
(2016) 04 AHC CK 0250
In the Allahabad High Court
Case No : Writ C. No. 43554 of 2010

Veer Nagar Sahakari Awas Samiti Ltd. Agra	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Urban Land (Ceiling and Regulation) Act, 1976 — Section 10(3), 10(5), 8(3)

Citation : (2016) 5 AllWC 5365 : (2016) 118 ALR 189 : (2016) 133 RD 327 : (2016) 2 RJ 1592

Hon'ble Judges : Krishna Murari and Amar Singh Chauhan, JJ.

Bench : Division Bench

Advocate : Rahul Agarwal, Advocate, for the Petitioner; C.S.C, for the Respondent

Final Decision : Allowed

Judgement

Krishna Murari and Amar Singh Chauhan, JJ.— Heard learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. Petitioner is a co-operative housing society duly registered under the provisions of the U.P. Co-operative Societies Act, 1965. Petitioner's society purchased land situate in village Basai Mustaqil (Chungi Andar), Tehsil & District Agra bearing Khasra nos. 1990/1 area 0.265 hectare, 2323M area 0.127 hectare, 2329/1M area 0.0350 hectare, 2330 area 0.0810 hectare, 2331M measuring 0.0350 hectare and 2334 measuring 0.0110 hectare, total area 0.698 hectare vide registered sale deed dated 24.08.2001 from its erstwhile owner Mahesh Prasad son of Chotey Lal.

3. Case set up by the petitioner is that though an area of 8687.1436 sq. meter of land which includes the area of aforesaid plots was declared surplus in the hand of the erstwhile owner Mahesh Prasad but since actual physical possession of the said land was never taken over by the State and the proceedings under the Urban Land (Ceiling and Regulations) Act, 1976 (hereinafter referred to as the

"Act, 1976") lapsed in view of the Urban Land (Ceiling and Regulations) Repeal Act, 1999 (hereinafter referred to as the "Repeal Act"), the State is left with no right over the land declared surplus and is wrongly and illegally interfering in the possession of the petitioner over the said land.

4. The whole issue thus revolves around the fact as to whether actual physical possession of the land declared surplus in the hand of the erstwhile owner was actually taken over by the State before 31.03.1999 when the Repeal Act was enforced. For determination of the issue involved, it may be relevant to mention the following facts which are culled out from the pleadings of the parties.

5. Statement under Section 6(1) of the Act, 1976 was filed by the erstwhile owner Mahesh Prasad before the Competent Authority on 14.08.1976, which was registered as case no. 1676/3315/1976-77, State v. Mahesh Prasad. In the statement, besides other land, his share of land measuring 16 bigha 4 biswa situate in village Basai Mustaqil, Tehsil & District Agra was also shown. The Competent Authority prepared a draft statement under Section 8(3) of the Act, 1976 on 28.01.1978, which is alleged to be sent through the process server instead of registered post. Notice and draft statement under Section 8(3) were never served upon the erstwhile owner Mahesh Prasad. The report of the process server goes to show that it was served on Kishan Lal who is alleged to be brother of Mahesh Prasad. Thereafter, the Competent Authority by means of an ex-parte order dated 08.03.1978 declared an area 8687.2514 sq. meter as excess land in the hand of the erstwhile owner Mahesh Prasad. Notification under Section 10(1) of the Act, 1976 was issued on 07.06.1979 which included the land in dispute as well. Subsequently, notification under Section 10(3) of the Act, 1976 was issued on 23.10.1992. Notice under Section 10(5) of the Act, 1976 is alleged to have been issued on 31.3.1993 calling upon Mahesh Prasad to surrender the possession of the land declared surplus within 30 days from the date of receipt of the order failing which proceedings for forcible possession under Section 10(6) of the Act, 1976 would be taken. Notice under Section 10(5) of the Act, 1976 was never served either upon erstwhile owner Mahesh Prasad nor did he deliver or surrender possession of the land in pursuance of the same.

6. Specific case set up by the petitioner is that actual physical possession has not been taken over by the State before the enforcement of the Repeal Act and thus entire proceedings stood abated.

