took the view that suit under Section 229-B for declaration of the title was not barred. Following was observed by the Court:

"The revenue court while dealing with the suit for declaration can, on coming to the finding that the entries made by the consolidation authorities were procured by fraud and were wrong, declare the plaintiff's right as tenure holder and direct that the entries be corrected accordingly."

Coming to the facts of the present case, the plaintiff's case was that the plot in dispute was purchased through registered sale deed dated 17.3.1969 both by the plaintiff and defendant (writ petitioner), who was co-sharer. The case of the plaintiff further was that it was the defendant petitioner who was looking after the cases in the court and the plaintiff was living in forest being Gaderiya looking after his goats, was duped by the defendant in removing his name from the revenue record. The plaintiff has also claimed that after the sale deeds, both the parties came in possession. A co-sharer who claim to be in possession of the property and his name being not recorded in consolidation proceeding is not debarred from bringing a suit under Section 229-B for correcting the entries and recording his name also if allegation is that his name was removed by practising fraud on him. The judgment of the Apex Court in the case of Karbalai Begum and Smt. Sudama (supra) fully supports the view taken by the courts below that suit is not barred under Section 49 of the U.P. Consolidation of Holdings Act, 1953.

There is one more aspect of the matter, which cannot be lost sight of. The plaintiff had come with the case that both plaintiff and defendant purchased the property from a third person by a common sale deed. The defendant vaguely denied the purchase of the property through sale deed but has not come up with any case in the written statement as to what was the source of his title. The decision of the trial court that since no case was filed in the consolidation court, the bar will not apply was not sufficient to overrule the objection but the revisional court has considered the matter in detail and has recorded positive finding that the name of the plaintiff was deleted by practising fraud on the defendant hence, the bar of Section 49 will not apply. The suit is still pending adjudication before the court below where final decision has to be taken after looking into the evidence and materials which have come on the record. At the very out set, without even permitting the plaintiff to lead evidence and to prove his case, throwing out the suit on the ground that the suit is barred by Section 49, is neither just nor legal. In view of the foregoing discussions, I do not find it a fit case for interference in writ jurisdiction envisaged under Article 226 of the Constitution of India."

52. Section 49 of 1953 Act under the scheme of things provided for contemplates bar of entertainment of suit by a Civil Court/Revenue Court in respect of right of

tenure holder, however exception has been carved out based on judicial pronouncement that when the name of a co-tenure holder could not be recorded by practising fraud, the entries in consolidation proceeding can be challenged and bar of Section 49 would not at all come into place since fraud vitiates even the most solemn proceeding.

53. Once we have proceeded to examine the parameters of the provisions of Section 49 of the U.P. Consolidation of Holdings Act, 1953, the larger issue i.e. engaging our attention is as to whether an incumbent, who otherwise has interest in property, loses his right in the property in question and stands ousted from the property merely because he has not at all participated in the proceedings in question.

54. In respect of right in land, the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950 are self sufficient and the provisions of U.P. Consolidation of Holdings Act, 1953 as already quoted above had only limited role to play in respect to consolidation of agriculture holdings to facilitate better quality of agriculture activities, whereas U.P. Act No.1 of 1951 deals with all aspects including the acquisition of interest of intermediaries and its consequences, vesting of land for Gaon Sabha and its superintendence, management of control of land etc by the Land Management Committee and its tenural rights, classes of tenure, transfers, dissolution, division/ extension of rights, rent, ejectment, conferment of rights etc. U.P. Consolidation of Holdings Act at no point of time has ever proceeded to deal with expansion of rights or with conferment of rights rather under the scheme of things provided under U.P. Consolidation of Holdings Act, the existing rights over the land under consolidation operation are only to be recognized under the provisions of U.P. Consolidation of Holdings Act and nothing beyond the same. The U.P. Consolidation of Holdings Act does not deal with grant of authority to grant substantive rights to a tenure holder rather it is only empowered to recognize the existing rights of tenure holder and in the said direction a full-fledged mechanism has been provided for.

55. Landed property be it individually, jointly, or based on co-sharer confers rights over the property in question and the said rights in question can be defeated or be taken away only in accordance with law.

56. Apex Court in the case of N. Padmamma vs. S. Ramakrishna Reddy AIR 2008 SC 2834 held that a right of property is a human right and also a constitutional right and the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such a right and as far as U.P. Consolidation of Holdings Act, 1953 is concerned, the purpose of the aforementioned Act is not at all to divest an incumbent of such right keeping in view the provisions of Article 300-A of the Constitution of India as its paramount object is to see that agricultural activity is to be carried out in one area and in case at the point of time of constituting one compact area, in respect of one compact area in case anyone has to raise any issue, he can come forward.

