

Neutral Citation No. - 2025:AHC:63290

A.F.R.

Reserved on 06.12.2024

Delivered on 24.04.2025

Court No. - 37

Case :- WRIT - B No. - 13075 of 2012

Petitioner :- Rajkumar Dubey

Respondent :- Board Of Revenue And Others

Counsel for Petitioner :- Anurag Singh, Ashutosh Srivastava, Govind Krishna, Satyendra Nath Srivastava, Shreyas Srivastava

Counsel for Respondent :- D.D. Chauhan, Madhur Prakash, Satya Prakash

Hon'ble Dinesh Pathak, J.

1. Heard learned counsel for the petitioner, learned counsel for the contesting private respondents as well as learned Standing Counsel for the State-respondents.

2. The petitioner is aggrieved with the orders passed by the revenue courts under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (in brevity 'Act, 1950') whereby suit filed on his behalf for declaration of his rights and title under Section 229-B of Act, 1950 has concurrently been discarded by all the three revenue courts on the point of maintainability of suit being barred under Section 49 of U.P. Consolidation of Holdings Act, 1953 (in brevity 'U.P.C.H. Act'), while deciding the issue no.7 framed by the learned trial court.

3. As per plaint case, the plaintiff-petitioner is claiming his right, title and interest over the property in question on the basis of mortgage deed dated 27.2.1901, registered on 04.3.1901, said to have been executed by Khuman Singh s/o Preetam Singh (predecessor-in-interest

of the defendants-respondants) in favour of Radha Kishan s/o Bhola Nath (predecessor-in-interest of the plaintiff-petitioner). Through the aforesaid mortgage deed, the land in question was mortgaged for thirty years against the loan amounting to Rs.290/-. Mortgage money was paid from the Hindu Undivided Family Fund. Subsequently, predecessors-in-interest of the petitioner had filed a suit for possession against Khuman Singh (father of defendant no.1) being Civil Suit No.418 of 1911 (Pitambar Lal & Others vs. Khuman Singh & Others). Aforesaid suit was decreed on 24.2.1912 and based on the said decree, possession was delivered on 29.3.1912. Since 1348 fasli, name of Smt. Ram Dulari (grand-mother of the plaintiff-petitioner) was recorded and thereafter name of the plaintiff-petitioner is recorded in Khatauni being mortgagee. The plaintiff-petitioner was initially Seerdar of the property in question. Subsequently, by operation of law, became Bhumidhar with transferable rights. On the advent of consolidation operation, he has executed a power of attorney in favour of Nanhu Singh (brother of defendant no.2 namely Rajendra) to look after the property and get the name of the plaintiff-petitioner in the consolidation record, however, he did nothing and got the name of the plaintiff-petitioner expunged from the record. By playing fraud on the plaintiff-petitioner, he got his name and defendants' name recorded in the consolidation record. Thus, name of defendants are fraudulently and illegally recorded in the revenue record which came to the knowledge of the plaintiff-petitioner for the first time on 27.1.1987 and, consequently, he filed suit for declaration.

4. On the contrary, defendants have filed written statement denying the pleadings made in the plaint with the contention that mortgage deed dated 27.2.1901, registered on 4.3.1901, was redeemed by judgment dated 29.2.1936 and decree dated 3.3.1946 passed by the Assistant Collector (Ist Class) in a Suit No.4/5. Nanhu Singh was never appointed as power of attorney by the plaintiff-petitioner to look after the property in question. The plaintiff-petitioner does not belong to the family of the original

mortgagee and he is never recorded in the revenue record, therefore, suit on his behalf is not maintainable being barred under Section 49 of the U.P.C.H. Act.

5. Learned trial court, after exchange of pleadings, has framed as many as ten issues to decide the suit. Out of them, issue no.7 was framed regarding bar of suit under Section 49 of U.P.C.H. Act which is quoted herein below:-

"Whether plaintiff's suit is barred under Section 49 of the Act ?"

6. The Assistant Collector (Ist Class)/Sub Divisional Officer, Bilhaur, Kanpur Nagar, vide judgment dated 7.11.2007, has decided the aforesaid issue in affirmative in favour of the defendants and held that the suit is barred under Section 49 of the U.P.C.H. Act. Having been aggrieved with the judgment dated 7.11.2007, the plaintiff has filed first appeal being Appeal No.46 of 2008 under Section 331(3) of Act, 1950. Learned Additional Commissioner, Kanpur Division, Kanpur, vide order dated 3.11.2008, has dismissed the appeal affirming the order passed by the trial court. Being dissatisfied with the order passed by the first appellate court, the plaintiff-petitioner has filed Second Appeal No.14 of 2008/09 before the Board of Revenue, U.P. at Allahabad which has been dismissed as well by the judgment dated 20.1.2011, which is under challenge before this Court.

