

PETITIONER:
PRATAP SINGH @ BABU RAM & ANR.

Vs.

RESPONDENT:
DEPUTY DIRECTOR OF CONSOLIDATION, MAINPURI & ORS.

DATE OF JUDGMENT: 22/09/1999

BENCH:
R.P.Sethi, S.S.Ahmad

JUDGMENT:

D E R
S.SAGHIR AHMAD, J.

Plot Nos. 510, 519, 520, 521, 522, 523, 524 and 533 of Khata No. 76 situated in village Akbarpur Kutubpur, Pargana Mustafabad, Tehsil Jasrana,, District Mainpuri, were recorded in the basic year in the name of Hiral Lal, father of the present appellants. When the Consolidation operations under the U.P. Consolidation of Holdings Act (for short "the Act") started, the respondents filed objections claiming, inter alia, that the plots in question constituted "Sir" and "Khudkasht" land of their predecessor-in-interest, namely, Hansraj, who had mortgaged these plots in favour of the predecessor-in-interest of the appellants on 21.1.1920. On the abolition of the Zamindari by the U.P. Zamindari Abolition & Land Reforms Act, 1950 (for short "the ZA&LR Act") they ought to have been recorded as "Bhumidhars" of the said land in view of Section 14 of the ZA&LR Act. The appellants contested the case before the Consolidation Officer by filing a written statement and the Consolidation Officer by his judgment and order dated 29.5.1963 decided the case in favour of Hira Lal. In appeal which was filed thereafter by the respondents, it was held by the Assistant Settlement Officer, Consolidation, by his judgment and order dated 11.7.1963, that on the abolition of Zamindari, possession of Hira Lal became adverse and since the respondents had not filed a suit for ejectment within the period of limitation (three years from the date of vesting), they lost all their rights and consequently, the revenue entries in favour of Hira Lal could not be interfered with. This order was upheld in revision by the Deputy Director of Consolidation who dismissed the revision on 6.9.1963. The respondents, thereafter, filed a writ petition in the High Court which was dismissed on 1.5.1969. In Special Appeal, which was thereafter filed by the respondents, it was noticed, at the time of hearing, that there was a conflict of decisions on the questions involved in the case and consequently following two questions were referred to the Full Bench : "(a) Whether the possession of the mortgagee whose rights have extinguished under section 14(1) of the Zamindari Abolition and Land Reforms Act is, on or after the date of vesting, per se, adverse or permissive? (b) Does the period of limitation for a suit under Section 209 of the U.P. Zamindari Abolition and Land Reforms Act commence to run from the date of vesting or on the date of demand for possession?" The Full Bench by majority opinion, which is since reported in AIR 1975 Allahabad 295 (Balwant & Ors. vs. The Deputy Director of Consolidation & Ors.),

held that the period of limitation for suit under Section 209 of the ZA&LR Act would not start from the date of vesting but from the date on which the possession is demanded by the mortgagor. After the decision of the Full Bench on the aforesaid questions of law, the matter was again placed before the Division Bench which disposed of the Special Appeal in terms of the majority judgment of the Full Bench. The writ petition filed by the respondents was allowed and the judgment passed by the Deputy Director of Consolidation was set aside. It is this judgment which is assailed before us. Learned counsel for the appellants has invited our attention to Entry 30 in Appendix III to the Rules made under the ZA&LR Act. This entry reads as under :

S. No.	Description of suit, other tation	Period begins	Time from Proper No. of the of	Application limit- period and	proceeding run
1	2	3	4	5	6
30.	209 Suit for ejectment of a person taking or retaining possession of the land unlawfully and for damages:-	(i) If the person was Three From the As in the in possession of years date of Court Fees the land on the vesting Act, 1870, date of vesting on one and the period of year's rent limitation for his calculated ejectment speci- at heredi- fied in the U.P. tary rates. Tenancy Act, 1939 had not expired. (ii)In case of occu- Three From the -do- pants referred to years date of in Section 144 declaration u/s 144. (iii)In case of occu- Six From 1st of -do- pants of land held years July follow- by a bhumidhar ing the date in the Govt. of occupation Estates in which the provisions of the Act have been extended from time to time (including 85 settled Bhabar Villages of Tarai and Bhabar Govt. Estates.			

3	4	5	6
(iv)In case of occu- Twelve -do- -do- pants of any years other land held by a Bhumidhar or asami where poss- session of such land is taken or retained unlaw- fully.			