57. Apex Court, in the case of *Rajiv Sarin vs. State of U.K.* 2011 (8) SCC 708 while considering the provisions of U.P.Z.A.L.R. Act alongwith K.U.Z.A.L.R. Act (Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act 1960) took the view where appellants' father had acquired in the year 1945 propriety right in an estate which comprised of large tracts of forest spanning in and around and where by Gazette notification dated 21.12.1977 under Section 4-A of K.U.Z.A.L.R. Act as amended by U.P. Act No.15 of 1978, the rights, title and interest of hissedar in respect of forest land situated in the specified areas ceased w.e.f. 01.01.1978 and the same were vested in the State Government, qua the said forest land stand taken by the State that the right, title or interest of a hissedar could be acquired without payment of compensation cannot be accepted as every hissedar whose rights, title or interest are acquired under Section 4, shall be entitled to receive and paid compensation. Said right has been recognised on the unvels of Article 300-A of the Constitution, that ensures that persons should not be deprived of property save by authority of law. The scrutiny of subject matter of U.P.C.H. Act clearly reflects that at no point of time endeavour under the said Act has been to deprive a person of his property rather said legislation was directly linked with agrarian reforms, an enactment under Schedule VII List II Entry 18 of "land".

58. Concious of this situation, mention has been made that right in the property in question is not at all lost under the provisions of U.P. Consolidation of Holdings Act, 1953, rather the forum to regain the property in question is lost being barred by operation of law.

59. Once a right in property cannot be taken away except in accordance with law as Article 300-A of the Constitution protects such right, in such a situation and in this background, the larger issue is that, would in such a situation accepting for the purposes of case that the rights are there even then there is loss of forum ?

60. At this juncture, the two Judgements of the Apex Court are being looked into.

61. Apex Court in the case of *Amar Nath vs. Kewla Devi and another* 2014 AIR SCW 3110 has clearly ruled in reference of bar being placed under Section 49 of U.P. Consolidation of Holdings Act, 1953 that where plaintiff claimed himself to be belonging to a common ancestor as defendant and then order was passed against him by playing fraud and his right to be accorded as co-bhoomidhar in revenue records cannot stand extinguished merely because he withdrew objection, the Apex Court took the view that orders of consolidation officer suffers of legal malice as there is accepted withdrawal of plaintiff's objection without examining evidence produced as to ownership of land and bar under Section 49 has been held to be not attracted. Relevant extract of the said judgement reads as follows:-

"We do not think it necessary to remit the matter back to the High Court for fresh consideration. We feel it is sufficient to set aside the impugned judgment and uphold the well-reasoned judgment of the first appellate court where it was

held that the very fact that the trial court held that it was proved that Amar Nath was s/o Vaij Nath based on the evidence on record, then automatically the court should have given half the portion of the disputed land to the appellant along with defendant no.1, Kewla Devi. Instead, the trial court as well as the Consolidation Officer have passed judgments that are bad in law as they have failed to see that the right of the appellant cannot simply be extinguished because of the defendants' plea that he has entered into a compromise. The defendants have taken undue advantage of the appellant's illiteracy and the Consolidation Officer has abdicated his role by allowing the objection of the appellant to be withdrawn and by not examining whether or not the appellant was indeed the S/o Vaij Nath who was the S/o Gaya. The order of the Consolidation Officer is thus bad in law and it has resulted in a grave miscarriage of justice. We think it fit to restore the judgment and decree passed by the first appellate court wherein the court declared that the appellant, Amar Nath is S/o Vaij Nath who was son of Gaya thereby holding that the order passed by the Consolidation Officer is void and illegal and the trial court was wrong in not quashing the order of the Consolidation Officer and that nowhere in the revenue record was his name recorded and fraud was committed against him as defendant no.1, Kewla Devi has got her name recorded in each and every revenue record. The judgment of the first appellate court is legal and valid as it is fair and keeping with the principles of justice. The trial court in its answer to issue nos. 1 and 10 has rightly held that Amar Nath is S/o Vaij Nath who was undisputedly the son of Gaya and if that fact was proved, then we see no reason why it was not directed for the appellant's name to be recorded in the revenue records. The right of the appellant over the suit schedule property cannot be extinguished simply because objection was withdrawn, over which there is a cloud of doubt anyway and also, the appellant has pleaded that he had no idea about the order of the Consolidation Officer in the first place. We find it highly likely that fraud was committed on him by the defendants as well as the Consolidation Officer by not recording his name in the revenue records as the defendants have taken undue advantage of his illiteracy so that the whole property goes to the defendants.

10. Answer to point no.2:

The question whether the original suit of the appellant was barred under Section 49 of the UP Consolidation of Land Holdings Act and Section 331 of the UP Zamindari Abolition and Land Reforms Act, we answer in the negative. The suit was not barred under the aforesaid provisions as the UP Zamindari Abolition and Land Reforms Act has no jurisdiction to deal with the subject matter. On the issue of Section 49 of the UP Consolidation of Land Holdings Act, we hold that the present case is not barred under this section as it is a suit for possession of the suit schedule property based on title, which is not within the jurisdiction of the authorities under the aforesaid Act. In the case of Suba Singh v. Mahendra Singh & Ors., it was observed by this Court that Section 49 does not bar jurisdiction of civil courts in matters of title to the land stating that -

"9. ...The result is that the plea of bar of the civil courts" jurisdiction to investigate and adjudicate upon the title to the land or the sonship of the plaintiff has no substance...."