7. A counter affidavit has been filed by the State wherein it has been stated in paragraph 3 that Mahesh Prasad filed statement under Section 6(1) of the Act, 1976 on 14.8.1976. On inquiry it was found that he was having 8687.2514 sq. meter land as surplus. Draft statement and notice under Section 8(3) of the Act, 1976 were issued and served upon Mahesh Prasad on 29.01.1978 but nobody appeared or filed any objection, as such, the Competent Authority vide order dated 08.03.1978 declared an area of 8687.2514 sq. meter land as surplus. It is further stated that notification under Section 10(1) of the Act, 1976 was sent for publication on 07.06.1979 which was published in official gazette on 26.11.1980.

It is also stated that notice under Section 10(5) was issued on 31.3.1993, which could not be served on account of non-availability of the tenure holder, as such, it was affixed on his house and thereafter, it was served personally on 25.06.1993. It is pertinent to point out at this stage that no documentary evidence in respect of personal service upon Mahesh Prasad has been filed along with the counter affidavit and only bald allegation has been made in this regard. Thus the facts in this regard are admitted between the parties and there is no dispute with regard to the same. A perusal of the counter affidavit further goes to show that there is not even an averment much less any document to establish that possession was surrendered by the erstwhile Mahesh Prasad or was forcibly taken under Section 10(6) of the Act. Counter affidavit is absolutely silent on the factum of taking over possession. What has been stated is that proceedings under Section 8(4) to 10(5) of the Act were completed and the landholders was dispossessed. It is further stated that no objection was filed by the landholder in response to notice under Section 10(5), therefore, the Tehsildar mutated the land declared surplus in the name of the State Government. It may be relevant to reproduce the following relevant paragraphs of the counter affidavit :

"16- ;g fd ;kfpdk ds izLrj&18 esa of.kZr dFku Lohdkj ugha gSA izfrmRrj esa ;g dguk gS fd Hkw&/kkjd o ftykf/kdkjh vkxjk dks dCtk nsus o ysus ds fy;s uxj Hkwfe lhekjksi.k vf/kfu;e dh /kkjk 10(5) ds vUrxZr uksfVI Hkstk x;k fti ij ;kph } kjk dksbZ vkifRr ugha dh x;h blfy, rglhynkj }kj k vfRfjDr fjDr Hkwfe 8687&1436 o0eh0 ij jkT; ljdkj ds uke dk vey njken fd;k x;k fdlh izdkj dk dksbZ fojks/k u gksus ds dkj.k /kkjk 10(6) ds vUrxZr cy iz;ksx djus dh vko";drk gh ugha iM+hA

21- ;g fd ;kfpdk ds izLrj&25] 26 o 27 esa of.kZr dFku ds IEcu/k esa ;g dguk gS fd dCtk n[ky dk dksbZ n[kyukek vyx ls rS;kj ugha fd;k x;k gSA Lrj Lohdkj gSA ijUrq Hkw/kkj d vf/kfu;e dh /kkjk 8@4 ls ysdj /kkjk 10@5 ds vUrxZr dk;Zokgh iw.kZ gksdj fof/kor n[ky gks pqdk gSA

22- ;g fd ;kfpdk ds izLrj&28 o 29 esa of.kZr Lohdkj ugha gSaA izfrmRrj esa ;g dguk gS fd Hkw/kkj d uxj Hkwfe lhekjksi.k vf/kfu;e esa nh x;h O;oLFkkvksa ds vUrxZr fof/kor dk;Zokgh gksdj csn[ky gks pqdk gS tSlk fd fjV ;kfpdk ds layXud&8 ls Li"V gSA

26- ;g fd ;kfpdk ds izLrj&36 esa of.kZr dFku ds IEcu/k esa ;g dguk gS fd Hkw&/kkjd dks vfRfjDr fjDr Hkwfe dk izfrdj dk Hkqxrku ugha fd;k x;k gS ftldk Hkqxrku "kklu ls ctV izkIr gksus ds mijkUr Hkw&/kkjd dks dj fn;k tk;sxA"

8. A perusal of the aforesaid facts mentioned in the counter affidavit demonstrates that the State has not stated that any possession memo was ever executed nor there is any detail as to when and in what manner the possession was taken from the erstwhile landholder prior to enforcement of the Repeal Act, 1999.

