IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 3rd OF JANUARY, 2023

WRIT PETITION No.4342 of 2022

BETWEEN:-

1. **SHRI MANOJ PATEL AGED ABOUT 45 YEARS S/O SHRI BUDDHULAL PATEL, OCCUPATION FORMER, R/O 1453, GANGA NAGAR, GARHA PURWA, JABALPUR (MP)**
2. **SMT. PHOOLA BAI AGED ABOUT 79 YEARS W/O SHRI BHUDDHULAL PATEL, OCCUPATION HOUSEWIFE, R/O 1453, GANGA NAGAR, GARHA PURWA, JABALPUR (MP)**
3. **SMT. KHIMMA BAI AGED ABOUT 70 YEARS W/O SHRI PANCHAMLAL PATEL, OCCUPATION HOUSEWIFE, R/O 955, LODHI MOHALLA, SANJEEVANI NAGAR, GARHA, JABALPUR (MP)**
4. **SMT. BHAGWATI AGED ABOUT 49 YEARS W/O SHRI BIHARILAL, OCCUPATION HOUSEWIFE, R/O 143, VILLAGE NANDGHAT, JABALPUR (MP)**
5. **SMT. SUNITA BAI AGED 47 YEARS W/O SHRI KOMALCHAND R/O SHRI DWARKA PRASAD, OCCUPATION HOUSEWIFE, R/O BHARDA ROAD, LAMTI BAMHNAUDI, JABALPUR (MP)**
6. **SMT. KIRAN PATEL AGED 44 YEARS W/O SHRI DWARKA PRASAD, OCCUPATION HOUSEWIFE, R/O 955, LODHI MOHALLA, SANJEEVANI NAGAR, GARHA, JABALUPR (MP)**
7. **KERA BAI PATEL AGED 43 YEARS D/O SHRI BUDDHULAL, OCCUPATION HOUSEWIFE, R/O 1453, GANGA NAGAR, GARHA PURWA, JABALPUR (MP)**
8. **KU. PREETI AGED 34 YEARS D/O SHRI BUDDHULAL, OCCUPATION UNEMPLOYED,**

R/O 1453, GANGA NAGAR, GARHA PURWA, JABALPUR (MP)

9. **SMT. GYARSI BAI PATEL AGED 38 YEARS W/O SHRI GIRIJA PATEL, OCCUPATION HOUSEWIFE, R/O PIPARITYA TWAR, TRIPURI, JABALPUR (MP)**

10. **SHRI RAJ PATEL AGED 19 YEARS S/O SHRI DWARKA PRASAD PATEL, OCCUPATION FORMER, R/O 955, LODHI MOHALLA, SANJEEVANI NAGAR, GARHA, JABALPUR (MP)**

ALL OF THE PETITIONERS ARE BEING REPRESENTED BY THEIR POWER OF ATTORNEY HOLDER SHRI PRAKASH NARAYAN YADAV S/O LATE SHRI RAM NARAYAN YADAV AGED ABOUT 51 YEARS, R/O H.NO.83, JAWAHARGANJ, NEAR POLICE STATION LORDGANJ, BEHIND YADAV SADAN, JABALUPR (MP)

.....PETITIONERS

(BY SHRI MUNISH SAINI - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH THROUGH THE PRINCIPAL SECRETARY, REVENUE DEPARTMENT, VALLABH BHAWAN, BHOPAL (MP)**

2. **THE COLLECTOR/DISTRICT MAGISTRATE CUM- COMPETENT AUTHORITY, UNDER URBAN LAND (CEILING & REGULATION ACT) 1976, COLLECTORATE, JABALPUR (MP)**

3. **THE SUB DIVISIONAL MAGISTRATE, SUB DIVISION ADHARTAL, DISTRICT JABALUPR (MP)**

4. **THE TAHSILDAR (NAZUL), TAHSIL & DISTRICT JABALPUR (MP)**

.....RESPONDENTS

(BY SHRI GIRISH KEKRE – GOVERNMENT ADVOCATE)

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Reserved on : 12.12.2022.

Pronounced on : 03.01.2023.

.....

"This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:"

ORDER

Since pleadings are complete, record of ceiling proceeding is also available, therefore, with the joint request of learned counsel for the parties, this petition is heard finally.

2. By the instant petition filed under Article 226 of the Constitution of India, the petitioners are challenging the order dated 31.01.2022 (Annexure-P/9) passed by the competent authority/respondent No.2 whereby the authority rejected their application preferred under Section 4 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short the 'Act, 1999') for declaring the proceeding initiated by the respondents abated in respect of vesting the land of original owner in the State under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 (for short the 'Act, 1976').

3. The facts of the case in short are that respondent No.2 for declaring the land of original owners namely Buddhulal Patel and Panchamlal Patel to be surplus, instituted a case under the provisions of the Act, 1976 which got registered as Case No.217/A-90(B-9)/81-82. Since the said proceeding was initiated only against Buddhulal Patel, therefore, he not only objected the same but also denied vesting of land in the State Government saying that he is not holding any surplus land. While objecting to the said proceeding, Buddhulal Patel also said that

the land owned by him is an agricultural land and does not fall within the purview of the Act, 1976 and as such, the provisions of the Act, 1976 are not applicable upon his land and, therefore, the proceeding initiated by the respondent/Authority deserves to be dropped. However, the authority after proceeding in the matter, declared the land owned by Buddhulal Patel to the extent of 9785.37 square meters to be surplus; published a draft statement under Section 9 of the Act, 1976 and a notification in the official gazette as per the requirement of Section 10(1) of the Act, 1976.

(3.1) Thereafter, describing the details of surplus land in letter dated 23.09.1986 (Annexure-P/2), respondent No.4 was directed to carry out the proceeding of taking possession over the land.

(3.2) In pursuance to the instructions given in the letter dated 23.09.1986 (Annexure-P/2), a possession case vide Case No.94/B-121/85-86 got registered on 23.09.1986. However, in the said case direction for issuance of notice to the original land owner was given so that further proceeding of taking possession over the surplus land in front of the land owner can be taken and for the said purpose, the case was fixed for 24.01.1987. Thereafter, the original owner of the land namely Buddhulal Patel on 18.08.1988 though appeared before the authority, but since he refused to sign the possession (*kabza*) letter, therefore, as per the provisions of Section 35(2) of the Madhya Pradesh Land Revenue Code, 1959 (in short the 'Act, 1959'), *ex parte* possession of the surplus land was taken over by the respondents.

(3.3) As per the petitioners, the proceeding of taking possession over surplus land was on different mode and provisions of other statute and as such, two notices on different dates i.e. 24.01.1987 and

16.08.1988 got issued. As per the petitioners, order dated 05.02.1992 passed in Case No.16/B-121/1991-92 reveals that the proceeding for taking possession over the surplus land which was already declared surplus in Case No.217/B-90(B-9)/81-82 again initiated in which possession warrant was also issued. As per the petitioners, registration of possession case again in the year 1992 and issuance of warrant of possession for taking possession over the land measuring 9785.37 square meters indicate that possession over the land on earlier occasion had not been taken whereas the land was recorded in the name of the State Government without there being any proceeding of possession as required under the provisions of the Act, 1976.

(3.4) In the year 1998, when one of the land owners namely Panchamlal died, Buddhulal Patel came to know about the fact that the land in question has been recorded in the name of the State Government. Though, Buddhulal Patel died in the year 2012, but during that time his legal heirs were also not aware of the fact that the land in question has been recorded in the name of State Government. As per the petitioners, later on, this fact came to their knowledge that late Buddhulal Patel along with other family members preferred a writ petition (W.P. No.4873/1999) before this Court which got disposed of vide order dated 17.01.2002 (Annexure-P/6) giving liberty to the petitioners therein to approach the competent authority and raise objection with regard to possession over the land. As per the petitioners, after coming to know about the said order, they preferred an application (Annexure-P/7) before the competent authority under Section 4 of the Act, 1999 mentioning therein that late Buddhulal Patel on 02.05.2003 moved an application before the authority requesting therein that his land had been wrongly declared as surplus whereas possession of the same is still with

him and as such, a request was made to reconsider the matter in light of the order passed by the High Court in W.P. No.4873/1999, but that application got rejected for want of prosecution on 13.01.2016. As per the petitioners, they were not aware of all these proceedings as the same were being handled by Buddhulal Patel who died in the year 2012 and as such, they again initiated all these proceedings.

(3.5) On the request made by the present petitioners, the competent authority called the report from the revenue officers. In turn, the Revenue Inspector submitted its report before the Tahsildar on 20.12.2021 mentioning therein that on a date fixed for handing over the possession of the land in question, the original owner of the land not only refused to handover the possession of the land, but also refused to sign the possession letter and thereafter under the provisions of Section 35(2) of the Code, 1959, *ex parte* possession had been taken and the revenue record was corrected accordingly. After receiving such report from the Revenue Inspector, the Tahsildar submitted its report before the Sub Divisional Officer on 24.12.2021 wherein the authority reiterated the same finding as has been given by the Revenue Inspector and ultimately, on 28.12.2021, reiterating the same facts as mentioned by the Revenue Inspector and Tahsildar in their reports, the Sub Divisional Officer has also submitted its report before the competent authority.

(3.6) The competent authority after taking note of the reports submitted by the revenue officers had passed an order on 31.01.2022 (Annexure-P/9) wherein it was referred by him that the Tahsildar after completing the proceeding of issuing notice under Section 10(5) of the Act, 1976 on 05.07.1994, taken the possession over the land in question on 18.08.1988. The competent authority in its order had also referred

that though in pursuance to order passed by the High Court in W.P. No.4873/1999, the original land owner preferred an application, but it got dismissed for want of prosecution vide order date 13.01.2016 and finally, possession over the land in question had been taken. The competent authority ultimately came to a conclusion that in view of the provisions of the Act, 1976 since possession over the land has been taken, therefore, provisions of the Act, 1999 are not applicable nor the case falls within the ambit of Section 3(1)(a) of the Act, 1999 and as such, the application preferred by the petitioners got rejected, hence this petition.

4. In rebuttal, a reply has been filed on behalf of the respondents/State taking a stand therein that this petition deserves to be dismissed on the ground of delay and laches. As per the respondents, the land in question was possessed by the State in the year 1988, but this petition has been filed in the year 2022 and as such, it suffers from delay and laches. As per the respondents, on 08.03.1984, a notice under Section 10(5) of the Act, 1976 was issued to the original land owner namely Buddhulal Patel and the same got served upon him on 04.09.1986 over which his thumb impression had also been obtained. As per the respondents, despite service of notice under Section 10(5) of the Act, 1976 upon the original land owner when possession of the land was not handed over within a period of 30 days, *ex parte* possession over the land in question was taken on 18.08.1988.

5. In response to reply filed by the respondents/State, a rejoinder has been filed by the petitioners stating therein that in the present case there was no compliance of Section 10(5) of the Act, 1976 as no such notice was ever served upon the original land owner. It is also

stated in the rejoinder that from the record itself, it can be gathered that the land owner had refused to handover the possession of the land in compliance of notice issued to him under Section 10(3) of the Act, 1976 and as such, in that situation compliance as per the requirement of the Act, 1976 by issuing notice under Sections 10(5) and 10(6) had to be made, but that was not done and possession of the land was taken *ex parte* that too applying the provisions of Section 35(2) of the Code, 1959. According to the petitioners, apart from the requirement of provisions of the Act, 1976, possession over the land in any manner cannot be taken and as such, the action taken by the respondents/authority deserves to be set aside.

6. Shri Saini, learned counsel for the petitioners submits that the petitioners are challenging the order passed by the competent authority mainly on the ground that the possession over the land in question had never been taken by the authority as per the provisions of Act, 1976. It is contended that though a notice under Section 10(5) of the Act, 1976 was said to have been issued, but no such notice is available in the possession case. It is also contended that from the record of possession, it can be gathered that possession over the land was taken under the provisions of Section 35(2) of the Code, 1959 whereas the same has no application in the present case because possession could have only been taken under the provisions of the Act, 1976 and that too after complying the mandatory requirements of issuing notice under Sections 10(5) and 10(6) of the Act, 1976. It is further contended that from the possession case, it is clear that since the original land owner had refused to handover the possession of the land, therefore, applying the provisions of Section 35(2) of the Code, 1959, *ex parte* possession was taken whereas it could have been done only after issuing notice

