Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2125 OF 2007

1. Bombay Wire Ropes Limited
   a company incorporated under the Companies Act, 1956 having its office at 401/405, Jolly Bhavan – I, 10, New Marine Lines, Mumbai – 400 020.
2. Mihir Kumar Chakraborty
   Executive Director and Shareholder of Petitioner No.1 above named residing at C, 403, Yashodeep Bldg., Kolshet Road, Thane – 400 607

....Petitioners

Versus

1. State of Maharashtra
2. Additional Collector and Competent Authority, under Urban Land Ceiling and Regulation Act, having his office at Collector's Office, 2nd Floor, Thane
3. Secretary, Government of Maharashtra, Urban Development Department, Mantralaya, Mumbai – 400 032
4. Thane Municipal Corporation
   Through the Assistant Director of Town Planning, having office at Thane Municipal Corporation Building, Thane (West), District Thane, Maharashtra
5. Maharashtra Housing & Area Development Authority, MHADA Building, Bandra (East), Mumbai - 51.

...Respondents

Dr. Milind Sathe, Senior Advocate, a/w Mr. Vineet B. Naik, Senior Advocate, Mr. Bhushan Deshmukh, Mr. Hitesh Jain, Ms. Krushi Barfiwala & Ms. Rima Desai, I/b Parinam Law Associates, for the Petitioners.

Mr. N. V. Walawalkar, Senior Advocate, a/w Mr. Y. S. Khochare, AGP for Respondent nos.1 to 3/State.

Mr. R. S. Apte, Senior Advocate, a/w Mr. N. R. Bubna, for Respondent nos.4.

Ms. Aparna Murlidharan, I/b Mr. P. G. Lad, for Respondent no.5.

CORAM: B. R. GAVAI &
N. J. JAMADAR, JJ
RESERVED ON: 16th January, 2019
PRONOUNCED ON: 13th February, 2019

JUDGMENT:- (Per N. J. Jamadar, J.)

1. In this petition, under Article 226 of the Constitution of India, initial challenge was to:

(i) the settlement order dated 30th November, 2004 passed by the Competent Authority under Section 8(4) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'the Principal Act');

(ii) the vesting notification dated 3rd March, 2005 under Section 10(3);

(iii) the possession notice issued on 7th April, 2005 under Section 10(5) and

(iv) the order passed by the State Government dated 28th August, 2006, under Section 34 of the Principal Act.

The Petitioners had prayed for quashing and setting aside of the aforesaid settlement, notification, notice and order. The Petitioners had further prayed for the direction to the Respondents to allow the Petitioners to implement the scheme under Section 20(1)(a) of the Principal Act, settled on 7th November, 1990, and, alternatively, prayed for re-computation of the excess vacant land and thereafter allow the Petitioners to

implement a fresh scheme under Section 20 of the Principal Act in respect of the entire excess vacant land so computed. As a further alternative, the Petitioners have prayed that the Respondents be directed to restore the land admeasuring 22,835.75 sq. mtrs. surrendered by the Petitioners on 6th January, 1994 for the benefit of Maharashtra Housing and Area Development Authority (MHADA), under the scheme dated 7th November, 1990.

2. Though, the *lis* has a chequered history, spanning for over 30 years, yet, the essential background facts can be summarised as under:

Petitioner no.1 is a Company incorporated under the Indian Companies Act, 1956. On the date the Principal Act came into force, the Petitioner no.1 was holding lands within the limits of Thane urban agglomeration. The Petitioners, thus, filed a return under Section 6 of the Principal Act. On 30th April, 1984 an order came to be passed under Section 8(4) of the Act declaring an area of 93,622.01 sq. mtrs. as excess land, out of its total holding of 1,44,423.81 sq. mtrs. On 10th March, 1988, an order came to be passed under Section 20(1)(a) of the Act for the purpose of providing sites and services, core houses and construction of tenements. An area admeasuring 93,522.61 sq.

mtrs. came to be exempted thereunder. On 7th November, 1990, another order under Section 20(1)(a) of the Act was passed to modify the aforesaid scheme dated 10th March, 1988, and an area admeasuring 74,906.127 sq. mts came to be exempted for providing plots/construction of tenements. The Petitioners were directed to hand over an area admeasuring 22,835.375 sq. mtrs. to the Government, free of cost, and accordingly, the Petitioners surrendered the said area on 6th January, 1994.

3. Certain supervening events occurred. Restrictions came to be imposed on development, on account of the chemical zone. The development plan for Thane Municipal Corporation was sanctioned by the State Government on 28th April, 1995 and, subsequently, Development Control Regulations for Thane Municipal Corporation were sanctioned. Resultantly, several parcels of the Petitioners land were rendered non-buildable. Thus, the Petitioners could not implement the scheme sanctioned on 7th November, 1990. In view of the aforesaid developments, the competent authority passed a fresh order under Section 8(4) of the Act and declared an area admeasuring 53,585.074 sq.mts. as excess vacant land. This order came to be further revised on 30th November, 2004, and now the competent authority declared an area admeasuring

69,356.394 sq. mtrs. as the excess vacant land. The Petitioners pointed out to the competent authority the infirmities in the aforesaid computation and declaration of excess vacant land. However, the Respondents paid no heed. The competent authority, without providing an effective opportunity to the Petitioners, issued a vesting notification under Section 10(3) of the Act. A notice under Section 10(5) of the Act demanding the delivery of possession came to be issued on 7th April, 2005.

4. The Petitioners thus preferred a revision before the State Government under Section 34 of the Act on 28th April, 2006. The then Hon'ble Chief Minister heard the Petitioners. By order dated 28th August, 2006, the Government, *inter alia*, upheld the settlement of excess vacant land to the extent of 69,356.39 sq. mtrs. However, the proceedings initiated under Section 10(3) and 10(5) of the Act as regards 19023.23 sq. mtrs. area, which fell in a residential zone, were quashed and set aside. The competent authority was further directed to sanction a scheme under Section 20 of the Act in respect of the said area admeasuring 19023.23 sq. mtrs. and the Petitioners were directed to implement the scheme within two years of its sanction.

Being aggrieved by and dissatisfied with the aforesaid orders, the Petitioners invoked the writ jurisdiction of this Court.

5. On 11th April, 2007, a Division Bench of this Court was persuaded to allow the petition. This Court was of the view that the computation of the excess land was erroneous and thus the matter deserved to be relegated back to the Additional Collector and the competent authority for computation afresh, as regards the excess vacant land held by the Petitioners and the implementation of the exemption order by the Petitioners in that context. The petition came to be allowed with the following directions:

> "(i). The order dated 28.8.2006 passed by the State Government under Section 34 of the said Act as also the order dated 30.11.2004 are set-aside and the matter is remanded back to the Additional Collector and the Competent Authority for computation afresh in respect of the excess vacant land held by the Petitioners and consequent surrender of land as per the policy of the State Government in respect of exempted lands. The same to be computed by the Additional Collector and the Competent Authority in accordance with law and subject to the directions as contained in this order.
>
> (ii). The Additional Collector and the Competent Authority would take into consideration the area of 22,597 sq.mtrs surrendered by the Petitioners pursuant to the first exemption order. The said area of 19,023 sq.mtrs. should be added to the area which would be developable by the Petitioners and thereafter the area to be surrendered to the State Government as per the policy should be computed.
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> (iii). The non-buildable area coming under various reservations should be excluded whilst computing the excess vacant land held by the Petitioners."

6. The Respondents assailed the aforesaid order before the Supreme Court in Special Leave to Appeal (Civil) CC No.6485 of 2007. On 3rd August, 2007, while issuing notice, the Supreme Court was pleased to direct that, '*status quo* as of today shall be maintained in the meantime'. By order dated 5th May, 2008, in Civil Appeal No.3227 of 2008, the Supreme Court was pleased to set aside the order passed by this Court. The relevant part of the order reads as under:

> "The impugned order of the High Court is, accordingly, set aside. The matter is remanded to the High Court to dispose of the issues after considering the counter filed by the appellant. Writ Petition No.2125/2007 is restored to the file of the High Court. Appellant shall file counter affidavit within four weeks from today. Rejoinder affidavit to be filed within two weeks thereafter. We request the High Court to dispose of the writ petition within three months after the filing of the counter and rejoinder affidavits. All the contentions are open to the parties before the High Court."

The Supreme Court further directed that the Thane Municipal Corporation and MHADA shall be impleaded as party Respondent to the writ petition.

7. In the meanwhile, the parliament had enacted the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as 'the Repeal Act'). The State Government adopted the Repeal Act under Clause (2) of Article 252 of the Constitution of India on 29th November, 2007. Thus

the Principal Act stood repealed in the State of Maharashtra with effect from 29th November, 2007.

8. In the light of aforesaid developments and legislative intervention Respondent nos.4 and 5 were impleaded and the petition came to be amended. The Petitioners, thus, claimed that in view of the repeal of the Principal Act, the proceedings before the competent authority, which were at the stage of computation of excess vacant land under Section 8(4) of the Principal Act, abated. Since the Respondents had not taken possession of the excess vacant land, the entire land stood released from the provisions of the Principal Act. In addition to the prohibitory reliefs, the Petitioners now also sought the restoration of possession of the lands admeasuring 22,835.375 sq. mtrs., surrendered by the Petitioners on 6th January, 1994.

9. It is evident that in view of the legislative intervention, in the form of the Repeal Act, 1999, and its adoption by the State Government with effect from 29th November, 2007, the subject matter of the petition, which was initially legality and justifiability of the action under the provisions of the Principal Act, catapulted into validity of the actions thereunder and sustainability of the proceedings itself under the Principal Act, also.

10. It may be apposite to note the resistance put-forth by the Respondents, at this stage. Respondent nos.1 to 3 contested the claim by raising three-fold contentions. Firstly, the order passed by this Court dated 11th April, 2007 is of no assistance to the Petitioners as initially *status quo* was ordered by the Supreme Court, on 3rd August, 2007, and later on, by order dated 5th May, 2008, the aforesaid order came to be quashed and set aside. Thus, the binding efficacy of the order passed by the Government under Section 34 dated 28th August, 2006 and the order passed by the competent authority under Section 8(4) of the Principal Act on 30th November, 2004 stood restored. Hence, the action taken by the Respondents in pursuance of the said orders are perfectly valid and enforceable. Secondly, the authorities have taken possession of the excess vacant land in pursuance of the aforesaid orders on 15th April, 2005 and also handed over the possession of an area admeasuring 50,333.07 sq. mtrs. to the Thane Municipal Corporation on 30th May, 2005. Therefore, the action of the Respondents – authorities is saved. Thirdly, it was specifically contended that the Petitioners had even made an application on 13th October, 2006 seeking exemption under Section 20 of the Act in respect of 19,023.33 sq. mtrs. of land, set out in the

order passed by the Government under Section 34 of the Act, which was subsequently assailed by the Petitioners. In pursuance of the said application, an exemption order came to be passed on 28th February, 2007, exempting an area admeasuring 13,264.87 sq. mtrs. The Petitioners, therefore, cannot question legality and correctness of the said order. The exemption order is saved by the Repeal Act.

11. Respondent no.4 – Thane Municipal Corporation, has asserted that the delivery of possession of an area admeasuring 50,333.07 sq. mtrs. is evidenced by the possession receipt dated 30th May, 2005. Respondent no.4 – Corporation has, thereafter, taken steps for the development of the said land which was reserved for Thane Municipal Transport, in a development plan. Accordingly, the tenders have been floated and work of filling in low lying area, and construction of RCC compound wall to encircle the plot have been duly executed and completed. Respondent no.4, thus, claimed to be in exclusive possession of the portions of the excess vacant land allotted to it.

12. Respondent no.5 – MHADA, on its part, contended that the land admeasuring 22,835.375 sq. mtrs., which was handed over to the State Government by the Petitioners, as a

part and parcel of the order dated 7th November, 1990 issued under Section 20(1)(a) of the Principal Act, was, in turn, handed over to Respondent no.5 on 30th November, 1994. Respondent no.5 specifically contends that the said exemption order dated 7th November, 1990 and the actions taken thereunder are expressly saved by Section 3(1)(b) of the Repeal Act, 1999. Since the said land was delivered to Respondent no.5 in the year 1994, as a part of a bargain, evidenced by the exemption order dated 7th November, 1990, the claim of the Petitioners for restoration of the said portion of the land was stated to be legally unsustainable.

13. At this juncture, to narrow down the controversy, it appears necessary to note the uncontroverted facts. They can be enumerated as under:

(**a**) In pursuance of a return filed by the Petitioners under Section 6 of the Principal Act, an order came to be passed under Section 8(4) on 30th April, 1984 declaring the total holding of the Petitioners to be 1,44,433.81 sq. mts and surplus vacant land of 93,522.61 sq. mtrs..

(**b**) On 10th March, 1988 an order came to be passed under Section 20(1)(a) of the Act, wherein the total

surplus area admeasuring 93,522.61 sq. mtrs. came to be exempted from the application of the provisions of the Act.

(c) On 7th November, 1990, the exemption order under Section 20(1)(a) came to be modified and a special dispensation was given. Total surplus area was computed at 1,90,211.61 sq. mtrs. and the area admeasuring 74,906.127 sq. mtrs. came to be exempted. One of the conditions was the surrender of an area admeasuring 22,835.375 sq. mtrs. to the State Government, free of cost.