7. Learned counsel for the plaintiff-petitioner, while assailing the concurrent finding of fact returned by all the three revenue courts in a proceeding arisen out of suit under Section 229-B of Act, 1950, has advanced fourfold following submission:-

7.1- The bar under Section 49 of U.P.C.H. Act is applicable only for the certain period i.e. from the date of promulgation of notification under Section 4 of U.P.C.H. Act up to the de-notification under Section 52 of the U.P.C.H. Act. As per his submission, Section 4 of the U.P.C.H. Act was promulgated on 16.9.1965 and the village was de-notified under Section

52 of U.P.C.H. Act by notification promulgated on 14.5.1977, however, suit was filed on 23.5.1988, therefore, provisions as enunciated under Section 49 of U.P.C.H. Act are not attracted in the instant matter. In support of his submission, learned counsel for the plaintiff-petitioner placed reliance on the case of Prashant Singh & Others vs. Meena & Others reported in 2024 (9) ADJ 187.

7.2- He has tried to point out the forgery committed against the plaintiff-petitioner and came with the plea that fraud vitiates everything even solemn proceedings. He has laid emphasis on the pleadings of the plaint that the plaintiff-petitioner has executed a power of attorney in favour of Nanhu Singh (brother of the defendants-respondents) to get his name recorded in the land revenue record during consolidation proceeding, however, by playing fraud Nanhu Singh got his and his brother's name recorded over the property in question and managed to expunge the name of plaintiff-petitioner. Plea of fraud has not appropriately been considered by all the three revenue courts and illegally held the suit barred under Section 49 of the U.P.C.H. Act. In support of his submission, learned counsel for the petitioner has placed reliance upon the case of Ram Briksha & Another vs. Deputy Director of Consolidation & 3 Others reported in 2017 (6) ADJ 356 (DB); Sagir Ahmad & Others vs. Deputy Director of Consolidation & Others reported in 2019 (6) ADJ 336 and Amar Singh vs. State of U.P. & Others reported in 2008 (2) ADJ 688.

7.3- It is next submitted that name of Smt. Ram Dulari (predecessor-in-interest of the plaintiff-petitioner) was recorded in 1348 fasli and 1366 fasli to 1369 fasli being a mortgagee. Predecessors-in-interest of the plaintiff-petitioner and, thereafter, he himself is in continuous possession over the property in question.

7.4- He has also laid emphasis on the condition no.6 of the mortgage deed, whereby mortgage would be foreclosed after thirty years, and the judgment passed in Suit No.418 of 1911 whereby possession has been delivered in favour of the mortgagee (predecessor-in-interest of the

plaintiff-petitioner). After the judgment passed in Original Suit No.418 of 2011 and foreclosure of the mortgage deed as per condition no.6 of the mortgage deed, defendants have no right, title and possession over the property in question. Thus, the present writ petition be allowed and the orders impugned passed by the revenue courts be quashed, being illegal and unwarranted under the law.

8. Per contract, learned counsel for contesting respondents has vehemently opposed the submissions advanced by learned counsel for the petitioner and contended that:-

8.1- The suit for redemption and possession of collateral property filed on behalf of the mortgagor against the mortgagee under Section 99 of Agra Tenancy Act (Act No. 3 of 2026) had been decreed on 29.2.1936 and got executed on 3.3.1946. Thus, the mortgagee (predecessors-in-interest of petitioner) has no right, title and possession over the property in question.

8.2- He vehemently opposed the execution of any power of attorney (unregistered) in favour of Nanhu Singh, as averred in paragraph number 13 of the plaint, and contended that copy of such power of attorney had never been filed before any of the three revenue courts. However, for the first time, the alleged document has been filed before this court which is a forged document.

8.3- Learned counsel for the respondents has emphasized that the name of the petitioner was never recorded in the Record of Rights, i.e., Khatoni 1356 fasli, 1348 fasli, and 1359 fasli. Even his name was not recorded in the Basic Consolidation Record, to wit, at the advent of the consolidation operation by way of notification under Section 4(2) of the U.P.C.H. Act.

8.4- It is next contended that no foul play or fraud has been committed against the plaintiff-petitioner, who was reluctant towards his right during the consolidation operation. Mere assertion of fact with regard to fraud is not sufficient to avert the bar under section 49 of the U.P.C.H. Act. In

paragraph 13 of the plaint, the plaintiff has taken a contradictory plea that he himself was taking care of the property in question at the relevant time.

8.5- It is next contended that orders under challenge, holding the suit barred under Section 49 of the U.P.C.H. Act, do not warrant any interference in the writ jurisdiction, thus, the same may be dismissed being misconceived and devoid of merits. In support of his contention, learned counsel for the contesting respondents has relied upon the case of Kushar Vs. Ahmed Khan, 1962 R.D. 172 decided by division bench of this court, Madan Mohan Mishra v. Chandrika Pandey (dead) by L.Rs., 2009 (107) R.D. 2 SC and the case of Ram Briksha and another (supra) and the case of Sagir Ahmed and others (supra).

9. Having considered the rival submissions advanced by learned counsel for the parties and upon perusal of the record, it is manifest that the question for consideration in the instant matter lies in a narrow compass as to whether the suit for declaration filed on behalf of the plaintiff under Section 229 B of the Act, 1950 is barred and not maintainable under Section 49 of the U.P.C.H. Act. Thus, nature and scope of Section 49 U.P.C.H. Act is required to be discussed, which is quoted herein below:

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

[Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 in respect of any land,

possession over which has been delivered or deemed to be delivered to a Gaon Sabha under or in accordance with the provisions of this Act.”