Therefore, since the present case too involves a question of "'sonship" of the plaintiff who is the appellant herein, there is no bar to the jurisdiction of civil courts under Section 49 of the aforesaid Act, in deciding the question of the appellant's right to the land he has inherited from his father.

11. Answer to point nos.3 & 4:

The order of the Consolidation Officer dated 14.2.1970 was obtained on the basis of fraud by the defendants. We feel that the Consolidation Officer has also committed fraud on the appellant, by accepting withdrawal of his objection and not going into the issue of whether he is the s/o Vaij Nath or not, and therefore whether he is the rightful heir, with a right in half-share of the disputed property. The Consolidation Officer has not discharged his duties properly and keeping with law has not given details of the objection or why the objection was not pressed by the appellant in his order. He has permitted a gross miscarriage of justice to continue by recording of the name of defendant no.1 as the only rightful heir to the land in dispute. In the case of *S. Partap Singh v. State of Punjab*, Ayyangar J. in his portion of the judgment at para 6 has quoted Lord Denning (in the case *Lazarus Estates Ltd. v. Beasley* 1956 1 All ER 341 at p.345) stating:

"No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud."

62. Apex Court in the case of *N. Padmamma and others vs. S. Ramakrishna Reddy and others* 2015 (1) SCC 417 has taken the view that in property law right of one party cannot be defeated. Relevant extract of the said judgments is as follows:-

"It is fairly well settled principle of law that the possession of a co-heir is in law treated as possession of all the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other. See *Corea v. Appuhamy* 1912 AC 230(PC).

Reference may also be made to the decision of this Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy* AIR 1957 SC 314 where this Court has succinctly summed up the legal position as under:

"But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be

adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The coheir in possession cannot render his possession adverse to the other co-heir, not in possession. merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster."

63. On these parameters, the issues that have been raised before us are being considered and in our considered opinion rights of the parties in a holding cannot be permitted to be defeated merely because they have not at all participated in consolidation proceedings and as to whether the bar of Section 49 of U.P. Consolidation of Holdings Act, 1953 would be attracted or not would essentially be a question of fact that can be answered on the basis of evidence adduced and to the said bar in question exceptions have to be carved out wherein suit in question would be not barred and Section 49 of U.P. Consolidation of Holdings Act, 1953 would not come into play where from the series of documents and circumstances it is reflected that planned fraud has been made to delete the plaintiffs name from the revenue records. From the record of the consolidations, it is clearly reflected that neither the incumbent, who has proceeded to get his name recorded nor consolidation authorities have proceeded to discharge their duties faithfully in consonance with the provisions of U.P. Consolidation of Holdings Act wherein the consolidation authorities are empowered to ascertain the share of each owner if there be more owners than one and in case such an exercise has not been undertaken, then it would be a case of legal malice and it cannot be ipso facto presumed that there has been ouster from the property in question and in such a situation an incumbent, who claims his right in the property in question has got every right to regain his property based on title for the reason that the right has been sought to be defeated based on fraud and manipulation.

64. The provisions of Section 49 of U.P. Consolidation of Holdings Act, 1953 in such backdrop would not at all be attracted and the suit in question would not at all be prima facie barred where suit in question is filed for possession of the suit property based on property interest. The reference is answered as follows Issue No.I

65. Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an

objection under Section 9 of the Act for separation of his share?

A. Because of the words "could or ought to have been taken" in latter part of Section 49 of the Act, same does not compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer whose name is recorded in representative capacity or they were willing to live jointly due to situation of their family and who have not filed an objection under Section 49 of the Act for separation of their share inasmuch as under the provisions of U.P. Consolidation of Holdings Act, 1953, it is the statutory obligation cast upon the authorities and the incumbent, who has been holding the property in question in the representative capacity to get the records corrected and in case in designed manner the obligation in question has not been discharged by Consolidation Authorities as well as by the incumbent holding the property in the representative capacity, then in such a situation Section 49 of the Act would not at all be attracted and such situation would be covered under the contingency of planned fraud to drop the name of other co-sharers from the revenue records.

Issue No.II

66. Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution?

A. The answer is that a party cannot be thrown in litigation against their will/need and by not raising claim to land of partition and separation of chak, their rights to property cannot be taken away under the protection provided for under Article 19(1)(f)/ Article 300-A of the Constitution of India.

Issue No.III

67. Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?

A. The rights of the co-sharers will not at all come to an end under Section 49 of the Act, on the notification under Section 52 due to not claiming partition of his share and separate chak in his name and till there is no ouster from the joint property his right in the property will continue to exist.

68. The reference is accordingly answered. The Writ Petition alongwith connected matters shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement.