REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10565 OF 2014
(Arising out of S.L.P. (C) No.4726 of 2011)

State of Assam ...Appellant

Vs.

Bhaskar Jyoti Sarma & Ors. ...Respondents

With

CIVIL APPEAL NO. 10566 OF 2014
(Arising out of S.L.P. (C) No.9615 of 2011)

Jones Ingti Kathar ...Appellant

Vs.

Bhaskar Jyoti Sarma & Ors. ...Respondents

AND

CIVIL APPEAL NO. 10567 OF 2014
(Arising out of S.L.P. (C) No.25824 of 2011)

Gauhati Metropolitan Development Authority & Anr. ...Appellants

Vs.

Bhaskar Jyoti Sarma & Ors. ...Respondents

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.

2. These appeals by special leave are directed against an order dated 21st September, 2010 passed by a Division Bench of the High Court of Assam at Guahati whereby Writ Appeal No.202 of 2007 filed by the respondents herein has been allowed, order dated 13th April, 2007 passed by a learned Single Judge of that Court set aside and the respondents held entitled to restoration of the possession of the land in dispute.

3. Late Bhabadeb Sarma, father of the respondents, was recorded as a Pattadar of a plot of land measuring 73.26 Ares equivalent to 1 Bigha, 4 Kathas and 16 Lachas, covered by K.P. Patta No.493 (old)/594 (new) in Dag No.1008(old) of Sahar Ulubari, in Mouza Ulubari, Guahati. With the adoption of Urban Land (Ceiling and Regulation) Act, 1976 by the State of Assam, the said Shri Bhabadev Sarma submitted returns under Section 6 of the said Act on 19th October, 1976. In Urban Land Ceiling Case No.343 of 1976 initiated by the District Collector against the said Shri Sarma, a draft

statement under Section 8(3) was served upon the owner in regard to the land aforementioned which was, according to the draft statement, beyond the ceiling limit of 2000 sq. meters permissible under the Act. Upon consideration of the objections raised by the owner to the said draft statement, a final statement under Section 9 was prepared and published on 3rd September, 1982 declaring an area measuring 7981.48 Sq. meters to be in excess of the permissible limit. A notification dated 16th May, 1984 under Section 10(1) followed declaring the vacant land aforementioned to be in excess of the ceiling limit.

4. In November 1984, the owner appears to have sold a major portion of the land in question to Mr. Kamala Kanta Ozah and five others in terms of different instruments of sale executed in their favour. A notification under Section 10(3) was published on 1st January, 1987 and the land in question declared Ceiling Surplus Government land. A part of the said land was on that basis allotted in favour of 8 families in terms of land policy of the Government while the remaining area measuring 8.03 Ares was retained by the Government. It is not in dispute that the land record was also corrected by

deleting the name of owner Bhabadeb Sarma as the Pattadar. It is also not in dispute that no land revenue was collected from the erstwhile owners post vesting of the land in the State under Section 10(3) of the Act.

5. The appellant's case is that possession of the entire surplus land was taken over by the Revenue Authority on 7th December, 1992. This did not, however, deter Kamala Kanta Ozah and others who had purchased the land either from filing an appeal against the order of vesting or challenging the proceedings in Writ Petition (Civil Writ Case No.2568 of 1992) filed before the High Court. Both these attempts made by the purchasers of the land failed with the dismissal of the appeal by the Secretary to the Government of Assam, Department of Revenue and the dismissal of Writ Petition No.2568 of 1992 by the High Court in terms of order dated 21st May, 2002. The High Court, it is pertinent to mention not only upheld the order passed by the Collector-cum-Competent Authority but also the allotment of a substantial portion of the land in favour of 8 different families eligible for such allotment. Writ Appeal No.419 of 2002 filed by Kamala Kanta Ozah and others against the order passed by the

Single Judge also came to be dismissed by the Division Bench of the High Court by an order dated 20th December, 2002. Special leave petition filed against the said order too failed and was dismissed by this Court on 8th August, 2003.

6. With the challenge to the proceedings under the Act concluding in the manner indicated above, the Government of Assam by an order dated 27th November, 2003 allotted an extent of 8.03 Are to Guwahati Metropolitan Development Authority (GMDA) for construction of an office building for the said authority. In the meantime on 12th December, 2003 the Urban Land (Ceiling and Regulation) Repeal Act was notified which came into force in the State of Assam w.e.f. 6th August, 2003. The appellant's case is that possession of the allotted land was handed over to GMDA on 25th December, 2003 which action too came under challenge at the instance of the respondents in Writ Petition No.2519 of 2004, who stepped into the shoes of Bhabadeb Sarma upon his death on 3rd October, 1997. A Single Bench of the High Court of Assam dismissed the writ petition upholding the allotment of the land to GMDA and declined the prayer for restoration of the possession in favour of the writ petitioners-

SUPREME COURT OF INDIA
JUDGMENT

respondents herein. Aggrieved by the said order, the respondents filed Writ Appeal No.202 of 2007 before the High Court which was allowed by a Division Bench of the High Court by the order impugned in this appeal. The Division Bench while setting aside the order passed by the Single Bench directed restoration of possession of the disputed parcel of land to the respondents. The present appeals filed by the State of Assam and GMDA assail the correctness of the said judgment and order of the High Court.