10. Needless to say that object of the U.P.C.H. Act is to provide for consolidation of agricultural holding for the development of agriculture. It is a complete code which contains provisions for redressal of grievance of tenure holders relating to their right, title and interest over the holding as well as grievances in relation to the chak allotment, its valuation and area, etc. While enforcing the object of U.P.C.H. Act to consolidate the holding and avoid fragmentation or scattered holding, consolidation authorities are also authorised to examine the revenue entries made in favour of the tenure holders. For this purpose, Section 8A provides preparation of statement of principles, stating forthwith the principle to be followed in carrying out consolidation operation in the unit. In Section 9, provision is made for issuing notice to the statement of principle prepared under Sections 8 and 8 A of the U.P.C.H. Act to tenure holders concerned and to persons interested calling upon them to file objection before him, if any, disputing the correctness or nature of entry in the extract and pointing out of any omission therefrom. Section 10 provides that annual register shall be revised on the basis of the order passed by the Consolidation Officer. Section 19 onwards, Sections 20 and 21 are relating to the Provisional Consolidation Scheme (Chak allotment proceedings). Thus, there is a provision under the U.P.C.H. Act to examine the right, title and interest of the tenure holders, while examining the correctness of entries. However, intending to discourage the multiplicity of proceedings, legislation has forbidden the jurisdiction of Civil and Revenue Court, under Section 49 of the U.P.C.H. Act from entertaining any of the following matters :-

(i) Declaration and adjudication of right of tenure holders qua land covered by notification under Section 4(2) of the U.P.C.H. Act,

or

(ii) Adjudication or any other right arising out of consolidation proceedings,

and

(iii) in regard to these matters (as mentioned above), proceedings could or ought to have been taken under the U.P.C.H. Act,

(iv) shall be done in accordance with the provisions of the U.P.C.H. Act.

11. Non-obstante clause used at the commencement of the Section 49 of U.P.C.H. Act coupled with the latter part of the Section, to wit, "proceedings could or ought to have been taken under this Act", imposes an absolute bar on civil or revenue courts from entertaining any proceedings in respect of the declaration and adjudication of right of a tenure holder or adjudication of any other rights arising out of consolidation operations, for which person concerned ought to have or could have taken proceedings at the time when the village was brought under the consolidation operations by promulgation of notification under Section 4(2) of the U.P.C.H. Act. Meaning thereby, final record of rights prepared under the provisions of the U.P.C.H. Act attaches finality concerning the declaration and adjudication of right of tenure holders, therefore, after denotification under Section 52 of the U.P.C.H. Act, civil or revenue courts have got no jurisdiction to reopen such adjudication or declaration of rights. Hon'ble Supreme Court, in the case of **Sita Ram vs. Chhota Bhondey and others**, AIR 1991 Supreme Court 249, while discussing the scope of Section 49 of U.P.C.H. Act has held that it is wide and comprehensive. Facts giving rise to the aforesaid cited case are that Chhota and Nanha are real brothers. In basic consolidation record, name of Nanha was recorded in the representative capacity on behalf of himself and his brothers. Son of Chhota has filed objection claiming his co-tenancy right over the property in question. Consolidation Officer has granted co-tenancy right, however, the appeal having been filed, order of Consolidation Officer was reversed. Having been aggrieved, revision was

preferred and the Deputy Director of Consolidation has upheld the order passed by the Consolidation Officer. In writ petition, order of the Consolidation Officer had been affirmed. At subsequent stage, civil suit had been filed for the declaration that order of Deputy Director of Consolidation was without jurisdiction. Contesting the suit, other side has raised preliminary objection that the suit is barred under Section 49 of the U.P.C.H. Act. Learned trial court has allowed the preliminary objection which has been upheld up to the stage of second appeal before Hon'ble High Court. Learned counsel for the appellant before Hon'ble Supreme Court came with the plea that the bar under Section 49 of the U.P.C.H. Act is not applicable to the suit on two grounds; that consolidation authorities could not decide question as to title to the land, and question relating to the parentage of the respondent, which the civil court alone could decide.

12. In this backdrop of the fact, Hon'ble Supreme Court has upheld that:

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

from the other provisions of the Act and the amendments that have been introduced therein.”

13. Section 49 of the U.P.C.H. Act, which bars the jurisdiction of the civil court and the revenue court, gives affect to the provisions enunciated under Section 5(2) of the U.P.C.H. Act, thus, to better understand the provisions of Section 49 of the U.P.C.H. Act, the provisions enunciated under Section 5(2) of the U.P.C.H. Act are also referable which denotes the effect of notification under Section 4(2) of U.P.C.H. Act that, at the advent of consolidation operation by way of notification under Section 4 (2) of the U.P.C.H. Act in the official gazette, until the publication of denotification under Section 52 of the U.P.C.H. Act or cancellation of such notification under Section 6 of the U.P.C.H. Act, as the case may be, every proceeding for correction of record and every suit and proceeding in respect of declaration of right or interest in any land lying in the area of notification, or of declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority, whether of the first instance or of appeal, reference or revision, shall on an order been passed on behalf of the court or authority before whom such suit or proceeding is pending, stand abated. Thus, the bar under Section 5(2) of the U.P.C.H. Act and the bar under Section 49 of the U.P.C.H. Act are operating in different dimensions, however, Section 49 is adjuvant to preserve the legal sanctity of declaration and adjudication of any right during the consolidation operation. Section 5 of the U.P.C.H. Act operates when the unit/area is notified for consolidation operation under Section 4 (2) of the U.P.C.H. Act, to wit, during the consolidation operation, before it's cessation under Section 6 or completion by denotification under Section 52. However, in furtherance of Section 5, the bar under Section 49 of the U.P.C.H. Act operates after de-notification under Section 52 of the U.P.C.H. Act, when the right, title and interest of the parties and other rights arising out of

consolidation operation has attained finality. While enforcing the bar under Section 49 of the U.P.C.H. Act, legislation is intended to cut short the multiple litigations and do not encourage the litigants to indulge in unended litigation process to get their right, title and interest adjudicate upon qua property in question. The phrase employed under Section 49 of the U.P.C.H. Act in the last part of the Section i.e. "for which a proceeding could or ought to have been taken under this Act" is quite meaningful and significant to preclude the jurisdiction of Civil Courts and Revenue Courts from entertaining any such litigation to adjudicate and declare the right, title and interest of the parties with respect to land which has already passed through consolidation operation and record of rights are finalized with respect thereto after de-notification under section 52 of the U.P.C.H. Act. Any tenure holder who ought to have vigilant and could have raised his voice by way of filing an appropriate objections under the U.P.C.H. Act during consolidation operation, if so reluctant and not filed an appropriate objection, would be stopped from raising such objection at subsequent stage before any civil or revenue court. In the matter of **Sita Ram (supra)** Hon'ble Supreme Court has observed that :

“As a result of the said amendment which has been introduced in Section 5 the right of the Courts to adjudicate in respect of declaration of rights or interest in any land lying in the area for which the notification has been issued under Section 4(2) or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act has been completely taken away and the adjudication of these rights is to be done by the consolidation authorities under and in accordance with the provisions of the Act and the Rules made thereunder. Section 49 of the Act which bars the jurisdiction of the civil and revenue Courts gives effect to the aforesaid provisions contained in Section 5(2) of the Act. As a result of these amendments civil and revenue Courts have no role in the matter of determination of rights or interests in any land lying in the area for which notice has been issued under Section 4(2) of the Act or for the declaration or adjudication of

any other right in regard to which proceedings can or ought to be taken under the Act.

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In the instant case respondent No. 1 was claiming an interest in the land lying in the area covered by notification issued under section 4(2) on the basis that he is the son of Chhota, brother of Nanha and that the lands were recorded in the name of Nanha in a representative capacity on behalf of himself and his other brothers. This claim which fell within the ambit of Section 5(2) had to be adjudicated by the consolidation authorities. Since it was a matter falling within the scope of adjudicatory functions assigned to the consolidation authorities under the Act the jurisdiction of the Civil Court to entertain the suit in respect of the said matter was expressly barred by Section 49 of the Act and the suit of the appellant was rightly dismissed on that ground.”

(emphasis supplied)

14. However, through judicial proclamation, an exception on the ground of fraud has been carved out under the legal presumption that fraud vitiates everything, even solemn acts of judicial proceedings. The learned counsel for the petitioner has emphasized on this point and submitted that fraud has been played upon plaintiff/petitioner and his name has been got expunged from the revenue record. The defendants got their names recorded during consolidation operation, despite the fact that plaintiff/petitioner has executed a power of attorney in favour of Nanhu Singh to get the entry corrected during the consolidation operation. In all the cited cases relied upon by the learned counsel for the petitioner, one thing is common which has been taken into account by the Hon’ble High Court and the Hon’ble Supreme Court that aggrieved persons have their pre-existing co-tenancy over the holding in question and having considered the pre-existing right, it has been summarised by Hon’ble Courts concerned that by playing fraud upon the party his name was left to be recorded during the consolidation operation, to wit, after notification promulgated under Section 4(2) and before de-notification promulgated under Section 52 of U.P.C.H. Act. Thus, in the eventuality of fraud, it

would not be justifiable to hold the suit filed on behalf of the aggrieved person at subsequent stage barred under Section 49 of U.P.C.H. Act.

15. To elucidate this proposition, I would like to discuss all the cited cases relied upon by the learned counsel for the petitioner. In the matter of **Ram Briksha and another** (supra), decided by Division Bench of this Court, the facts giving rise to the said writ petition are that Ram Briksha (petitioner) was recorded in the basic consolidation record. In the previous consolidation operation, no objection was filed by Ram Vilas, however, in subsequent consolidation operation, he has filed an objection under Section 9A-2 of U.P.C.H. Act claiming himself as the real brother of the petitioner whose name got expunged by playing fraud. The petitioner (Ram Briksha) has contested the case with the plea that while the objection was not filed in the previous consolidation operation and finality is attached with the final consolidation record, the objection filed in the subsequent consolidation operation is barred under Section 49 of U.P.C.H. Act. In this backdrop of the facts, co-ordinate bench of this court has formulated three questions and referred the matter before Division Bench for consideration, which are quoted herein below:-

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

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

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

16. Replying all the three questions, Hon'ble Division Bench has held that right of the parties in the holdings cannot be directed to be defeated merely because they have not at all participated in the consolidation proceedings and as to whether the bar under Section 49 of U.P.C.H. Act would be attracted or not, would essentially be a question of fact that can be answered on the basis of evidence adduced and to said bar in question, exceptions have to be carved out wherein suit in question would not be barred and Section 49 of U.P.C.H. Act would not come into play where from the series of documents and circumstances it is reflected that planned fraud has been made to delete the plaintiff's name from the revenue record. From the record of the consolidations, it is clearly reflected that neither the incumbent, who has proceeded to get his name recorded, nor consolidation authorities have proceeded to discharge their duties faithfully in consonance with the provisions of U.P.C.H. Act wherein consolidation authorities are empowered to ascertain the share of each owner if there be more owners than one and if such an exercise has not been undertaken, then it would be a case of legal malice and it cannot be ipso facto presumed that there has been ouster from the property in question and in such situation any incumbent, who claims his right in the property in question, has got every right to regain his property based on title for the reason that right has been sought to be defeated based on fraud and manipulation.

(emphasis supplied)

17. Answers given by Hon'ble Division Bench for all the three referred questions are quoted hereinbelow:

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

Issue No. II:- The answer is that a party cannot be thrown in litigation against their will/need and by not raising claim to land of partition and separation of chak, their rights to property cannot be taken away under the protection provided for under Article 19(1)(f)/ Article 300-A of the Constitution of India.

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

18. Hon'ble Division Bench, as mentioned above, has acknowledged the pre-existing co-tenancy right of Ram Vilas being a co-sharer along with his brother, whose name was left to be recorded in the first consolidation operation due to some inadvertent mistake or fraud. Thus, in this backdrop, Hon'ble Division Bench came to the conclusion that his pre-existing right cannot be curtailed on the ground of bar under Section 49 of UPCH Act.

19. Almost similar facts were examined by Co-ordinate Bench of this Court in the case of **Sagir Ahmad and others** (supra) wherein pedigree

was admitted to both the parties. Mr. Bechai Shah and Bhaggu Shah S/O Wazid Shah were real brothers. In the first consolidation operation, the name of Bechai Shah was exclusively recorded, however, name of Bhaggu Shah was left to be recorded despite the fact that in Khatauni pertaining to 1359 F. name of both the brothers were jointly recorded. On the advent of second consolidation operation, Bhaggu Shah has filed objection under Section 9A-2 of UPCH Act claiming co-tenancy rights along with his brother, after his death along with his heirs, to the land in question. The co-ordinate Bench of this Court, relying upon the verdict of Division Bench of this Court in the matter of Ram Briksha (supra), came to the conclusion that the bar of Section 49 of UPCH Act would not operate where it is reflected from the record and circumstances that name of the recorded tenure holder has been removed by playing fraud. Accordingly, if it is found that name of recorded tenure holder or co-sharer has been expunged from the revenue record by playing planned fraud, it would be a case of legal malice and in such situation, the person whose name has been expunged will have right to claim the property in question based on title for reason that such a right has been established to be defeated on manipulated.

20. Case of Amar Singh (supra), relied upon by learned counsel for the petitioner, is sailing on the same boat so far as it relates to the facts of the case wherein plot in dispute was purchased through registered sale deed dated 17.03.1969 by plaintiff (Saru) and defendant (Amar Singh-petitioner). The case of the plaintiff was that the defendant/petitioner used to look after the cases in different courts and plaintiff used to live in a forest being *gadariya*, looking after his goats. However, he has been duped by defendant in removing his name from the revenue record. Plaintiff has also claimed that after the registered sale deed dated 17.03.1969, both the parties came in possession over the subject matter of the sale deed (suit property). Thus, in this backdrop of the facts, it has been held that a co-sharer, who claimed to be in the possession over the

property in question and his name being not recorded in the consolidation proceeding, is not debarred from bringing a suit under 229 B of Act, 1950 for correcting the land revenue entries and recording his name also if allegation is that his name was removed by practising fraud on him. In support of his observation learned coordinate Bench of this Court has relied upon the case of **Karbalai Begum vs. Mohd. Sayeed and another, AIR 1981 SC 77.**