9. At this stage, it may also be relevant to refer to the pleadings of the petitioner in the rejoinder affidavit. It has categorically been stated therein that possession of the land in question was never surrendered or delivered at any point of time

under Section 10(5) of the Act, 1976 by erstwhile owner Mahesh Prasad to the State Government or to any person duly authorised by the State Government in that behalf. It is also categorically stated that the possession was also never taken by the competent authority or caused it to be given to the State Government or any person duly authorised by it in that behalf by invoking the provisions of Section 10(6) of the Act. No evidence of any kind in the form of a document or certificate has been filed along with the counter affidavit to show that possession of the land in question was ever surrendered or delivered to the State Government or any person authorised by it in that behalf. It may be relevant to quote paragraph 8 of the rejoinder affidavit, which reads as under :

"8. That the contents of paragraph no. 5 of the counter affidavit, as stated, are wrong and denied. It has been incorrectly stated that the petitioner purchased the land in question which was in possession of the State Government. In fact, the possession of the land in question was never surrendered or delivered at any point of time under Section 10 (5) of the ULCR Act by said Mahesh Prasad to the State Government or to any person duly authorised by the State Government in that behalf. The possession was also never taken by the Competent Authority or caused it to be given to the State Government of Uttar Pradesh or any person duly authorised by the State Government in that behalf by invoking to the provisions of Section 10(6) of the ULCR Act. The deponent has not placed on record or made any mention about any kind of document or certificate to show that the possession of the land in question was ever surrendered or delivered to the State Government or any person authorised by the State Government in that behalf. Similarly, the copy of any document or certificate of taking of the possession from Mahesh Prasad has not been brought on record. For these reasons, neither the date of surrender/delivery of possession or taking over of alleged possession has been stated either in the paragraph under reply or in the entire Counter Affidavit nor the person to whom such possession was surrendered or delivered has been mentioned, which establishes that fact that the possession of the land in question was never surrendered/delivered /taken by the State Government or its any authorised officer or by the Competent Authority itself.

10. It may also be relevant to quote the paragraphs 11 & 12 of the rejoinder affidavit wherein it has been held stated that entire file of the concerned case was obtained by the petitioner under the Right to Information Act and the same does not contain any document to establish that possession was ever taken either by the State Government or anybody on its behalf or even the competent authority from the erstwhile owner Mahesh Prasad. The aforesaid two paragraphs read as under :

"11. That it may also be stated that an inspection of the record of Case No. 1676/3315/1976-77, State v. Mahesh Prasad, maintained in the Officer of the concerned Competent Authority, has clearly revealed that there is no document or any evidence to show that the possession of the land in question was ever

surrendered, delivered or taken under the provisions of ULCR Act. The essential particulars to establish the surrender /delivery/taking over of the possession (e.g. its date and the name of the officer who took over the possession) have not been deliberately disclosed, as no such particulars at all existed. It may also be mentioned that the petitioner through one Sri Rajesh Saraswat S/o R.P. Saraswat, R/o 17/264, Jaal Gali, Chilli Int Road, Agra moved an application dated 4.2.2011 under the RTI Act to obtain the copy of the entire file of the concerned Case No. 1676/3315/1976-77 which was made available to him vide communication dated 263 dated 9.3.2011. A perusal of the copy of the entire file made so available under RTI Act also clearly established that it had no document of taking of possession.

12. That it is also vehemently denied that the sale dated 24.8.2001, executed by said Mahesh Prasad was null and void and was a nullity in the eyes of law. In fact, ULCR Act stood repealed on 18.3.1999 and since thereafter, the provisions of the ULCR Act had no application to the land in question, inasmuch as the possession of the land in question was never surrendered/delivered or taken over by the State Government or any officer authorised in that behalf. The said sale deed was legal, effective and binding and any contrary averment in the paragraph under reply or in other paragraphs of the Counter Affidavit is wrong and unfounded. It may also be mentioned that pursuant to the aforesaid sale deed dated 24.8.2001, said Mahesh Prasad delivered the actual and physical possession of the land in question to the petitioner-society and also transferred a good title to the petitioner and such facts were specifically mentioned in the sale deed itself, a copy whereof has already been brought on record by the petitioner as Annexure-3 to the Writ Petition. "

11. The copy of the entire file obtained under the Right to Information Act has been filed by the petitioner as annexure-RA-2 to the rejoinder affidavit. From a perusal thereof, we also do not find any document either in the form of a certificate or possession memo to demonstrate that either the possession was delivered by the erstwhile owner Mahesh Prasad voluntarily or it was taken over from him by the State authority or the competent authority in any manner including that under Section 10(6) of the Act, 1976.

12. The normal mode of taking over possession is drafting a "Punchnama" in the presence of "Panchas" and taking possession and giving delivery to the beneficiaries. This was the view taken by the Hon"ble Supreme Court in Balmokand Khatri Education and Industrial Trust v. State of Punjab, AIR 1996 SC 1239 wherein it was observed as under :

"It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the punchnama in the presence of panchas and taking possession and

giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession."

13. In *Sita Ram Bhandar Society v. Govt. of NCT of Delhi*, (2009) 10 SCC 501 the Hon"ble Apex Court held that when possession is to be taken of a large tract of land then it is permissible to take possession by a properly executed panchnama.

14. In *Banda Development Authority v. Moti Lal Agarwal*, (2011) 5 SCC 394 the Hon"ble Apex Court laid down the following principles as to what act would constitute taking possession of acquired land, namely:

"(i) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(ii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iii) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document. "

15. In the case in hand, from a perusal of the averments made in the pleadings of the parties especially, the counter affidavit and the entire record of the case, filed as annexure-RA-2, obtained under the Right to Information Act, it goes to show that actual physical possession of the land in question was never taken by the State Government or the competent authority. There is no evidence much less even an whisper of possession of the land declared surplus being taken from the erstwhile tenure-holder either by the State Government or its representative or the competent authority.

16. From an analysis of the factual position enumerated and discussed above, we are satisfied that even though the land in dispute was declared surplus but actual physical possession of the same was never taken by the State Government from the erstwhile tenure-holder Mahesh Prasad. The pleadings of the record do not indicate that even symbolic possession can be said to have been taken by the State Government.

17. Now we proceed to analyse the effect of the Repeal Act, 1999 in the light of the above facts and settled legal position by various judicial pronouncements.

Act, 1976 was repealed by Section 2 of Repeal Act, 1999, which was adopted in the State of Uttar Pradesh with effect from March, 1999. The Repeal Act, 1999 contains a savings clause in Section 3, which reads as under :

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

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

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

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

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20. 2 Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

"4. Abatement of legal proceedings :- All proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of this Act, before any Court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to Sections 11, 12, 13 and 14 of the Principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf by the Competent Authority."

18. Dispute arose with regard to interpretation and true import of the savings clause contained in the Repeal Act. The question has been answered in a series of judgments by various Division Benches of this Court as well as Hon"ble Apex Court. It may be relevant to quote some of them, which are as under :

19. In the case of Babu Chand v. State of U.P., 2009 (75) ALR 873, a Division Bench of this Court has held that possession on paper is a symbolic possession and word "possession" used in clause (a) of sub-section (2) of Section 3 of the Act means actual physical possession and not the symbolic possession.

20. The issue was again considered by another Division Bench of this Court in the case of Ram Chandra Pandey v. State of U.P. and others, 2010 (82) ALR 136 wherein it was held that mere symbolic possession does not amount to taking over actual physical possession. It was further held that unless actual physical possession has been taken by the State, the party would be entitled to the benefit of the Repeal Act, 1999.