According to the above entry, a suit for ejectment against the person taking or retaining possession of the land unlawfully and for damages could be filed within three years from the date of vesting. Learned counsel for the appellants has contended that the words "from the date of vesting" refer to the date from which the period of three years would start running. He contended that the period of limitation has to be counted from the date of vesting, i.e. 1.7.1952 and since the suit by the predecessor-in-interest of the respondents was not filed within three years from that date, his rights in the land in question came to an end and the predecessor-in-interest of the appellants acquired title by adverse possession. We are not prepared to subscribe to this view. The significant words in this entry are "taking or retaining possession of the land unlawfully". If the possession from the inception was lawful, it would remain lawful. Its character would not change as we shall presently see with reference to various provisions of the ZA&LR Act. Zamindari was abolished in the State of Uttar Pradesh by the U.P. Zamindari Abolition & Land Reforms Act, 1950, which came into force on 1.7.1952. Section 4(1) of this Act provides that with effect from the date specified in the Notification issued by the State Government under this Section, all estates shall vest in the

State free from all encumbrances. Consequences of vesting are indicated in Section 6. Clauses (g) and (h) of Section 6 provide as under : "(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 mortgage of such estate or part thereof shall, except as provided in Section 73 of the Transfer of Property Act, 1882 (IV of 1882), be enforceable against his interest in the estate;" Under clause (g) quoted above, a mortgage with possession stands converted into a simple mortgage, while clause (h) provides that no claim for money against an intermediary, relating to the mortgage, would be enforceable against the interest of the intermediary in the estate except as provided under Section 73 of the Transfer of Property Act. The obvious reason is that the interest of the intermediary has vested in the State free from all encumbrances and, therefore, mortgage cannot be enforced against that interest even for recovery of mortgage money. Recourse can, therefore, be had to the provisions of Section 73 of the Transfer of Property Act to proceed against the substituted security for the recovery of the mortgage money. Section 14 of the Act [as it stood at the relevant time] provided as under : "(1) Subject to the provisions of sub-section (2) a mortgagee 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 estates. (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 on 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 on 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 thekedar 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." Section 14 (1) purports to abolish all the rights of the mortgagee in possession of an estate or a share therein with effect from the date of vesting. It specifically provides that a mortgagee in possession shall cease to have any right to hold or possess land in such estate. Sub-section (1), however, operates subject to the provisions of Sub-section (2) as is evident from the opening words of Sub-section (1). Sub-section (2) provides that if the land, which was the subject matter of the mortgage referred to in Sub-section (1), was in the personal cultivation of the mortgagee on the date immediately preceding the date of vesting, then, if such land was 'sir' or 'khudkasht' land of the mortgagor on the date of the mortgage, the said land shall be deemed to be 'sir' or 'khudkasht' of the mortgagor for purposes of Section 18. The implication of this provision is that even if the land was in the cultivatory possession of the mortgagee, on the date of vesting, it would be treated, fictionally, 'sir' or 'khudkasht' of the mortgagor, provided the land, on the date of the mortgage, was the 'sir' or 'khudkasht' of the mortgagor. The immediate effect of this deeming provision would be that the mortgagor would acquire 'Bhumidari' rights in respect of that land under Section 18 of the Act. Thus, the overall effect of Sub-section (1) and (2) of Section 14 is that the rights of a mortgagee come to an end with effect from the date of vesting and the mortgagor becomes 'Bhumidhar' of that land under Section 18 of the Act. To put it differently, the encumbrance created by the mortgagor comes to an end as the land vests in the State free from encumbrance but the rights of the mortgagee to recover mortgage money is preserved as it is provided in Section 6(h) that it can be recovered from the "substituted security" under Section 73 of the Transfer of Property Act. We may point out that "Bhumidari" rights, acquired by the mortgagor under Section 18, are new rights created under the Act after the land in which such rights have been acquired had vested in the State free from all encumbrances. This land, notwithstanding that it was the subject matter of mortgage prior to the date of vesting, would not be treated as "substituted security" within the meaning of Section 73 of the Transfer of Property Act and a mortgage decree, if any, cannot be executed against that land. (See: Rana Sheo Ambar Singh vs. Allahabad Bank Ltd., 1962 (2) SCR 441 = AIR 1961 SC 1790) The next and immediate question which crops up is the question relating to the status of the mortgagee in respect of that land. Even though the mortgagee was in cultivatory possession of the land on the date of vesting, his rights under the mortgage qua that land come to end as that land vests in the State subject to the condition that if the land, on the date of the mortgage was 'sir' or 'khudkasht' land of the mortgagor, the latter, namely the mortgagor would become a 'Bhumidhar' under Section 18. If in these circumstances, the mortgagee continues to remain in possession in spite of his rights having come to an end by the force of law, what would be the character of his possession; whether the possession would immediately become 'hostile' to that of the mortgagor who has acquired 'Bhumidari' rights under Section 18, or the mortgagee would be treated to be continuing in possession for and on behalf of the mortgagor. It is, at this stage, that the words used in Entry 30 relating to suits under Section 209 of the Act as set out in Appendix III to the Rules made under the ZA&LR Act become relevant. In Column 3 meant for "Description of suit, application and other proceeding", the words used are "Suit for ejectment of a person taking or retaining