21. Hon'ble Supreme Court in the matter of Karbalai Begum (supra) had an occasion to consider the scope of bar under Section 49 of U.P.C.H. Act. In the peculiar facts and circumstance, Karbalai Begum (appellant before Hon'ble Supreme Court) had been denied her co-tenancy right over the property in question on the ground of bar under Section 49 of U.P.C.H. Act. The facts giving rise to the aforesaid case was that Karbalai Begum (widow) was co-tenant with the defendants no.1 and 2 who were cousins of her husband. They were in joint possession of the plot in dispute being co-bhumidhars. They had a joint khata upto 1959 fasli. During consolidation proceeding, name of defendants were exclusively recorded over the plot in question. At later stage, Karbalai Begum had filed a suit for co-tenancy to the extent of her share. The defendants came with the plea that the suit is barred under Section 49 of U.P.C.H. Act inasmuch as right and title of the parties became final during consolidation operation. The trial court has dismissed the suit, however, the District Judge, on appeal being filed, has allowed the same with specific finding of fact that clear fraud was committed during consolidation operation either by the defendants or by somebody else as a result whereof rights of the plaintiff was said to be extinguished. Hon'ble High Court, in second appeal, has reversed the judgment passed by the District Judge for want of evidence to prove the fraud committed by the consolidation authorities. Hon'ble Supreme Court has affirmed the finding returned by the District Judge and held that fraud was practised upon Karbalai Begum which resulted in extinguishing her name during consolidation operation. In this backdrop

of facts, the Hon'ble Supreme Court has held that bar under Section 49 of U.P.C.H. Act will not apply in the matter of fraud where co-tenancy has been denied. It has further been observed that it is well settled that mere non-participation in the rent and profit of the land of the co-sharer, does not amount to an ouster so as to give title by adverse possession to the co-sharer in possession. Indeed, even if this fact be admitted, the legal position would be that defendant no.1 (Mohd. Bashir) and defendant no.2 (Mohd. Rashid), being co-sharers of plaintiff, would become constructive trustees on behalf of the plaintiff and the right of plaintiff would be deemed to be protected by the trustees.

(Emphasis added)

22. However, in the case of **Narendra Singh and others vs. Jai Bhagwan AIR 2005 SC 582**, relied upon by the Hon'ble Division Bench in the matter of **Ram Briksha** and another (supra), Hon'ble Supreme Court has held that the High Court was right in invoking the plea of bar under Section 49 of U.P.C.H. Act. In the cited case, Hon'ble Supreme Court has observed that the argument that relevant entry in the name of father should have been treated in the representative capacity for sons is misleading. Whether the father was *Karta* or manager of family and as such, could have recorded in the representative capacity for all corners in the family was also a question of title which fell within the exclusive jurisdiction of the authorities under the Act.

23. In view of the discussion made in preceding paragraph, this Court is sceptical of the submission advanced by learned counsel for the petitioner that bar under Section 49 applies only for certain period which starts from the promulgation of notification under Section 4(2) of U.P.C.H. Act till the notification promulgated under Section 52 of U.P.C.H. Act. In support of this submission, learned counsel for the petitioner has placed reliance upon the latest judgment of Hon'ble Supreme Court in the matter of **Prashant Singh and Others Vs. Meena and Others 2024(9) ADJ 187**.

Paragraph no.9 relied upon by learned counsel for the petitioner is quoted herein below:

“ 9. On a plain reading, we find that Section 49 of the 1953 Act contemplates bar to the jurisdiction of the Civil or Revenue Court for the grant of declaration or adjudication of rights of tenure holders in respect of land lying in an area for which consolidation proceedings have commenced. Section 49 of the 1953 Act is a provision of transitory suspension of jurisdiction of Civil or Revenue Court only during the period when consolidation proceedings are pending. Notably, such suspension of jurisdiction of these Courts through the non obstante provision is only with respect to the declaration and adjudication of rights of tenure holders. In other words, unless a person is a pre-existing tenure holder, Section 49 does not come into operation.”

24. Facts giving rise to the cited case is similar to the facts of the case, as discussed above, wherein co-tenancy right of aggrieved person has been denied by the recorded tenure holders. In the cited case subject matter of the suit is an ancestral property originally owned by one Angat who died leaving behind his three sons namely Ramji Lal, Khushi Ram and Pyara. Subsequently, Pyara died issueless and his share devolved equally upon his two brothers. Khushi Ram died as well leaving behind his son namely Kalyan Singh. During consolidation operation, record had been manipulated to delete the name of Kalyan Singh and he had been shown missing. Having been aggrieved, Kalyan Singh has instituted a suit for declaration to the extent of his half share over the property in question. Learned trial court has decreed the suit giving co-tenancy right to Kalyan Singh. The first appellate court has affirmed the order passed by the trial court. The Board of Revenue, on second appeal being filed, remitted the matter before the trial court to decide afresh after framing an issue with respect to applicability of Section 34 of Specific Relief Act. Writ Petition filed by Kalyan Singh assailing the order passed by the Board of Revenue was allowed. Plea was raised before the Hon'ble Supreme Court that suit filed by Kalyan Singh was barred under Section 49 of U.P.C.H. Act. In this backdrop of the facts, Hon'ble Supreme Court has held that the