21. The same view has been taken in a series of judgment of the Hon"ble Apex Court starting from Pt. Madan Swaroop Shrotriya Charitable Trust v. State of U.P., 2000(6) SCC 325, Ghasitey Lal Sahu v. Competent Authority, (2004) 13 SCC 452, Mukarram Ali Khan v. State of U.P., (2007) 11 SCC 90, Vinayak Kashinath Shilkar v. Dy. Collector and Competent Authority and Ors., 2012 (4) SCC 718 and State of Uttar Pradesh v. Hari Ram, 2013(4) SCC 280 wherein the provisions of the Principal Act and also Repeal Act were examined in detail and it was held as under :

"17. Sub-section (2) of Section 10 states that after considering the claims of persons interested in the vacant land, the Competent Authority has to determine the nature and extent of such claims and pass such orders as it might deem fit. Sub-section (3) of Section 10 states that after the publication of the notification under sub-section (1), the Competent Authority has to declare that the excess land referred to in the Notification published under sub-section (1) of Section 10 shall, with effect from such date, as might be prescribed in the declaration, be deemed to have been acquired by the State Government. On publication of a declaration to that effect such land shall be deemed to have been vested absolutely in the State Government, free from all encumbrances, with effect from the date so specified.

Legal fiction:

18. The Legislature is competent to create a legal fiction, for the purpose of assuming existence of a fact which does not really exist. Sub-section (3) of Section 10 contained two deeming provisions such as "deemed to have been acquired" and "deemed to have been vested absolutely". Let us first examine the legal consequences of a "deeming provision". In interpreting the provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. This Court in Delhi Cloth and General Mills Company Limited v. State of Rajasthan, (1996) 2 SCC 449, held that what can be deemed to exist under a legal fiction are facts and not legal consequences which do not flow from the law as it stands.

Voluntary Surrender :

31. The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering refused possession. The Court in Maharaj

Singh v. State of U.P. and others, (1977) 1 SCC 155, while interpreting Section 117 (1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that "vesting" is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan, held as follows:

28. We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest", generally means to give a property in Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI. Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorisation cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executory devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well.

The Supreme Court further went on to hold that the it is mandatory for the State to issue a notice under sub-clause 5 of Section 10 directing the petitioner/land holder to deliver peaceful possession to the State, failing which it was mandatory for the Respondents to take forceful possession under Section 10 (6) of the Act. The Supreme Court in paragraphs 36 and 37 held as under:

"36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) of Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the Competent Authority may take possession of the vacant land to be given to the State Government and for that purpose, force as may be necessary can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the Competent Authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted to only in a situation which falls under subsection (6) and not under sub-section (5) of Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10 (5), then "forceful dispossession" under sub-section (6) of Section 10.

37. The requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may" has been used therein, the word "may" in both the sub-sections has to be understood as "shall" because a Court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result the land holder being dispossessed without notice, therefore, the word "may" has to be read as "shall"."

The Supreme Court after dealing with the effect of the Repeal Act held that mere vesting of the land under sub clause (3) of Section 10 would not confer a right on the State Government to have de facto possession of vacant land unless there has been a voluntarily surrender of the vacant land before 18.3.1999 or forceful possession of the land under Section 10 (6) of the Act. The relevant paragraph No. 42 is extracted here under:

"42. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

The same issue has been reaffirmed by the Apex Court in the case of *Gajanan Kamlya Patil v. Addl. Collector & Comp. Auth. & Ors.* reported in JT 2014 (3) SC 211. "

22. Learned Standing Counsel has tried to distinguish the ratio of the decision of the Hon"ble Apex Court in the case of *Hari Ram (Supra)* by relying upon a subsequent judgment rendered by the Hon"ble Apex Court in the case of *State of Assam v. Bhaskar Jyoti Sarma*, (2015) 5 SCC 321. Relying upon the said judgment, it is contended that in case of *Bhaskar Jyoti Sarma (Supra)*, it has been clarified that the earlier decision did not deal with the question whether a breach of Section 10(5) of the Principal Act and possible dispossession without notice would vitiate the act of dispossession itself or render it non-est in the eye of law. Reliance has also been placed on a Division Bench judgment dated 27.7.2015 in the case of *Shiv Ram Singh v. State of U.P. & others*, writ petition no. 37964 of 2009. Relying upon the decision in the case of *Bhaskar Jyoti Sarma (Supra)*, it has further been contended that the issue of possession being a disputed question of fact was not amenable to writ jurisdiction under Article 226 of the Constitution.