under Sections 10(5) and 10(6) of the Act, 1976. Therefore, the petitioners have challenged the total action of the respondents/authority saying that it was a *de facto* possession said to have been taken only in papers that too applying the wrong provision whereas no such possession has ever been taken by the authority and as such, all the proceedings initiated by the respondents/authority are illegal and liable to be declared abated in view of the provisions of the Act, 1999. In support of his contention, learned counsel for the petitioners has placed reliance upon a case reported in **(2013) 4 SCC 280 [State of Uttar Pradesh Vs. Hari Ram]** wherein the Supreme Court has very categorically observed that for vacant possession over a land declared to be surplus, compliance of issuance of notice under Sections 10(5) and 10(6) of the Act, 1976 is mandatory and without following the same, if possession of any land said to have been taken, it shall be declared illegal and in view of the provisions of Section 3 of the Act, 1999, the proceeding of vesting the land under the provisions of the Act, 1976 shall also be declared abated. Learned counsel for the petitioners prays that under the facts and circumstances of the case, the respondents/authority may be directed to correct the revenue record accordingly by deleting the name of State Government over the land in question which was declared to be surplus and being the legal heirs of original owner, names of present petitioners may also be directed to be inserted in the revenue record over the said land.

7. *Per contra*, Shri Kekre, learned Government Advocate has opposed the submissions advanced by learned counsel for the petitioners and submitted that this petition is liable to be dismissed on the ground of delay and laches and in support whereof, he has placed reliance upon a decision of Supreme Court reported in **(2015) 5 SCC 321 [State of**

Assam Vs. Bhaskar Jyoti Sarma and others]. He has further placed reliance upon a decision of Division Bench of this Court passed in **W.A. No.91/2006 [Lalji Choubey Vs. The State of M.P. and another]** wherein it was observed that once a compliance under Section 10(5) of the Act, 1976 has been done then it can be considered that possession has been duly taken over.

8. I have heard the rival submissions advanced by learned counsel for the parties at length and perused the record.

9. So far as the objection raised by the respondents with regard to dismissal of this petition on the ground of delay and laches on relying upon the decision of **Bhaskar Jyoti Sarma** (supra) is concerned, the said issue is to be decided first because if it survives then this petition can be dismissed even without entering into the merits of the case.

10. In **Bhaskar Jyoti Sarma** (supra), the Supreme Court after considering the facts and circumstances existing in the case came to a conclusion that there was delay in raising the grievance with regard to dispossession. In the said case, the Supreme Court after discussing the decision of **Hariram** (supra) has observed as under:-

> "**12.** 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.
>
> **13.** The case of the appellant is that actual physical possession of the land was taken over on 7-12-1991 no matter unilaterally and without notice to the erstwhile landowner. 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 landowners in terms of Section 10(5) would by itself mean that such dispossession is no dispossession in the eye of the law and hence insufficient to attract Section 3 of the Repeal Act. Our answer to that question is in the negative.

14. 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.

15. 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 7-12-1991 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.

16. 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 landowner on 7-12-1991 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 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.

17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram case [State of U.P. v. Hari Ram, (2013) 4 SCC 280 : (2013) 2 SCC (Civ) 583] . That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram case [State of U.P. v. Hari Ram, (2013) 4 SCC 280 : (2013) 2 SCC (Civ) 583] 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 the 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.

18. Mr Goswamy drew our attention to a decision of this Court in State of Gujarat v. Gyanaba Dilavarsinh Jadega [State of Gujarat v. Gyanaba Dilavarsinh Jadega, (2013) 11 SCC 486 :

(2014) 1 SCC (Civ) 590] 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 7-12-1991. 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 far-fetched 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 7-12-1991.

19. 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 7-12-1991 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 the learned counsel for the parties whether they can, upon remand on the analogy of the decision in Gyanaba Dilavarsinh Jadega [State of Gujarat v. Gyanaba Dilavarsinh Jadega, (2013) 11 SCC 486 : (2014) 1 SCC (Civ) 590] , 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 enter 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."