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

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

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

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

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

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

(2) Where –

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

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

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

8. A bare reading of Section 3 (supra) makes it clear that repeal of the Principal Act does not affect the vesting of any

vacant land under sub-section (3) of Section 10, possession whereof has been taken over by the State Government or any person duly authorised by the State Government in that behalf or by the competent authority. In the case at hand, the appellant claims to have taken over the possession of the surplus land on 7th December, 1991. That claim is made entirely on the basis of a certificate of handing over/taking over of possession, relevant portion whereof reads as under:

> *"<u>Certificate of handing over/taking over possession</u>*
>
> *Today on this 7th December, 1991, we took over possession of 70.32 Are of acquired land as scheduled below vide order of the Deputy Commissioner, Kamrup's ULC Case No.343 dated 2-3-91 and as per Assam Gazette notification dated 1-1-87 in the case No.ULC343/76.*
>
> *<u>Schedule of land</u>*
>
> *xxx xxx xxx*
>
> *xxx xxx xxx*
>
> *Received the possession*
>
> *(Taken over possession unilaterally)*
>
> *Sd/-Illegible Given the possession*
>
> *Designation – SK (G) Designation*
>
> *7.12.91 Dated Dated*
>
> *7/12*
>
> *Countersigned*
>
> *Sd/-Illegible*

Circle Officer

Guwahati Revenue Circle"

9. Relying upon the above document it was strenuously argued on behalf of the appellants that actual physical possession was taken over from the erstwhile land owner as early as in December, 1991, no matter relevant official record does not bear testimony to any notice having been issued to the land owners in terms of Section 10, sub-section (5) of the Act. It was argued that so long as actual physical possession had been taken over by the competent authority title to the land so taken over stood vested absolutely in the State Government under Section 10(3) and could not be claimed back no matter the Principal Act stood repealed after such vesting had taken place. In support of the contention that actual physical possession had been taken over by the competent authority, the appellant places heavy reliance upon the fact that challenge to the proceedings under the Act mounted in Writ Petition No.2568 of 1992 by the purchasers of a part of the disputed land had failed right up to this Court and the allotment of a substantial part of the surplus land in favour of the 8 families affirmed. This,

according to the appellant, proves that possession of the surplus land had indeed been taken over from the erstwhile owner in terms of proceedings held on 7th December, 1991. It was also contended that Bhabadeb Sarma, the erstwhile owner, had remained aloof even when he was a party to the writ petition filed by the purchasers who had questioned the validity of the order passed by the competent authority including the allotment of the surplus land in favour of third parties. It was urged that the Repeal Act would have no effect whatsoever even when the taking of possession was without notice to the erstwhile owner especially when the owner had failed to question any such take over at the appropriate stage in appropriate proceedings. The challenge mounted by the legal heirs of the deceased erstwhile owner 13 years later was clearly untenable and afterthought. Failure of the land owner to seek redressal against non-compliance with the statutory requirement of a notice before possession is taken would constitute abandonment of the right of the owner under Section 10 (5) which cannot be resuscitated after lapse of such a long period only to take advantage of the Repeal Act. The question whether actual

physical possession of the disputed land had been taken over is in any case a seriously disputed question of fact which could not be adjudicated or determined by the High Court in its writ jurisdiction.

10. Mr. P.K. Goswamy, learned senior counsel, appearing for the respondents, on the other hand, argued that actual physical possession must be proved to have been taken over by the State Government or by a person duly authorised by the State Government in that behalf or by the competent authority in order that the saving of clause in the Repeal Act could save any action already taken under the principal Act. Possession of surplus land could, in turn, be taken only by the owner surrendering or delivering possession to the State Government or the persons duly authorised by the State Government. In the event of failure or refusal of the owner to surrender or deliver the same, possession of the surplus land could be taken forcibly also but only in accordance with the procedure prescribed. The Scheme of Section 10 does not, according to Mr. Goswamy, permit taking over of possession by the State Government or the authorised person or the public authority without following the

procedure prescribed under Section 10(5), namely, issuing a notice in writing to the person to surrender or deliver the same. Inasmuch as actual physical possession in the case at hand is alleged to have been taken over without following the said procedure the alleged take over shall be deemed to be *non-est* in the eye of law atleast for the purposes of Section 3 of the Repeal Act. Relying upon the decision of this Court in ***State of Uttar Pradesh v. Hari Ram (2013) 4 SCC 280***, it was argued by Mr. Goswamy that the procedure prescribed under Section 10(5) for taking physical possession of the land under Section 10(6) was mandatory and so long as the said procedure was not followed, no possession can be said to have been taken over within the meaning of Section 3 of the Repeal Act.