23. On a careful perusal of the decision of *Bhaskar Jyoti Sarma (Supra)*, the same is clearly distinguishable on facts. In the said case, there was a specific pleadings that possession of the entire surplus land was taken by the revenue authority on 07.12.1991, out of which an area of 8.3 acres land was allotted in favour of the Guwahati Metropolitan Development Authority. The claim of the State of Assam of taking over physical possession of the land was based on the certificate of handing/taking over possession, which is also quoted in the judgment itself. However, since the official record was silent on the issuance of notice under Section 10(5) of the Act, 1976, the question before the Court for

adjudication was whether the failure of the Government or the authorised officer or the competent authority to issue a notice to the landholders in terms of Section 10(5) of the Act, 1976 would by itself mean that such dispossession is no dispossession in the eyes of law. In the case of Bhaskar Jyoti Sarma (Supra), possession, as a matter of fact, had already been taken by the State without issuing notice under section 10(5) and admittedly, a possession memo was on record and it was, in these circumstances, the Hon'ble Apex Court distinguished the case of Hari Ram (Supra) and held that breach of Section 10(5) and dispossession without notice would not vitiate the act of dispossession itself or render it non-est. Paragraph 11 of the judgment in the case of Bhaskar Jyoti Sarma (Supra) makes it abundantly clear and same reads as under :

"11. Section 3 of the Repeal Act postulates that vesting of any vacant land under sub-section (3) of Section 10, is subject to the condition that possession thereof has been taken over by the competent authority or by the State Government or any person duly authorised by the State Government. The expression "possession" used in Section 3 (supra) has been interpreted to mean "actual physical possession" of the surplus land and not just possession that goes with the vesting of excess land in terms of Section 10(3) of the Act. The question, however, is whether actual physical possession of the land in dispute has been taken over in the case at hand by the competent authority or by the State Government or an officer authorised in that behalf by the State Government. The case of the appellant is that actual physical possession of the land was taken over on 7th December, 1991 no matter unilaterally and without notice to the erstwhile land owner. That assertion is stoutly denied by the respondents giving rise to seriously disputed question of fact which may not be amenable to a satisfactory determination by the High Court in exercise of its writ jurisdiction. But assuming that any such determination is possible even in proceedings under Article 226 of the constitution, what needs examination is whether the failure of the Government or the authorised officer or the competent authority to issue a notice to the land owners in terms of Section 10(5) would by itself mean that such dispossession is no dispossession in the eye of law and hence insufficient to attract Section 3 of the Repeal Act. Our answer to that question is in the negative. We say so because in the ordinary course actual physical possession can be taken from the person in occupation only after notice under Section 10(5) is issued to him to surrender such possession to the State Government, or the authorised officer or the competent authority. There is enough good sense in that procedure inasmuch as the need for using force to dispossess a person in possession should ordinarily arise only if the person concerned refuses to cooperate and surrender or deliver possession of the lands in question. That is the rationale behind Sections 10(5) and 10(6) of the Act. But what would be the position if for any reason the competent authority or the Government or the authorised officer resorts to forcible dispossession of the erstwhile owner even without exploring the possibility of a voluntary surrender or delivery of such possession on demand. Could such use of force vitiate the dispossession itself or

would it only amount to an irregularity that would give rise to a cause of action for the aggrieved owner or the person in possession to seek restoration only to be dispossessed again after issuing a notice to him. It is this aspect that has to an extent bothered us. The High Court has held that the alleged dispossession was not preceded by any notice under Section 10(5) of the Act. Assuming that to be the case all that it would mean is that on 7th December, 1991 when the erstwhile owner was dispossessed from the land in question, he could have made a grievance based on Section 10(5) and even sought restoration of possession to him no matter he would upon such restoration once again be liable to be evicted under Sections 10(5) and 10(6) of the Act upon his failure to deliver or surrender such possession. In reality therefore unless there was something that was inherently wrong so as to affect the very process of taking over such as the identity of the land or the boundaries thereof or any other circumstance of a similar nature going to the root of the matter hence requiring an adjudication, a person who had lost his land by reason of the same being declared surplus under Section 10(3) would not consider it worthwhile to agitate the violation of Section 10(5) for he can well understand that even when the Court may uphold his contention that the procedure ought to be followed as prescribed, it may still be not enough for him to retain the land for the authorities could the very next day dispossess him from the same by simply serving a notice under Section 10(5). It would, in that view, be an academic exercise for any owner or person in possession to find fault with his dispossession on the ground that no notice under Section 10(5) had been served upon him."