In the aforesaid case after vesting the land into the State, the same was allotted to Guwahati Metropolitan Development Authority (GMDA) and the said action was never challenged by original owner of the land, whereas it was the subsequent purchaser who after coming into force the Act, 1999, came forward and challenged the vesting of land and then the Supreme Court dismissed the claim of the subsequent purchaser saying that it suffers from delay and laches. However, here in this case, the actual owner of the land continuously contested the action of the respondents and thereafter, approached the High Court by filing a writ petition in the year 1999 and in pursuance to liberty granted in that petition, filed an application before the authority. Thus, in my opinion, the facts of **Bhaskar Jyoti Sarma** (supra) are altogether different than that of present case and as such, this petition cannot be dismissed on the

ground of delay and laches for the reason that in the first round of litigation, this Court not only entertained the petition filed by the original land owner, but also granted liberty to approach the competent authority by making an application and in pursuance thereof, present dispute arises and as such, the objection raised by the respondents is hereby rejected.

11. From the documents available on record, it is clear that on 18.08.1988 in pursuance to notice issued under Section 10(3) of the Act, 1976, though the original land owner appeared before the authority but refused to handover the possession of the land or to sign the possession letter and, therefore, the Tahsildar proceeded *ex parte* in the matter for taking possession over the land under the provisions of Section 35(2) of the Code, 1959 whereas no notice under Section 10(5) of the Act, 1976 was served upon the original land owner. However, the respondents in their reply have taken a stand that a notice under Section 10(5) of the Act, 1976 was issued, but the same was not issued under the provisions of Section 10(5), whereas, it was a notice issued under the provisions of Section 10(3) of the Act, 1976 and served upon the land owner. If the land owner after appearing before the authority refused to handover the possession of the land in question, then a notice under Section 10(5) ought to have been issued to him, but as is clear from the order of competent authority, the possession over the land in question has been taken by the authority on 18.08.1988 even without issuing the notice under Section 10(5) of the Act, 1976 to the original land owner. Moreso, from perusal of original record, it is clear that in pursuance to liberty granted by this Court on earlier occasion, an application under Section 4 of the Act, 1999 was made by the original land owner along with other persons on 06.09.2002 before the authority but it got rejected vide order

dated 23.06.2011 for want of prosecution. However, in the petition, reply and impugned order passed by the competent authority, it is mentioned that in pursuance to order passed by the High Court in W.P. No.4873/1999, the original land owner preferred an application on 02.05.2003 which got dismissed for want of prosecution on 13.01.2016 whereas from the original record of possession case produced by the respondents, it can be gathered that the date of filing the application was 06.09.2002 and the date of its dismissal was 23.06.2011. From perusal of order-sheet dated 19.04.2011 which is a part of record, it is also clear that the Tahsildar (Kotwali) carried out the spot inspection in presence of Halka Patwari, parties and villagers in which it was found that the legal heirs of original land owner are cultivating the land, meaning thereby that in the year 2011, the land in question was in possession of the legal heirs of the original land owner. In the record of possession case, nowhere it is shown that a notice under Section 10(5) of the Act, 1976 was issued upon the original land owner. However, from the impugned order passed by the competent authority surprisingly it is mentioned that in Case No.217/A-90(B-9)/81-82 after following due procedure on 05.07.1994, a notice under Section 10(5) was issued and only thereafter, the Tahsildar took possession over the land on 18.08.1988 which was virtually impossible and in fact, it was an incorrect factual position because if the possession was said to have been taken on 18.08.1988 then there was no need to issue a notice under Section 10(5) on 05.07.1994 and as such, it shows that no notice under Section 10(5) of the Act, 1976 was ever issued to the original land owner. The relevant portion of the order of competent authority is reproduced hereunder:-