provisions under the U.P.C.H. Act does not enable the Consolidation Officer to grant ownership to Ramji Lal (uncle of Kalyan Singh) in respect of a property, which, before consolidation proceeding, never vested in him. Vice versa, the Consolidation Officer could not take away the ownership right of Kalyan Singh which he had already inherited much before commencement of the consolidation proceeding. There is no doubt that the power to declare the ownership in an immovable property can be exercised by a civil court, however, same can be interpreted in light of the provisions under Section 5 of C.P.C. whereby local law has been given priority. Thus, declaration of right and title of the parties pertains to agriculture land can only be examined in the revenue courts, to wit, either under the Act No.50 (now substituted by U.P. Revenue Code, 2016) or U.P.C.H. Act. Hon'ble Supreme Court, in the cited case, having considered the non obstante clause enunciated under Section 49 of U.P.C.H. Act, has clarified in the later part of the paragraph no.9 that suspension of jurisdiction of Civil Court and the Revenue Court through non obstante provisions is only with respect to the declaration and adjudication of rights of tenure holders. It has further been clarified that unless a person is pre existing tenure holder, section 49 does not come into operation, thus, aggrieved person has to prove his pre existing legal right and title over the property in question in case he wants bypass the bar under Section 49 of U.P.C.H. Act. In the given circumstances of the present case, petitioner is claiming his alleged pre existing right through mortgage deed dated 04.03.1901 and subsequent order passed in Original Suit No. 418 of 1911. However, subsequent decree dated 03.03.1946 passed in suit for redemption/possession has not been denied by the plaintiff except questioning its legality on the ground of previous decree passed in Suit No. 418 of 1911. In my considered opinion, once the suit for redemption/recovery of possession filed on behalf of the mortgagor has been decreed and possession has been delivered to him, plea raised on behalf of the petitioner (alleged descendent from mortgagee) *qua*

foreclosure of the mortgage and previous judgment in Suit No. 418 of 1911 has got no substance in the eye of law. It would be apposite to mention that mortgagor has filed a suit under Section 99 of Agra Tenancy Act 1926 (U.P. Act No. 3 of 1926) which is quoted herein below:

“ 99. Resolution of wrongful ejectment.—(1) Any tenant or rent-free grantee ejected from or prevented from obtaining possession of his holding or any part thereof, otherwise than in accordance with the provisions of this Act, by -

(a) his landlord or any person claiming as land-holder to have a right to eject him, or

(b) any net of oaring through such land-holder or person, whether as as tenant or otherwise,

may sue the person person so ejecting him or keeping him out of possession—

(i) for possession of the holding ;

(ii) for compensation for wrongful dispossession; and

(iii) for compensation for any improvement he may have made :Provided that no decree for possession shall be passed where the tenant, at the time of the passing of the decree, is liable to ejectment in accordance with the provisions of this Act within the current agricultural year.

(2) If the decree is for possession no compensation for an improvement shall be awarded.

(3) When a decree is given for compensation for wrongful dispossession but not for possession, the compensation awarded shall be for the whole period during which the tenant was entitled to remain in possession.

(4) A tenant who has sued for possession only shall not be entitled to instituted a separate suit for compensation for wrongful dispossession, or for an improvement, in respect of the same cause of action.”

25. Section 99 of the Agra Tenancy Act 1926 (U.P. Act No. 3 of 1926), as quoted above, denotes that suit for recovery of possession can be filed against the wrongful ejectment. Aforesaid suit being O.S. No. 4/5, filed on 09.09.1935, was allowed on 29.02.1936 with a direction to deliver the possession to the plaintiff over the property in question with the cost

amounting Rs. 133/-. Copies of the judgment dated 29.02.1936 and decree dated 03.03.1946 are annexed as Annexure no. CA-1 and CA-2 to the counter affidavit. Existence of the aforesaid judgment and decree has not specifically been denied in paragraph no.5 of the rejoinder affidavit except an averment that subsequent suit alleged in the para under reply has no significance and material bearing on the controversy involved between the parties on account of existence of previous decree dated 26.02.1912 passed in Suit No. 418 of 1911.

26. So far as the entry in the land revenue record is concerned, learned trial court in its order dated 07.11.2007 has unequivocally observed that in 1356 *fasali*, 1348 *fasali* and 1359 *fasali*, name of the petitioner is not recorded in the revenue record. Petitioner has filed the extract of khatauni 1348 *fasali* and khatauni 1366 -1369 *fasali* to demonstrate that name of Ram Dulari wife of Urmakhan Lal Dubey is recorded as the mortgagee. Perusal of aforesaid document as annexed in the writ petition evince that in the column of tenure holder, name of predecessors-in-interest of defendants/respondents is recorded and below their name, name of Ram Dulari is recorded as mortgagee. It would be apposite to mention that in the judgment dated 29.02.1936 passed in Suit No. 4/5, Ram Dulari was directed to deliver the possession of property in question in favour of Daulat Singh (predecessor-in-interest of contesting respondents). There is no credible evidence on the record to prove that name of plaintiff or his predecessors were ever recorded in the land revenue record being a co-tenure holder of land in question. Under the old Acts viz. N.W.P. Tenancy Act 1901, U.P. Act no. 3 of 1926 and U.P. Tenancy Act 1939, mere entry of mortgagee, *prima facie*, would not confer any type of tenurial right in favour of the plaintiff-petitioner over the property in question, that too, qua land which was recorded as "Asamiyan Dakheekar" under class 6(1). At this juncture, it would not be befitting to make any comment *qua* entries in the khatauni as mentioned above which has not been discussed by the courts below. Therefore, in the light of the subsequent judgment

passed by court competent under Section 99 of U.P. Act No. 3 of 1926, plaintiff/petitioner cannot be considered to be a co-tenure holder or co-sharer/bhoomidhar or bhoomidhar with transferable right in his exclusive ownership. Thus, case of **Prashant Singh (supra)** decided by Hon'ble Supreme Court is not applicable in the instant matter.