24. Thus, it would be seen that it is, in fact, the actual physical possession which is of material importance to determine the rights of the parties in view of the provisions of the Repeal Act. As already stated above in the case of Bhaskar Jyoti Sarma (Supra) actual physical possession of the land declared surplus was taken over by the State Government on 7th December, 1991. The ratio of the said decision at best can be said to be that manner and mode of taking physical possession is immaterial and whether possession has been taken over unilaterally without notice or by use of force. In any case, where the tenure holder has been dispossessed from land declared surplus prior to enforcement of the Repeal Act, 1999, the benefit of the said Act would not flow to the tenure-holder.

25. The position is exactly reverse in the case in hand. Admittedly, in the case in hand, though notice under Section 10(5) of the Act was issued on 31.3.1993 but there is not even an assertion by the State in the counter affidavit nor there exists any document on the record of the case to demonstrate that possession of the land declared surplus was taken over from the erstwhile tenure holder before enforcement of the Repeal Act, 1999.

26. Further in so far as the ratio of the decision in the case of Bhaskar Jyoti Sarma (Supra) with respect to determination of disputed question of fact in writ jurisdiction is concerned, it is no doubt correct that a seriously disputed question

of fact could not normally be adjudicated or determined by the High Court in its writ jurisdiction. However, question of fact becomes disputed when it is raised by one party and denied by the other and there is material on record to prima-facie indicate that there exists a dispute with respect to said facts. In the case in hand, the State has failed to even allege much less demonstrate that physical possession of the land declared surplus was taken over from erstwhile tenure holder at any point of time prior to the enforcement of the Repeal Act, 1999. In the absence of any denial by the State in the counter affidavit, of the allegations that possession has not been taken, and lack of any material or even an assertion when and in what manner the possession was taken, the issue of possession cannot be said to be a disputed question of fact.

27. In view of the aforesaid, the ratio of the decision in the case of Bhaskar Jyoti Sarma (Supra) is not at all attracted and can be said to be applicable in the facts of the present case. For the same reasons, reliance by the learned Standing Counsel on the Division Bench judgment in the case of Shiv Ram Singh (Supra) is also misfounded. In the said case also, there is a categorical finding returned by the Division Bench that possession of the land declared surplus was taken over prior to the date of the Repeal Act and the petitioner therein waited for more than 3 years, after the Repeal Act came into force, to file first writ petition and thereafter waited for a period of 2 years after disposal of the writ petition despite finding of the District Magistrate that possession was taken over on 25.6.1993. From a perusal of the original record, which were produced, the Division Bench returned a finding that possession was duly taken over after following the provisions contained in 1983 directions. There is no such averments in the case in hand nor the complete record, which was obtained by the petitioner under the Right to Information Act filed along with the rejoinder affidavit goes to show that the Register in Form No. ULC-III has any entry of taking over possession of the land in question.

28. In view of above facts and discussion, the only irresistible conclusion is that the State has failed to establish that physical possession of the land declared surplus was taken over prior to the enforcement of the Repeal Act and thus the proceedings under the Act of 1976 would stand lapsed after enforcement of the Repeal Act, 1999 and there is no infirmity or illegality in the sale deed obtained by the petitioner from the erstwhile tenure holder Mahesh Prasad after the enforcement of the Repeal Act. Accordingly, writ petition succeeds and stands allowed. A writ of mandamus is issued commanding the respondents not to interfere in the actual physical possession of the petitioner over the land in dispute and they are further directed to re-enter the name of the petitioner in the revenue records.

29. However, in the facts and circumstances, we do not make any order as to costs.