"**8.** <u>**प्रकरण का सहपत्रों सहित अध्ययन एवं परीक्षण किया गया।**</u>

> **विचारोपरान्त अधीनस्थ राजस्व अधिकारियों के प्रतिवेदन पर विचार किया गया। अधीनस्थ राजस्व अधिकारियों द्वारा प्रतिवेदित किया गया है कि सक्षम प्राधिकारी, नगर भूमि सीमा जबलपुर रा.प्र.क्र. 217/ब–90(ब–9)/81–82 में विधि अनुसार निर्धारित प्रक्रिया को पूर्ण करने के पश्चातृ दिनांक 05.07.1994 को धारा 10(5) के तहत कार्यवाही किए जाने के उपरांत तहसीलदार द्वारा दिनांक 18.08.88 को कब्जा प्राप्त किया गया है।** इस प्रकार प्रश्नाधीन भूमि कब्जा प्राप्त शासकीय भूमि है एवं आवेदक द्वारा माननीय उच्च न्यायालय की W.P. No. 4873/1999 में पारित आदेश दि. 17.01.2002 के निर्देश के पालन हेतु दि. 02.05.2003 को आवेदन प्रस्तुत किये जाने पर प्र.क्र. 17/बी–121/2012–13 दर्ज किया जाकर कार्यवाही प्रारंभ की गई, जो दिनांक 13/01/2016 के अनुसार अदम पैरवी में खारिज किया गया है। आवेदक द्वारा पुनः आवेदन प्रस्तुत किया गया है। इस प्रकार आवेदक द्वारा माननीय उच्च न्यायालय द्वारा पारित आदेश के पालन में पुनः आवेदन प्रस्तुत किया गया है। आवेदक के द्व ारा प्रस्तुत अभ्यावेदन के सबंध में अधीनस्थ राजस्व अधिकारियों से प्राप्त अभिमत अनुसार विधि अनुसार निर्धारित प्रक्रिया पूर्ण कर प्रश्नाधीन भूमि का कब्जा प्राप्त किए जाने से प्रश्नाधीन भूमि कब्जा प्राप्त शासकीय भूमि है।"

The only notice available on record is a notice issued under Section 10(3) of the Act, 1976 intimating the original land owner to handover the possession of the land which is already declared surplus and for which a notification under Section 10(1) of the Act, 1976 has already been issued. It clearly indicates that the mandatory requirement of issuing notice under Sections 10(5) and 10(6) of the Act, 1976 to the original land owner before taking possession over the land was not followed by the respondents/authority. The possession over the land was taken by the authority under the provisions of Section 35(2) of the Code, 1959 which is apparently illegal because that was not the procedure prescribed under the Act, 1976 for taking possession over a land.

12. It is already settled that if *de facto* possession is taken, the same cannot be considered to be a legal possession and after enforcement of the Act, 1999, proceeding initiated under the provisions of the Act, 1976 can be declared abated. In **Hariram** (supra), the Supreme Court has not only discussed the impact of Section 3 of the Act, 1999, but also dealt with a situation when a *de facto* possession

over a vacant land has been taken by the State. In the said case, the Supreme Court has observed as under:

> "**41.** Let us now examine the effect of Section 3 of Repeal Act 15 of 1999 on sub-section (3) of Section 10 of the Act. The Repeal Act, 1999 has expressly repealed Act 33 of 1976. The objects and reasons of the Repeal Act have already been referred to in the earlier part of this judgment. The Repeal Act has, however, retained a saving clause. The question whether a right has been acquired or liability incurred under a statute before it is repealed will in each case depend on the construction of the statute and the facts of the particular case.
>
> **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. The 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 landowner or holder can claim the benefit of Section 4 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 4 of the Repeal Act.**
>
> **43.** We, therefore, find no infirmity in the judgment [State of U.P. v. Hari Ram, (2005) 60 ALR 535] of the High Court and the appeal is, accordingly, dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 4 of the Repeal Act. However, there will be no order as to costs."
>
> (Emphasis Supplied)

From the facts and circumstances available in the present case, it is clear that after initiating the proceeding by the respondents declaring the land to be surplus and vested in the State under the provisions of the Act, 1976, possession over the same has not been taken by them and as per the requirement of law, after enforcement of the Act, 1999, the said proceeding can be considered to be illegal and further, in view of the

provisions of Section 4 of the Act, 1999, it can be declared to be abated. The Division Bench of this Court in **W.A. No.509/2017 [Brijesh Gautam Vs. State of M.P. & others]** relying upon a Division Bench decision of this Court passed in **W.A. No.558/2016 [State of M.P. & Ors. Vs. Rajubai and others]** has observed that if possession is refused to be handed over then issuance of notice under Section 10(6) of the Act, 1976 is a mandatory requirement and if that has not been done, then the possession shown to have been taken by adopting other modes, is absolutely illegal. Furthermore, in a Division Bench decision of this Court passed in **W.A. No.734/2008 [Ram Kumar Pathak and others Vs. State of M.P. and another]**, the Appellate Court has observed as under:-