JUDGMENT

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.

12. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile land owner on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not

SUPREME COURT OF INDIA
JUDGMENT

because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.

13. Reliance was placed by the respondents upon the decision of this Court in ***Hari Ram's*** case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in ***Hari Ram's*** case (supra) considering whether the word 'may' appearing in Section 10(5) gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5) and possible dispossession without notice would vitiate the act of dispossession itself or render it *non est* in the eye of law did not fall for consideration in that case. In our opinion, what Section 10(5) prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December

1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

14. Mr. Goswamy drew our attention to a decision of this Court in ***State of Gujarat and Anr. V. Gyanaba Dilavarsinh Jadega (2013) 11 SCC 486*** to argue that a Writ Court could also examine the question of dispossession as was the position in that case which too arose out of a proceeding under the Urban Land (Ceiling and Regulation) Act. This Court in that case remanded the matter back to the High Court to determine the question whether possession of the land had been taken over before the Repeal Act came into force. In the instant case the Single bench of the High Court had while dismissing the writ petition filed by the respondents relied upon the fact that the writ petition filed by the purchasers of a portion of the

surplus land had been dismissed and the allotment of a portion of the surplus land in favour of separate family affirmed not only by the Division Bench of the High Court but also by this Court in a further appeal. The possession of land purports to have been taken over from the erstwhile owner in terms of proceedings dated 7th December, 1991. Inference drawn appears to be that if allotment of substantial part of the surplus land to the third parties has been affirmed, it only means that possession was indeed taken over for otherwise there was no question of allotting the land to third parties nor was there any question of such allottee-occupants using the same. We cannot, however, ignore the fact that the question of dispossession of the owner or the transferee was never agitated or determined by the High Court in the writ petition filed by the transferee. We could appreciate the argument if the issue regarding dispossession had been raised and determined by the Courts in the previous litigation. That was, however, not so, apparently, because the question of dispossession was not relevant in the proceedings initiated by the transferees who were challenging the vesting order on the ground of their

having purchased the surplus land from the owner. That attempt failed as the Court found the sale in their favour to be void. The question of dispossession relevant to Section 3 of the Repeal Act thus never arose for consideration in those proceedings. It will, therefore, be much too farfetched an inference to provide a sound basis for either the High Court or for us to hold that dismissal of the writ petition filed by the purchasers in the above circumstances should itself support a finding that possession had indeed been taken over. Having said that we must hasten to add that even the Division Bench has while reversing the view taken by the single bench not recorded any specific finding to the effect that possession had actually continued with the erstwhile owner even after the vesting of the land under Section 10(3) and the proceedings dated 7th December, 1991.

15. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker

of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of ***Gyanaba Dilavarsinh Jadega*** (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in

certain situations upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution.

16. Confronted with the above position, Mr. Goswamy made a suggestion. He urged that having regard to the fact that Urban Land (Ceiling and Regulation) Act, 1976 has been repealed as also the fact that no notice under Section 10(5) was ever issued any proceedings meant to determine whether actual dispossession had or had not taken place, whether by the High Court or any Civil Court is bound to take another decade if not more. The respondent would, therefore, be happy and satisfied if the order passed by the High Court is upheld except to the extent of land to be restored to the respondents equivalent to 8.03 Are (equivalent to 3 Kathas) which extent has been allotted in favour of Guwahati Metropolitan Development Authority. The appellant has responded to the said offer of the respondents and pointed out that out of the eight families in whose favour the surplus area was settled in the year 1992, four families have been allotted disputed land in questing

measuring 1 bigha, 4 Kathas, 16 laches. John Ingti Katha one of the respondents in these appeals is one of such allottees of the settled area. The affidavit further states that settlement of 8.03 'Are' (equivalent to 3 Kathas) was made in 2003 in favour of GMDA in the year 2003 and that restoration of the balance land i.e. 1 bigha, 4 Kathas, 16 laches to respondents 1 to 3 will affect the settlement already made in favour of John Ingti Kathar and his wife, late Bansidhar Duara and his wife, Sri Jyotimoyh Chakrabarty and his wife and Sri P.S. Bhattacharjee and his wife. The affidavit further give details of the settlement made in respect of the dispute extent of land in favour of GMDA and the four families mentioned above.

17. From the affidavit filed after the conclusion of the argument in this case, it appears that the disputed extent of land i.e. 1 bigha, 4 Kathas, 16 laches also stands fully settled in favour of allottees. Such being the case the offer made by Shri Goswamy does not appear to be a feasible solution at this stage particularly when the allotments made are not in question nor have the allottees been impleaded as party respondents.

18. In the result, these appeals succeed and are, hereby, allowed. The order passed by the Division Bench of the High Court is set aside and that passed by the Single Bench of that Court affirmed. The parties are left to bear their own costs.

....J.
(T.S. THAKUR)

....J.
(R. BANUMATHI)

New Delhi;
November 27, 2014

SUPREME COURT OF INDIA
JUDGMENT