(d) Possession of the said area admeasuring 22,835.375 sq. mtrs. was delivered by the Petitioners to the Additional Collector, Thane, on 6th January, 1994. The said land parcel changed the hands and came to be delivered to Respondent no.5 on 30th November, 1994.

(e) On 9th April, 2003 a revised order came to be passed under Section 8(4) and thereby the excess vacant land was computed at 53,585.074 sq. mtrs. The Schedule indicates that the area of land delivered to MHADA came to be excluded from consideration.

(f) The aforesaid order dated 9th April, 2003 came to be

further revised on 30th November, 2004 and now the total excess vacant land was computed at 69,356.394 sq. mtrs.

(g) On 3rd March, 2005, a notification came to be issued under Section 10(3) of the Principal Act and thereby the excess vacant land stood vested in the State Government.

(h) On 7th April, 2005, notice under Section 10(5) of the Act came to be issued calling upon the Petitioners to hand over the possession of the excess vacant land which vested in the State Government.

(i) Thereupon, the Petitioners filed a revision application before the State Government, and therein, on 28th August, 2006, the impugned order was passed.

(j) In pursuance of the application of the Petitioners a scheme under Section 20(1)(a) of the Act came to be sanctioned on 28th February, 2007 in respect of the area admeasuring 19,023.33 sq. mtrs., which was shown to be in the residential zone.

14. Indeed, the said fact of the scheme under Section 20, sanctioned on 28th February, 2007, is put in contest by the petitioners. The core controversy revolves around taking over of the possession of excess vacant land on 15th April, 2005 and the alleged delivery of the plots of land admeasuring 50,333.07 sq.

mtrs. by Respondent no.2 to Respondent no.4 on 30th May, 2005, as claimed by the Respondents. The very factum of Respondent no.2, having lawfully taken possession of the excess vacant land and, in turn, delivered it to Respondent no.4, is put in issue.

15. The aforesaid controversy, on facts, has significant bearing on the rival claims, in law. The fate of the rival claims hinges upon the application of the provisions of the Repeal Act, which incorporates the saving clause and thereby protects the legality and validity of certain proceedings, orders and actions under the Principal Act. The applicability of those saving clauses has been made dependent upon existence and proof of certain facts. Hence, the aforesaid controversy at hand.

16. Before adverting to record the submissions of the learned Counsels for the parties, it may be expedient to extract the relevant sections of the Repeal Act.

> **"2**. **Repeal of Act 33 of 1976**.—The Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the principal Act) is hereby repealed.
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> **3**. **Savings.**— (**1**) The repeal of the principal Act shall not affect—
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> (**a**) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;
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> (**b**) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken

thereunder, notwithstanding any judgment of any court to the contrary;

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

(**2**) Where—

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

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

4. **Abatement of legal proceedings**.—All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act insofar as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

17. From the text of Section 3(1) of the Repeal Act, it becomes abundatly clear that the Repeal Act expressly saves the vesting of any vacant land under sub-section (3) of Section 10, provided the possession of such vacant land has been taken over by the State Government. Secondly, it saves the validity of any order granting the exemption under sub-section (1) of Section 20 and also any action taken thereunder, notwithstanding any judgment of any Court to the contrary. Thirdly, it also saves any payment made to the State

Government as a condition for granting exemption under sub-section (1) of Section 20. Section 4 of the Repeal Act, on the other hand, gives a complete quietus to all the proceedings relating to any order made or purported to be made under the Principal Act, pending before any Court, Tribunal or other authority, on the day immediately before the Repeal Act comes in force. The legislative intent is thus clear that except the proceedings and actions, which are expressly saved under Section 3 of the Act, rest of the proceedings under the Principal Act shall abate.

18. In this backdrop, Dr. Sathe, the learned Senior Counsel advanced a two-pronged submission. Firstly, according to the learned Senior Counsel, in the instant case, in view of the order passed by this Court on 11th April, 2007 whereby the proceedings were remitted to the competent authority for a fresh computation of the excess vacant land under Section 8(4) and also to consider the grant of exemption contemplated under Section 20 of the Act, on the day the Repeal Act came into force i.e. 29th November, 2007, all the proceedings lapsed in view of Section 4 of the Repeal Act.

19. Amplifying this submission, it was urged that in view of the setting aside of the order of the Government under

Section 34 of the Act, by this Court, and the remittance of the matter to the competent authority, the proceedings stood relegated to the stage of the draft settlement of excess vacant land under Section 8(4) of the Act and they continued to be so posited on the day the Repeal Act came into force. As a necessary corollary, it was urged that the notification issued by the competent authority under Section 10(3) and the consequent notice under Section 10(5) also stood effaced. Thus, the proceedings in respect of the subject land cannot be said to have reached the stage of vesting of the land in the State Government under Section 10 of the Act. The learned Senior Counsel would further urge that the fact that on 5th May, 2008, the Supreme Court quashed and set aside the aforesaid order passed by this Court on 11th April, 2007, is of no avail to Respondents as on the date the Repeal Act came into force, the order passed by this Court was holding the field. Resultantly, consequence of lapsing of the proceeding under the Principal Act is inevitable and must follow.

20. Secondly, it was urged, with a degree of vehemence, that even if the claim of the Respondent authorities that the provisions of Section 3 of the Repeal Act come to their aid is considered, yet, it becomes evident that even the provisions of

Clause (a) of Section 3(1) of the Repeal Act are far from attracted. The learned Senior Counsel strenuously urged that the claim of the Respondent authorities that they had taken possession of the excess vacant land, allegedly vested in the State Government under Section 10(3) of the Principal Act, is demonstrably false and fraught with contradictions and infirmities. It was submitted that on the one hand the claim that possession of the excess vacant land was taken on 15th April, 2005, is factually unsubstantiated, and on the other hand, the said claim is legally unsustainable as the possession can not be said to have been taken in conformity with the provisions of Section 10(5) and (6) of the Principal Act as the 30 days mandate has not been adhered to. Thus, the Respondent authorities are precluded from drawing support and sustenance to their illegal action from the provisions of Section 3(1)(a) of the Repeal Act. To put in other words, the learned Senior Counsel urged that since the possession of the excess vacant land was not taken in accordance with the provisions of Section 10(5) and (6) of the Act, vesting of the said land is not protected and saved by Section 3 of the Repeal Act.

21. In opposition to this, Mr. Walawalkar, the learned Senior Counsel stoutly submitted that the proceedings do not

abate under Section 4 of the Act. On the contrary, the action of the Respondent – Authority is totally saved by the provisions of not only Clause (a) of sub-section (1) of Section 3 but also Clause (b) thereof. The learned Senior Counsel urged with tenacity that the Petitioners can not draw much mileage from the fact that 30 days notice was not given to the Petitioners before taking over possession of the excess vacant land. Since the vesting of the excess vacant land in the State Government is indisputable and there is material to indicate not only taking over of the possession by Respondent no.2 but also to show further parting of the said possession in favour of Respondent no.4, much prior to the adoption of the Repeal Act by the State, the claim of the Petitioners was said to be unsustainable.

22. The learned Senior Counsel further submitted that the Petitioners had suppressed from this Court the fact that the Petitioners had acquiesced in the order passed by the Government under Section 34 of the Principal Act and submitted an application for exemption under Section 20(1)(a) of the Principal Act. Accordingly, a scheme came to be sanctioned on 27th February, 2007. The petition had came up for hearing before this Court on 11th April, 2007. Had all these facts been brought to the notice of this Court, probably, a

different view would have been taken. Nonetheless, in view of the provisions contained in Clause (b) of sub-section (1) of Section 3 of the Repeal Act, the validity of the said order granting exemption under sub-section (1) of Section 20 and all the actions taken thereunder are saved. Thus, according to the learned Senior Counsel for Respondent nos.1 to 3, the validity of the said order under Section 20, is beyond the pale of challenge.

23. We have given careful consideration to the material on record and the aforesaid rival submissions on behalf of the parties. In the backdrop of the controversy, we find that the aspect of the passing of the exemption order under Section 20 of the Act on 28th February 2007, and its consequences upon the claims of the parties, are required to be considered first. We proceed to do so.

24. It is undisputable that the impugned order, passed by the Government under Section 34 of the Principal Act, gave liberty to the Petitioners to seek exemption under Section 20 of the Principal Act as regards the area admeasuring 19,023.33 sq. mtrs. falling in the residential zone. The record indicates that, in pursuance of the said order, an application was filed on 13th October 2006 by one S. S. Runwal, Constituted Attorney of

Petitioner No.1. Pursuant thereto, the competent authority passed the order on 28th February 2007. It is imperative to note that the Writ Petition was filed on 7th February 2007. The petition was heard and decided on 11th April 2007. Concededly, the twin facts, i.e., Petitioner No.1 had already filed an application in adherence to the order passed under Section 34 of the Principal Act, and an order under Section 20 of the Act was already passed on 28th February 2007, were not brought to the notice of the Court.

25. The submission on behalf of Respondent Nos. 1 to 3 that Petitioner No.1 had acquiesced in the order passed by the Government under Section 34 of the Act is required to be appreciated in the aforesaid factual backdrop. Evidently, the Petitioners could not have challenged the impugned order and sought exemption under the very same order, at least, without disclosing the said fact. The grant of exemption under Section 20 of the Act even before the petition could be heard by this Court on 11th April 2007, could not have been construed as insignificant or inconsequential. It is not a case of the Petitioners, simply and passively, allowing the consequences of the impugned order to take effect, but, by a positive act, the Petitioners sought to enforce a part of the impugned order,

albeit favourable to them. We do not mean that the Petitioners could not have challenged that part of the order which was adverse to their interest, but it was incumbent upon the Petitioners to disclose the fact that, on their own volition and initiation, a part of the impugned order came to be enforced.

26. Dr. Sathe, the learned Senior Counsel attempted to wriggle out of the situation by putting forth a submission that the Petitioners had revoked the power of attorney executed in favour of Shri S.S. Runwal, who had made the application, dated 13th October 2006, for sanction of the Scheme under Section 20. The Petitioners, thus, endeavoured to disown the said application and the order passed thereon. It is pertinent to note that the Petitioners took no pains to substantiate the said claim, even in the rejoinder, except asserting that the Petitioners had revoked the Power of Attorney in favour of Shri S. S. Runwal. No material was placed on record in support of the said claim. We do not know as to when the Power of Attorney was revoked. It is interesting to note that one of the affidavits in rejoinder, dated 11th August 2016, came to be filed by one Sandip S. Runwal, the Constituted Attorney of Petitioner No.1. In our view, the said fact further confounds the confusion. We are, therefore, persuaded to hold that the Petitioners cannot

be permitted to wriggle out of the situation on the strength of a bald assertion that the Constituted Attorney's power was revoked.

27. Once it is held that the exemption order under Section 20 of the Principal Act was lawfully passed, in pursuance of an application made on behalf of Petitioner No.1, the submission on behalf of Respondent Nos.1 to 3 that the Petitioners had acquiesced in the impugned order, passed by the Government under Section 34 of the Act, becomes justifiable. Apart from this legitimate inference of acquiescence, the existence of a valid exemption order under Section 20 has multiple pivotal implications on the claim of the Petitioners, in view of Section 3 of the Repeal Act.

28. In view of the provisions of Clause (b) of Section 3(1) of the Repeal Act, the validity of any exemption order under Sub-section (1) of Section 20 of the Principal Act and also the action taken thereunder are declared immune from the consequences of repeal. The non-obstant clause, with which Clause (b) ends, makes the legislative intent clear and explicit. It implies that despite a judgment by a Court of competent jurisdiction, whereby an order of exemption or condition thereunder or any action taken thereunder is declared invalid,

the validity of the said order and condition or action thereunder is saved and protected. Thus, the legal effects of such order, condition or action thereunder cannot be set at naught, despite a judgment of any Court to the contrary.

29. A profitable reference in this context can be made to the Full Bench judgment of this Court in the case of ***Maharashtra Chamber of Housing Industry, Mumbai & Ors. Vs. State of Maharashtra & Anr.***[1], wherein the majority view, as recorded in paragraph 135, reads as under :-

> *"135. As a result of the above discussion the questions referred to us are answered as under:-*
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> *(a) That the repeal of the Principal Act shall not affect the validity of the order of exemption under Section 20(1) of the Principal Act and all consequences following the same including keeping intact the power to withdraw the said exemption by recourse to Section 20(2) of the Principal Act. Further, merely because Section 20(2) is not specifically mentioned in the saving clause enacted by Section 3(1)(b) of the Repeal Act that does not mean that the power is not saved. The said power is also saved by virtue of applicability of Section 6 of the General Clauses Act, 1897. That Section of the General Clauses Act, 1897 applies to Section 3(1)(b) of the Repeal Act.*
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> *(b) Once having held that the power to withdraw the exemption also survives the repeal of the Principal Act, then, all consequences must follow and the said power can be exercised by the State Government in accordance with law. That power and equally all ancillary and incidental powers to the main power to impose conditions are also saved and survive the repeal. Meaning thereby the terms and conditions of the order of exemption can be enforced in accordance with law.*

12014 (6) Mh.L.J. 829.

(c) Question Nos.1 and 2 in the AFFIRMATIVE, by holding that Section 6 of the General Clauses Act, 1897 applies to the savings of the exemption order including all terms and conditions thereof, validity of which or any action taken there-under has been saved by Section 3(1)(b) notwithstanding any judgment of any court to the contrary.

(d) Question Nos.3 and 4 will have to be answered as above, but by clarifying that though it would be open for the State to enforce the exemption order and terms and conditions thereof, validity of which is saved by the Repeal Act, but having regard to the language of Section 20(2) of the Principal Act it cannot be held that same can be enforced only by withdrawal of the order of exemption in terms of subsection (2) of Section 20, which power also survives the repeal of the Principal Act. In other words, though Section 3(1)(b) of the Repeal Act read with Section 6 of the General Clauses Act, 1897 states that repeal of the Principal Act shall not affect the validity of the exemption order passed under Section 20(1) of the Principal Act or any action taken there-under notwithstanding any judgment of any court to the contrary, still the obligations and liabilities incurred voluntarily under the exemption order by the person holding the vacant land in excess of ceiling limit need not be enforced only by exercise of powers under subsection (2) of Section 20 of the Principal Act, but by all other legally permissible means."

30. The Full Bench of this Court has, thus, held that not only the exemption order under Section 20(1), and the conditions and actions thereunder, are saved but even the power of the State Government under sub-section (2) of Section 20 of withdrawing exemption is also saved by virtue of applicability of Section 6 of General Clauses Act of 1897. In clause (b), extracted above, the Full Bench has held that apart

from the power to withdraw the exemption which also survives the repeal of the Principal Act, all ancillary and incidental powers to the main power to impose conditions are also saved and survive the repeal.

31. In paragraph 63, the Full Bench observed, *inter-alia,* as under :-

> *"63. In the case of the lands which are subject matter of a valid exemption order and validity of which is not affected even by any court's order to the contrary and equally any action taken there-under is not affected by repeal of the Principal Act and is saved though the same may not have been upheld by the Court, then, the intent and purpose is not to allow any person holding the excess vacant land and which is already vested in the State to escape the legal consequences resulting from the order of exemption. If that order is passed in order to sub-serve public interest and to uphold it and to relieve undue hardship, then, such an order of exemption which may be conditional visits the person with consequences."*
>
> *(emphasis supplied)*

32. Reverting to the facts of the case, in the light of aforesaid legal position, it becomes abundantly clear that the exemption order dated 28th February 2007 binds the Petitioners. The consequences emanating from the said exemption order cannot be obviated, on any premise. As already indicated, the said exemption order was not brought to the notice of this Court, before passing the order dated 11th April 2007, and thus it's validity has not been questioned much less tested. Even if, we assume that the said exemption order, dated

28th February 2007 would also have been set aside by this Court, then also, its validity is saved by clause (b) of Section 3(1) of the Repeal Act. The fact that the preceding order of determination of excess vacant land, dated 30th November 2004, was set aside, therefore, does not affect its existence and validity.

33. A useful reference in this regard can be made to the judgment of the Supreme Court in the case of ***Smt. Darothi Clare Parreira & Ors. Vs. State of Maharashtra & Ors.***[2], wherein also the land holders had made an application under Section 21 of the Principal Act, and simultaneously, filed a Writ Petition in the High Court challenging the Notification issued under Section 10(3). The appellants in the said case had also not mentioned this fact of their filing application under Section 20 and rejection thereof before the publication of the Notification under Section 10(3). In the said case, it was urged before the Apex Court that the competent authority had no power to have the Notification under Section 10(3) published in the gazette until the application either under Section 20 or 21 is disposed of. The Supreme Court negatived the said contention and observed as under :-

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2AIR 1996 Supreme Court 2553.

> *"6. The previous owner stands divested or right, title and interest in the land subject to the right to make application provided under Section 20 and 21. It is difficult to accept the contention of the learned counsel for the appellants that the competent authority has no power to have the notification under Section 10(3) published in the Gazette until the application either under Section 20 or 21 is disposed of. The very language of Sections 20 and 21 and the exercise of the power thereunder would arise only when the land stands vested in the Government. The power of examination and exemption would arise only when the Government becomes the owner and the erstwhile owner seeks to obviate the hardships under Section 20 or to subserve the housing scheme for weaker sections under Section 21 as envisaged thereunder. Thereat, the Government is required to consider whether the proposals made by the erstwhile owner for undertaking the scheme as envisaged under Section 21 or hardships as envisaged under Section 20 for exemption would merit consideration. In this case, admittedly, the application under Section 20 came to be filed though that was suppressed before the High Court and this Court and came to be dismissed before notification under Section 10(3) of the Act was published. It also appears, as stated earlier, that application under Section 21 was filed on March 29, 1979, the date on which the appellants had filed the writ petition in the High Court. It would, therefore, be seen that the application came to be filed much after the date of the vesting and publication of the notification under Section 10(3) of the Act. The effect of the vesting is not contingent upon filing an application for disposal under either Section 20 or 21."*
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> *(emphasis supplied)*

34. Reference can also be made to the ruling of the Supreme Court in the case of ***Special Officer & Competent Authority Urban Land Ceilings, Hyderabad & Anr. Vs. P.S. Rao***[3]**.** In this case, it was urged on behalf of the State that the application for grant of exemption under Section 20(1)(b) of the Act is not maintainable once the excess land has been declared

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3AIR 2000 SC 843.

as the excess land has vested in the State under Section 10, in as much as the declarant cannot be said to be "*holding*" the land any longer.

35. Repelling the aforesaid contention and pointing out the distinction in the meaning of the word "*hold*" in Section 20(1)(a) and Section 2(1) of the Principal Act the Supreme Court expounded the law as under :

> *"9 In our view, in the context of Section 20(1)(a) and Section 20(1)(b), the definition given in Section 2(1) cannot be applied. The reason is that such a construction will make Section 20 unworkable and otiose. We have pointed out above that it is not possible to make any meaningful application for exemption under Section 2(1)(a) or (b) unless the exact quantum of excess is determined under Section 10 after following the various provisions of the Act relating to statutory deductions and mode of computation. If the contention of the State referred to above is to be accepted, then the peculiar position will be as follows. As stated by us, before the excess is determined, a person will not able to seek exemption because he does not know what is the actual excess land held and once the excess is determined, he cannot apply because he is not holding the excess land. Thus, the entire object of Section 20 will be frustrated. That is why we say that the definition of the words 'to hold' in Section 2(1) cannot be applied in the context of Section 2(1) (a) or Section 2(1)(b)."*
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> *(emphasis supplied)*

36. In view of the aforesaid enunciation of the legal position, it becomes clear that making of the application for exemption under Section 20(1) of the Principal Act, post determination of the excess vacant land, vide order dated 30th November 2004, and vesting of the said vacant land in the State Government, vide Notification under Section 10(3), dated 3rd

March 2005, estopps the Petitioners from even questioning the legality and correctness of the determination under Section 8(4) and the vesting of the vacant land under Section 10(3). This inference and consequence is further strengthened by the Saving Clause, incorporated in Section 3(1)(b) of the Repeal Act, as the exemption order with all its attendant facets gets insulated from challenge.

37. The aforesaid position has a material bearing also on the claim of the Petitioners for restoration of land admeasuring 22,835.375 sq. mtrs., which was surrendered on 6th January 1994 in terms of the earlier exemption order dated 7th November 1990. From perusal of the said exemption order, it becomes evident that one of the conditions was that the land admeasuring 22,835.375 sq. mtrs. was to be handed over to the State Government, free of cost. A submission was advanced on behalf of the Petitioners that since the said exemption order stood cancelled by subsequent determination of excess vacant land and the later exemption order, the State Government cannot retain the said land.

38. This submission looses sight of the fact that the last order under Section 8(4) as well as the vesting Notification under Section 10(3) proceed on the premise that the Petitioners

had surrendered the said land admeasuring 22,835.375 sq. mtrs. to the State Government. Even the exemption order, dated 28th February 2007, is based on the said computation. The basis of determination, as mentioned in sub-clause (c) of the Schedule appended to the said exemption order, is the computation of excess vacant land under the order dated 30th November 2004. In this view of the matter, the said surrender of land admeasuring 22,835.375 sq. mtrs. partakes the character of a condition attached to the exemption order, dated 28th February 2007, and, thus, stands protected and survives the repeal.

39. This leads us to first challenge based on the premise that the vesting of the vacant land, being not accompanied by possession, on the day the Repeal Act came into force, is not saved. The challenge, as indicated above, is two fold. We deem it appropriate to first consider the submission based on the abatement of the proceedings under Section 4 of the Repeal Act.

40. Dr. Sathe, the learned Senior Counsel would urge that Section 4 of the Repeal Act came into effect, on the instant, on 29th November, 2007 and all the proceedings abated. It was further submitted that the consequences brought about by statutory intervention, in the form of repeal, do not whither

away by the subsequent order of the Supreme Court dated 5th May, 2008, whereby Supreme Court set aside the order passed by this Court on 11th April, 2007. To bolster up this submission Dr. Sathe, placed reliance upon a Constitution Bench judgment of the Supreme Court in the case of ***K. Prabhakaran vs. P. Jayarajan.***[4] In the said case, the following question, *inter alia,* arose for decision:

> "Whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment passed on him would have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than 2 years was disqualified from filing nomination and contesting the election on the dates of nomination and election?"

The Supreme Court answered the aforesaid question in the following terms:

> "We are, therefore, of the opinion that an appellate judgment of a date subsequent to the date of nomination or election (as the case may be) and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact disqualified from filing nomination and contesting the election on the date of nomination or election (as the case may be)."

41. Drawing an analogy, based on the aforesaid pronouncement, it was submitted that the order of the Supreme

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4 (2005) 1 SCC 754.

Court dated 5th May, 2008, does not revert or undo the lapsing of the proceedings brought about by Section 4 of the Repeal Act.

42. From the perusal of the aforesaid pronouncement, it becomes evident that the question that arose before the Supreme Court had its genesis in the election dispute. It is trite that the acceptance or rejection of the nomination, on the count of disqualification etc., is a matter of moment and time is essence in such election disputes. The subsequent removal of the disqualification, based on the judgment of the Appellate Court, will not set the clock back. The aforesaid judgment, in our considered view, may not govern the controversy at hand with equal force.

43. It is pertinent to note that before the Repeal Act came into force in the State of Maharashtra, the Supreme Court on 3rd August, 2007 had directed that, "*status quo* as of today shall be maintained in the meantime". In the peculiar circumstances, we are of the view that the '*status quo*' is required to be construed not only in the restricted sense qua the question of possession of the subject lands but also to affect the proceedings which were to be taken up in pursuance of the order passed by this Court dated 11th April, 2007. In view of the order passed by the Supreme Court on 3rd August, 2007, it

would be rather hazardous to hold that what held the field on 29th November, 2007, was only the order passed by this Court on 11th April, 2007.

44. Even otherwise, this issue of lapsing of the proceedings under Section 4 of the Repeal Act pales in significance if the case is covered by the saving clause incorporated in Section 3 of the Repeal Act. We have already considered the applicability of Section 3(1)(b) of the Repeal Act. Now, the applicability of Section 3(1)(a).

45. From the phraseology of Section 3(1)(a) of the Repeal Act (extracted above), it becomes crystal clear that where the possession of the vacant land has not been taken over by the State Government or by any person duly authorised by the State Government in this behalf or by the competent authority, the proceedings under the Act would not survive the repeal of the Principal Act. Mere vesting of the vacant land in the State Government, by operation of law, pursuant to a notification under Section 10(3), without accompanied by actual possession does not bring into operation Section 3(1)(a) of the Repeal Act. Thus, the factum of possession assumes critical significance.

46. In the instant case, apart from questioning the validity of alleged action of taking over possession, the

Petitioners have put in contest the very factum of possession of the disputed land with the authorities of the State. Inviting our attention to the panchnama evidencing the alleged delivery of possession dated 15th April, 2005, Dr. Sathe urged that the unilateral and self-serving panchnama is of no avail to the State. Evidently, the panchnama dated 15th April, 2005 records that the possession of the vacant lands admeasuring 69,356.39. sq. mtrs. was taken in presence of the panch witnesses, but none was present for the tenure holder, Petitioner no.1.

47. Dr. Sathe, the learned Senior Counsel strenuously urged that the falsity of the claim of the authorities that the possession was subsequently handed over to Respondent no.4, in terms of the possession receipt dated 30th May, 2005, is borne out by the fact that the letter calling upon the Thane Municipal Corporation to take over the possession came to be addressed on the succeeding date i.e. 31st May, 2005. Laying emphasis upon the intrinsic evidence of the panchnama dated 15th April, 2005 and the aforesaid apparent inconsistency, it was submitted that the claim is unworthy of credence.

48. Per contra, Mr. Apte, the learned Senior Counsel for Respondent no.4 submitted that vesting of the excess vacant land in the State Government is evidenced by not only mutation

entries in respect of the said lands in the record of right but also there is evidence to show that after obtaining the possession of the vacant land, designated as reserved in the development plan of Thane Municipal Corporation, actual development of the said land was undertaken. Reliance was placed on the record of rights which indicate that as of 29th December, 2005, the subject lands were mutated in the name of the State Government pursuant to Mutation Entry No.2270. To demonstrate that Respondent no.4 had carried out developmental activities over the subject lands, the correspondence between the Thane Municipal Transport Undertaking and the Thane Municipal Corporation, the resolution passed in the meetings of the Transport Committee, to award the contract of work to M/s. Jay Hind Road Builders, date 11th December, 2006, work order dated 15th February, 2007 and completion certificate dated 30th November, 2008, were passed into service. Reliance was also placed on the tender notices issued for the construction of RCC frame structure compound wall at Kolshet on the reserved plot for Thane Municipal Transport Undertaking.