> "8. Now the question remains whether on coming into force of Repeal Act, 1999 whether the proceedings were pending? In this case, no notice under Section 10(5) of the Act was served upon the appellants while it was the mandatory requirement of the law to serve this notice. Even for the sake of arguments, if it is assumed that the notice dated 29.2.1992 was issued to the appellants, even then 30 days' notice was the mandatory requirement of the law and until and unless a notice of 30 days could have been issued, the provision shall be deemed to be not complied with. Factually, neither notice under Section 10(5) was served upon the appellants nor any notice before handing over possession was given to the appellants. Neither the notice under Section 10(5) of the Act nor the warrant of possession bears the signature of the appellants. Apart from this, the possession which was stated to be taken on 3.31992 was not in the presence of witnesses. Even if it is assumed that the two names which are appearing in the notice were witnesses, but no particulars of the witnesses are on record. No specific Panchnama was prepared on the spot that in the presence of these witnesses, the possession was taken. When, at what time and in whose presence, the possession was taken, letter of possession is silent. In view of non-compliance of mandatory provision as contained under Section 10(5) of the Act or the suspicious circumstances in taking possession, it is apparent that the factual possession on the spot was not taken. Apart from this, the appellants/petitioners from the very inception were claiming their possession on the land and had come forward with the plea

> that the appellants were dispossessed after interim order in this appeal. The fact which has been established is that no factual possession was taken from the appellants and they continued to be in possession till filing of the appeal which was filed on 24.6.2002 after coming into force of Repeal Act, 1999. In aforesaid circumstances, the appellants were in possession of the land, as on the date, on which the Repeal Act, 1999 came into force. In such circumstances, it can very well be said that the proceedings were pending on the date when the Repeal Act came into force. If the appellants remained in possession of the land and their possession was not disturbed, then they were entitled to retain the land and the proceedings shall be deemed to have been abated [See: Vinayak Kashinath Shilkar Vs. Deputy Collector and Competent Authority & others (2012) 4 SCC 718].
>
> 9. Now the question remains whether there were any laches on the part of the appellants in filing the writ petition? So far as the contention of respondents that the possession was already taken on 3.3.1992 and the petition was filed belatedly, is concerned, we have already recorded the finding that no notice under Section 10(5) of the Act was served upon the appellants and in fact the appellants were in possession of the land, then there were no laches on the part of the appellants in filing the writ petition. The learned Single Judge has dismissed the writ petition without considering the merits of the case merely on the ground of laches, which order cannot be affirmed. In aforesaid circumstances, we find that the proceedings were pending as on the date when the Repeal Act had come into force. The appellants were in possession of the land on the date when this appeal was filed, so the appellants are entitled for the benefit of the Repeal Act, 1999."

13. So far as the case of **Lalji Choubey** (supra) on which learned Government Advocate has placed reliance is concerned, the same has no application in the present case for the reason that in the said case, the High Court has considered the fact that a notice under Section 10(5) of the Act, 1976 was issued to the land owner and only after getting it served, possession over the land was taken and the revenue entries were corrected accordingly, but here in this case as is clear from the record itself, no notice under Sections 10(5) and 10(6) of the Act, 1976 was ever issued to the original land owner. Here in this case, admittedly the possession over the land in question has been taken by

the respondents/authority under the provisions of the Code, 1959 that too after taking shelter of Section 35(2) and as such, the respondents from very inception proceeded contrary to the settled principle of law which is purely illegal and cannot be sustainable in the eyes of law. Thus, this Court has no hesitation to hold that the proceeding initiated by the respondents in respect of vesting the land in question in the State under the provisions of the Act, 1976 is illegal as it was done without following due procedure.

14. In the result, the petition filed by the petitioners stands **allowed**. The impugned order dated 31.01.2022 (Annexure-P/9) passed by the competent authority is hereby set aside. The respondents are directed to correct the revenue entries and restore the names of the original land owner and their legal heirs in the revenue record. As contended by the petitioners in the petition that they are still in possession over the land in question, therefore, they be allowed to continue in possession over the land in question.

(SANJAY DWIVEDI)
JUDGE

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