27. Last submission advanced by learned counsel for the petitioner *qua* fraud committed on plaintiff/petitioner by Nanhu Singh has got no substance in the eye of law, as well. Mere assertion of fraud is not sufficient to render the judicial proceeding concluded by the court competent illegal unless it is proved by credible and unimpeachable evidence. As per plaintiff's case, he has executed a power of attorney in favour of Nanhu Singh to get the land revenue entry corrected in his name during the consolidation operation. Pleading in the plaint in this regard has specifically been denied by defendants-respondents in written statement. In support of the aforesaid pleading no documentary evidence has been filed before any of the three revenue courts. However, for the first time, petitioner has filed the photostat copy of alleged power of attorney dated 22.08.1966 as Annexure no. 5 to the writ petition. Bare perusal of aforesaid power of attorney evince that it is an unregistered document bearing signature of the present petitioner and two witnesses. Respondents have specifically denied this document in para 12 of counter affidavit and contended that under the garb of fabricated Power of Attorney, petitioner has played fraud.

28. In my considered opinion, document filed for the first time before this Court is not admissible in evidence, that too, same is a photostat copy of unregistered document. Coordinate bench of this Court in the matter of Mangaroo (dead) Through LRs. And Others Vs. Deputy Director of Consolidation, Deoria and Others, (2011) 113 RD 300 has made an observation that fraud cannot be inferred on mere allegation. Relevant paragraph no.9 of the aforesaid judgment is quoted herein below:

“9. The respondents further alleged that fraud had been practised on them. In the opinion of the Court, fraud cannot be inferred on mere allegations. It has to be established on facts or on the basis of proven facts. The connotation of fraud has been explained in the case of State of Andhra Pradesh v. T. Suryachandra Rao, paragraphs 4 to 14. Fraud therefore has to be proved. A mere allegation would not sufficient to establish fraud. This aspect has also been dealt with by the Apex Court in the case of Indian Bank v. Satyam Fibres (India) Pvt. Ltd., The said decision relies on a Privy Council decision in the case of Satish Chandra Chatterji v. Kumar Satish Kantha Roy, and the relevant paragraph for the said proposition as extracted in the Apex Court judgment is quoted below: "Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them - proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dextrous knave would escape."

29. Hon’ble Supreme Court has elucidated the scope of fraud in the matter of **Harjas Rai Makhija (D) Through LRS. Vs. Pushparani Jain and Another**, decided on January 2, 2017 reported in 2017 (134) RD 811 and held that fraud has a definite meaning in the law and it must be proved and not merely alleged and inferred. Relevant paragraph no.21 of the aforesaid judgment is quoted herein below:

“ 21. We agree that when there is an allegation of fraud by non-disclosure of necessary and relevant facts or concealment of material facts, it must be inquired into. It is only after

evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent, is stretching the principle to a vanishing point.”

30. Having considered the aforesaid judgments in the given circumstances of the present case and discussion as made by this Court in preceding paragraphs, it is evident that no case of fraud could be made out in the instant matter, inasmuch as plaintiff-petitioner is throughout claiming his right and title over the property in question being mortgagee. However, in pursuance of the judgment passed in Suit No. 4/5 under Section 99 of U.P. Act No. 3 of 1926 possession of the property has been handed over to the mortgagor (defendant-respondent). Thus, right of the mortgagee, if any, comes to an end. Mortgagee (plaintiff-petitioner or his predecessor in his interest) were never recorded in the land revenue record in their individual capacity being a co-tenure holder with the defendants (mortgagor). Facts and circumstances of all the cited cases relied upon by learned counsel for the petitioner is distinguishable in the given circumstances of the present case. Right and title of the plaintiff/petitioner in the property in question cannot be said to be a pre existing co-tenancy right. Assuming *arguendo* that he was in the possession over the property in question in pursuance of the decree passed in the year 1912, his possession came to an end in year 1946 in compliance of judgement and decree passed in Suit No. 4/5, to wit, before zamindari abolition and enforcement of the U.P.C.H. Act. On the date of advent of consolidation operation, his name was not recorded in the basic consolidation record, thus, plea of fraud as raised on behalf of the plaintiff-petitioner cannot be substantiated in the facts and circumstances of the present case. The alleged power of attorney relied upon by the plaintiff is itself under cloud, as discussed above.

31. In this conspectus, as above, I do not find any justifiable and convincing ground to warrant the indulgence of this court in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. There is nothing on record to demonstrate as to how the petitioner is prejudiced, or is there any likelihood of causing miscarriage of justice to him, owing to the order impugned passed by all the three revenue courts. There is no illegality, perversity, ambiguity or infirmity in the order under challenge.

32. Resultantly, instant writ petition, being devoid on merits and misconceived, is **dismissed** with no order as to costs.

Order Date :-24.4.2025

vinay/vkg/VR/sumit