49. The aforesaid documents do indicate that on 15th September, 2005 itself the transport manager had sought

assistance of the city engineer to level the land admeasuring 22,500 sq. mtrs., (out of the surplus holding) allotted to the Transport Undertaking to facilitate further development. The resolution of the transport committee dated 11th December, 2006 indicates that the tenders were invited for the said work by publishing notices in the newspapers on 11th July, 2006, and the bid of M/s. Jay Hind Road Builders was accepted. The completion certificate for the said work came to be issued on 30th November, 2008. The publication of tender notices for the work of erecting a compound wall around the said plot is also evidenced by aforesaid documents.

50. We have adverted to the aforesaid material and documents, in detail, because the factum of possession was seriously disputed. In the face of the aforesaid material, which points to the factum of possession with Respondent no.4, in no uncertain terms, the discrepancy in the date on the letters, which evidence the delivery of possession to Respondent no.4, does not warrant throwing the claim of Respondent nos.1 to 4 overboard. It is pertinent to note that there is a communication dated 31st May, 2005 addressed by the competent authority to the Deputy Secretary, Government of Maharashtra specifically informing that the possession of the land admeasuring

50,333.07 sq. mtrs. has been handed over to the Thane Municipal Corporation, and soliciting directions regarding the valuation of the acquired land. The reference to this letter finds mention in the letter dated 31st May, 2005 addressed to the Commissioner, Thane Municipal Corporation by the competent authority, also. It is mentioned therein that separate proposals are being submitted to the Government for fixing the price of the acquired lands. In this view of the matter, we are not inclined to discard the claim of the Respondent authorities on the basis of inconsistency in the dates.

51. The fact that subsequent to taking over the possession of the subject lands, they have been delivered to the concerned authority for the public purpose for which the lands were designated in the development plan, cannot be simply brushed aside. The Court is required to take cognizance of such subsequent development. In this context, a reference can be made to the judgment of the Supreme Court in the case of ***State of Uttar Pradesh and others vs. Aadarsh Seva Sahakari Samiti Ltd.***[5], wherein it was observed that such development by a public authority on the land so vested in the State

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5 (2016) 12 SCC 493.

Government is a very relevant factor. Paragraph 5 of the said judgment reads as under:

> "5. It is also brought to our notice by the learned Senior Counsel Mr. Misra that after the proceedings under Sections 10(3) and 10(5), notice and the alleged taking over possession of the land in question, the subsequent event has taken place, namely, the said property has been transferred to the Lucknow Development Authority by the State Government and the Development Authority has laid a park for public use. On this, the learned Senior Counsel for the respondent submits that the said event has taken place during the pendency of the proceedings before the High Court. Though it may be the fact, subsequently, after the transfer of the property in favour of the Development Authority, the Authority has developed a park is an undisputed fact. This is also a very relevant aspect of the matter for this Court to annul the impugned judgment/ order passed by the High Court."

52. Dr. Sathe, the learned Senior Counsel, then urged that even if it is assumed that the possession was taken by Respondent no.2 on 15th April, 2005, it was not a valid action, and clearly in breach of the provisions of Section 10(5) and 10(6) of the Principal Act, which mandates a 30 days notice before taking forcible possession of the land vested under Section 10(3) of the Principal Act. The relevant part of Section 10 of the Principal Act read as under:

> "**10(5)** Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.
>
> **(6)** If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be

> given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary."

Admittedly, the notice for delivering possession, under Section 10(5), was issued on 7th April, 2005. It called upon the Petitioners to deliver possession within 30 days thereof. Yet, the Respondent authorities took possession on 15th April, 2005. The learned Senior Counsel would urge that at the most the State can be said to have taken *de jure* possession of the subject land but the *de facto* possession remained with the Petitioners. For bringing a case within the ambit of Section 3(1)(a) of the Repeal Act, the *de facto* possession, taken in conformity with the aforesaid provisions of the Principal Act, is required, urged the learned Senior Counsel.

53. Dr. Sathe, the learned Senior Counsel, placed reliance upon the judgments of this Court in the cases of (1) ***M/s. Johnson and Johnson Ltd. and another vs. State of Maharashtra and another*** *in Writ Petition No.1461 of 2009 dated 9th November, 2011* and (2) ***Abdul Mohammed Hussain Pitawala vs. State of Maharashtra*** *in Writ Petition No.687 of 2008 dated 4th January, 2012.*

54. In the case of ***Johnson and Johnson*** (supra), it was observed that the provisions of Section 10(6) show that the authority becomes entitled to take possession only on the failure of the person in possession to deliver possession within 30 days. Thus, for the authority to get the power to take possession under Section 10(6), a period of 30 days must lapse between the date of the service of notice and the date on which the possession is taken under Section 10(6). Since it was found that the possession in the said case was not taken in accordance with law, the Petitioners therein were declared to be in possession of the surplus land on 29th November, 2007, when the Act was repealed and, thus, all the proceedings lapsed.

55. Following the aforesaid judgment, in the case of ***Abdul Pitawala*** *(supra)*, wherein the notice dated 8th October, 2007 issued in the said case, did not allow 30 days period to the person in possession to hand over the possession of the surplus land, and possession was taken on 25th October 2007, it was reiterated that such action would be contrary to the provisions of the Act and, thus, possession cannot be said to have been legally taken.

56. A very strong reliance was placed on the judgment of the Supreme Court in the case of ***State of Uttar Pradesh vs.***

Hariram[6] In this case, the following question arose for consideration and decision, before the Supreme Court :-

> "....Whether the deemed vesting of surplus land under Section 10(3) of the Urban Land (Ceiling and Regulation Act, 1976 [for short 'the Act'] would amount to taking de facto possession depriving the land holders of the benefit of the saving Clause under Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 [for short 'the Repeal Act']."

57. The aforesaid question cropped up in the backdrop of the following facts :-

The landholder filed a return under Section 6 on 28th September 1976. Draft settlement under Section 8(3) was made on 13th May 1981. Order under Section 8(4) came to be passed on 29th June 1981. Notification under Section 10(1) was issued on 12th June 1982. Vesting Notification under Section 10(3) was issued on 12th November 1997. The Repeal Act came into force in the State of Uttar Pradesh on 18th March 1999. Even after coming into force of the Repeal Act, the competent authority issued a notice under Section 10(5) on 19th June 1999 and called upon the landholder to deliver possession of the surplus land.

58. In the backdrop of the aforesaid facts, the Supreme Court, *inter-alia,* observed that :-

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62013(4) SCC 280.

> ".....the expressions *"deemed to have been acquired"* used as a deeming fiction under sub-section (3) of Section 10 can only mean *"acquisition of title"* or *"acquisition of interests"*. ..... Under Section 10(3), what is vested is *de jure* possession not *de facto*, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent".