possession of the land unlawfully and for damages." These words contemplate a suit for ejectment of a person who has taken possession unlawfully or continues to retain that possession unlawfully. In the case of possessory or usufructuary mortgage, possession is delivered to the mortgagee. Delivery of possession to the mortgagee is a sine qua non of such a mortgage. It is delivered in terms of the mortgage by the mortgagor of his own volition to the mortgagee. The mortgagee gets possession over the land only because it has been delivered to him in terms of the mortgage deed which equally binds him. The entry into possession of the mortgagee in these circumstances cannot be said to be unlawful. Once the possession was delivered to the mortgagee lawfully by the mortgagor himself, the further retention of that possession by the mortgagee would obviously be with the consent of the mortgagor and the mortgagee shall be treated to be retaining the possession for and on behalf of the mortgagor till the mortgage is redeemed. The character of possession of the mortgagee who was lawfully inducted into possession by the mortgagor, does not change at any stage and it continues to be lawful possession. A bare reading of the words of Entry 30 in Appendix III, relating to suits under Section 209 of the Act, makes it clear that the period of limitation would not run from the date of vesting, as the character of mortgagee's possession remains 'permissive' and does not become 'adverse' to the interest of the mortgagor who after acquiring "Bhumidari" rights under Section 18, may still allow the mortgagee to continue in possession. As pointed out earlier, Entry 30 would apply to a suit where a person has obtained possession over land "unlawfully" and continues to retain that possession unlawfully. The period of limitation in the case of a 'permissive' possession would start running from the date the mortgagee, who is asked to deliver possession, refuses to do so. 'Permissive possession' means that the mortgagee is in possession over the property in question with the leave of the owner, or to put it differently, of the 'Bhumidar'. If on being asked to deliver possession, the mortgagee refuses or declines to do so, it would give rise to a cause of action on the date on which possession is refused to be delivered and consequently the period of three years would start running from that date. The High Court has considered the question from another angle. It has noticed that a usufructuary mortgage stands converted into simple mortgage. It then proceeded to consider the ingredients of a simple mortgage and ultimately came to the conclusion that if the matter is examined from that angle, then too, the possession of the mortgagee would be permissive in character and the period of limitation for filing a suit under Section 209 would commence from the date on which the mortgagee refuses to deliver possession. In *Shri Ram vs. Dhan Bahadur Singh* AIR 1965 Allahabad 223 as also in *Mustafa Khan vs. Deputy Director of Consolidation* 1972 ALJ 854 = AIR 1973 Allahabad 372, it was held that possession of the mortgagee is permissive in the sense that it is with the consent of the mortgagor. In *Mahabal Singh vs. Ram Raj*, 1950 ALJ 713 = AIR 1950 Allahabad 604, which is a Full Bench decision of the High Court, it was held that possession of a mortgagee of tenancy land, whose transfer was forbidden by law, would be 'permissive' in character. This decision has since been approved in *Raj Narain vs. Sant Prasad* AIR 1973 SC 291 in which this Court observed, *inter alia*, as under: "We are unable to accede to the above contention, because we find that the matter is covered by two Full Bench decisions of the Allahabad High Court. In

a five-Judge decision of the Allahabad High Court in the case of AIR 1950 All 604 (supra), the court referred to the decision of a three judge bench of that court in the case of AIR 1944 All 25 (supra) and found that the following five propositions had been laid down in the earlier case : "(1) That the usufructuary mortgage of an occupancy holding by a tenant is void and not voidable. (2) That a mortgagor after giving possession to the mortgagee cannot recover possession of the holding without paying the money which he had taken from the mortgagee. (3) That a mortgagee of an occupancy holding by remaining in possession for over 12 years does not extinguish the rights of the mortgagor to redeem him and by such possession the mortgagee only prescribes for mortgagee rights. (4) That it is open to the mortgagor to seek possession of the holding by tendering the consideration which he had received and he may do so by a redemption suit. (5) The relationship which comes into existence as a result of the mortgage of an occupancy holding and its possession being transferred to the mortgagee, though not strictly speaking that of a mortgagor and a mortgagee, is analogous to that relationship, and the action which is raised by the mortgagor to recover possession of the holding on payment of the money due to the mortgagee, though not strictly in the nature of a redemption, is analogous to a redemption suit." It was also observed that to take a contrary view from the law laid down in those five propositions would have the effect of unsettling the law established for a number of years. Mr. Agarwal has not questioned the correctness of the above mentioned five propositions and, in our opinion, rightly so. In the matter of the interpretation of a local statute, the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of unsettling transactions which might have been entered into on the faith of those decisions. The doctrine of stare decisis can be aptly invoked in such a situation." We are not, in this case, considering the question of the mortgagee acquiring title by adverse possession against the mortgagor. That question is separate and distinct from the question we are considering in the instant case in which we are concerned only with the interpretation of Entry 30 of Appendix III which prescribes the period of limitation for a suit under Section 209 of the UPZA&LR Act. Of course, if the suit is not filed within the period of limitation, the consequences indicated in Section 210 of the ZA&LR Act will follow with the result that the person already in possession unlawfully or retaining such possession qua the "Bhumidari" land would immediately acquire the status contemplated by Section 210. In our opinion, the majority decision of the Full Bench lays down the correct law. The Full Bench decision has since been followed by Hon. R.M. Sahai, J. (as His Lordship then was) in Tribeni vs. Chakauri & Ors. 1982 ALJ 784, in which it was laid down that the rights of a mortgagee come to an end from the date of vesting and his possession was 'permissive' in character and not adverse to the interest of the mortgagor. We find no merit in this appeal which is accordingly dismissed. There will be no order as to costs.