59. The Supreme Court further explained the import of Sub-section (3) of Section 10 to envisage "voluntary surrender", sub-section (5) of Section 10, to address "peaceful dispossession" and sub-section (6) of Section 10 to cover the situation of "forceful dispossession". In the process, the Apex Court observed as under :-

> "35.....Subsection (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.
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> 36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub- section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub- section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10.

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

60. Ultimately, the Supreme Court, in the facts of the said case, held that the State had failed to establish that possession of the land in question was taken either under Sub-section (3), sub-section (5) or or sub-section (6) of Section 10 and, thus, the landholder was entitled to the benefit of Section 4 of the Repeal Act. The Supreme Court concluded as under :-

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

61. Dr.Milind Sathe, the learned Senior Counsel, banking upon the aforesaid exposition of law, strenuously

urged that the aforesaid pronouncement is on all four with the facts of the instant case. The failure of the Respondents to adhere to the 30 days mandate of sub-section (5) and thereafter resort to the process of forceful dispossession vitiates the entire exercise and, therefore, it cannot be stated that the Respondents have taken lawful possession of the subject lands.

62. Reliance was also paced on another judgment of the Supreme Court in the case of ***Gajanan Kamlya Patil Vs. Additional Collector and Competent Authority (ULC) and Ors.***[7], wherein, after following the aforesaid pronouncement in the case of *Hariram* (Supra), it was observed in paragraph 12 as under :-

> "12 We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. The facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MMRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the appellants."

7(2014) 12 SCC 523.

63. Per contra, Shri Walawalkar, the learned Senior Counsel for Respondent nos. 1 to 3 placed an equally strong reliance upon a subsequent judgment of the Supreme Court in the case of ***State of Assam Vs. Bhaskar Jyoti Sarma & Ors.***[8]**.** The learned Senior Counsel would urge that in the case of *Bhaskar Jyoti Sarma* (Supra), the Supreme Court has considered the question as to whether even a failure to give a notice under Section 10(5) of the Principal Act leads to the only conclusion that such a dispossession, without notice under Section 10(5), is no dispossession in the eye of law, and answered the same in the negative. Thus, according to the learned Senior Counsel, the fact that the 30 days time did not elapse between the notice under Section 10(5) and the dispossession under Section 10(6) of the Principal Act does not detract materially from the Respondent's case and cannot lead to an inference that there was no dispossession in the eye of law, before the Repeal Act came into force.

64. In order to understand the ratio of the aforesaid judgment, in a correct perspective, reference to the facts therein becomes imperative. In the said case, return under Section 6 was filed on 19th October 1976. Final settlement under Section

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8 (2015) 5 SCC 321

9 was made on 3rd September 1982. Notification under Section 10(1) was issued on 16th May 1984. The Vesting Notification under Section 10(3) was issued on 1st January 1987. The State claimed to have taken possession of the surplus land on 7th December 1992. In the said case also, the possession of the disputed land was taken over from the erstwhile land holder by the State Government Authority, unilaterally. In the meanwhile, in November 1984, the original landholder sold a major portion of the land. The Repeal Act came into force in the State of Assam on 6th August 2003. Thereupon the Successor-in-interest of the original holders, sought to challenge the proceedings, including the allotment of a portion of the disputed land to Guwahati Metropolitan Development Authority (GMDA). A Single Bench of the High Court of Assam dismissed the Writ Petition. The Division Bench set aside the order passed by the Single Bench and directed restoration of possession of the disputed land to the Respondents.

65. The fundamental challenge was that since the possession was not taken over by following the procedure prescribed under Section 10(5) of the Act, the same was non-est in the eye of law at least for the purposes of Section 3 of the Repeal Act. Reliance was placed on the decision of the Supreme

Court in the case of ***State of U.P. Vs. Hariram*** (Supra) in support of the said submission. The Supreme Court posed the following question for consideration, and answered it in the negative :-

> "13 But assuming that any such determination is possible even in proceedings under Article 226 of the constitution, what needs examination is whether the failure of the Government or the authorised officer or the competent authority to issue a notice to the land owners in terms of Section 10(5) would by itself mean that such dispossession is no dispossession in the eye of law and hence insufficient to attract Section 3 of the Repeal Act. ***Our answer to that question is in the negative.***"
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> *(emphasis supplied)*

66. While answering the aforesaid question in the negative, the Supreme Court enunciated the law as under :-

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

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 land owner on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not 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."

(*emphasis supplied)*

67. It is imperative to note that the Supreme Court specifically considered the ratio of its earlier judgment in the case of ***Hariram*** **(Supra)** and explained the same as under :-

> "17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5) gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5) and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case. In our opinion, what Section 10(5) prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so."
>
> (*emphasis supplied)*

68. In view of the aforesaid exposition of the legal position, particularly after considering the judgment of the Supreme Court in the case of ***Hariram*** (Supra), it can be stated that failure to strictly adhere to the procedure prescribed in Sub-sections (5) and (6) of Section 10 does not necessarily lead to setting aside the entire proceedings under the Principal Act. If the factum of possession is established, the irregularity in the

procedure for taking possession does not warrant an inference that the very act of taking possession is non-est in the eye of law.

69. On a careful consideration of the facts and attendant circumstances of the matter at hand, we are of the considered view that, they are more nearer to the facts of ***Bhaskar Sarma*** (supra) than those of ***Hariram*** (supra). In view of the pronouncement in the case of ***Bhaskar Jyoti Sarma*** (Supra), the failure to abide by the time limit of 30 days may amount to an irregularity. Consequently, the pronouncements of this Court in the case of ***M/s. Johnson and Johnson Ltd.*** (supra) and ***Abdul Mohammed Pitawala*** (supra), to the contrary, do not hold the field. Furthermore, it must be noted that in the case of ***Hariram*** (supra) itself, the Supreme Court, expressly observed in paragraph 41 that 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.

70. The conspectus aforesaid consideration is that in the backdrop of the facts and the setting of the instant matter, we

are inclined to hold that the pronouncement of the Supreme Court in the case of ***Bhaskar Jyoti Sarma*** (supra), governs controversy at hand. We are, therefore, persuaded to hold that the fact that the Petitioners were dispossessed on 15th April 2005, much before the 30 days period stipulated in the notice to hand over possession dated 7th April 2005, does not vitiate the action of taking possession nor does it amount to 'no dispossession' in the eye of law and a mere *de jure* possession.

71. Resultantly, we are inclined to hold that both clause (a) and clause (b) of Section 3(1) of the Repeal Act have full force and play and, therefore, the proceedings do not abate under Section 4 of the Repeal Act.

72. For the foregoing reasons, the petition deserves to be dismissed.

73. The petition, thus, stands dismissed. In the circumstances, there shall be no order as to costs.

[N. J. JAMADAR, J.] **[B. R. GAVAI, J.]**