CASE NO.:
Appeal (civil) 1772 of 1980

PETITIONER:
CHANDRIKA PRASAD

RESPONDENT:
PULLO (DEAD) BY LRS. AND ORS.

DATE OF JUDGMENT: 10/04/2000

BENCH:
S.B. MAJMUDAR & S. SAGHlR AHMAD & U.C. BANERJEE

JUDGMENT:
JUDGMENT

2000 (2) SCR 1145

The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. This appeal, on grant of special leave, has been referred to a larger Bench by an order dated 27th July, 1999 of a Bench of two learned Judges of this Court and that is how it was placed for disposal before this Bench. A few relevant facts for highlighting the legal question involved in this appeal deserve to be noted at the outset.

Background facts :

The appellant before us is the son of one Ram Harakh, who claimed adhivasi rights in two plots of agricultural land being Nos. 210/1 and 549 situated in village Kanak Sarai of Mirzapur district in the State of Uttar Pradesh. This claim was put forward in defence to a suit filed by respondent Nos. 1 and 2 herein under Section 229-B(3) of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as 'the U.P. Act'). The aforesaid claim was based on Section 20 of the said Act. In the basic year as provided in the aforesaid U.P. Act, these plots of lands were recorded in the names of Sri Narain, Sheo Narain, Nar Narain, Jagdish Narain, Ghanshyam, Kripa Shanker, Kashi Shanker and Daya Shanker. The respondent Nos. 1 and 2 herein claimed interest in these lands on the ground that Sri Narain and others had transferred their interests to one Shri Ram Manawan who, thereafter has executed a sale deed on 10th February, 1961 in favour of respondent Nos. 1 and 2. The appellant's father Ram Harakh put forward his claim for the aforesaid two plots of lands before the Consolidation Officer. The basis of his claim was that he was in possession of these two plots of lands in the years 1356 and 1359 Fasli as sub-tenant of mortgagees and accordingly adhivasi rights were available to him under Section 20 of the U.P. Act.

Respondent Nos. 1 and 2 resisted the said claim of Shri Ram Harakh and filed objections. They contended before the Consolidation Officer that after the sale deed in their favour they were in actual physical possession of the plots in dispute. That Ram Harakh had surrendered his rights over the plots in dispute in favour of Sri Narain and others some time about 15 or 16 years back.

The Consolidation Officer on 19th March, 1966 allowed the objections filed by respondent Nos. 1 and 2. It may be mentioned that pending the consolidation proceedings, Ram Harakh died and in his place the name of the appellant was substituted. The appellant pursued the claim put forward by his father Ram Harakh. But his claim was rejected by the Consolidation Officer. The appellant field an appeal before the Settlement Officer (Consolidation) which was dismissed on 6th June, 1966.

The appellant then carried the matter in revision before the Deputy

Director of Consolidation, who allowed the same and remanded the case to the Settlement Officer (Consolidation). After remand, the appellant authority, namely, the Settlement Officer (Consolidation) allowed the appellant's appeal on llth May, 1968 and held that the appellant's father Ram Harakh had acquired the adhivasi rights in the lands in question.

However, a finding was recorded against Ram Harakh that he had surrendered his rights in favour of Sri Narain and others.

Being aggrieved by the aforesaid decision, the appellant as well as respondent Nos. 1 and 2 filed two revision applications before the Deputy Director of Consolidation. The Deputy Director, Consolidation allowed the claim of the appellant and rejected the revision filed by respondent Nos. 1 and 2. It was held that there was no surrender by Ram Harakh in favour of Sri Narain and others. It was further held that since Ram Harakh was in cultivatory possession in the years 1356 and 1359 Fasli, as such, he had acquired the rights under Section 20 of the U.R Act.

Being aggrieved by the order of the Deputy Director (Consolidation), respondent Nos. 1 and 2 filed a Writ Petition No. 1626 of 1969 before the Allahabad High Court. A learned Single Judge, Justice R.S. Misra, dismissed the writ petition of respondent Nos. 1 and 2 on 5th November, 1971. The learned Single Judge held that the father of the appellant was recorded in column of sub-tenant and that he was a sub-tenant of the mortgagee and, as such, he had acquired rights under Section 20 of the U.R Act. The learned Single Judge also confirmed the findings of the courts below that the mortgagee had let out the plots in dispute in due course of management like a prudent owner.

Respondent Nos. 1 and 2, being aggrieved by the aforesaid decision of the learned Single Judge, filed Special Appeal No. 257 of 1971 before the Division Bench of the High Court. The Division Bench of the High Court by its impugned judgment, relying upon the full Bench judgment reported in 1974 A.L.J. 706, held that if a person is recorded in sub-tenants' column and another person is recorded as mortgagee in the remarks column, none of them will be deemed to be a recorded occupant. The Division Bench also rejected the contention of the appellant that, in any case, they had acquired the rights under Section 20(a)(ii) of the U.P. Act.

Now, it may be noted that the impugned judgment of the Division Bench also disposed of a cognate matter by adopting the same set of reasoning. It fell for consideration in Special Appeal No. 332 of 1971. By a common judgment, both these appeals were allowed and it was held that a sub-tenant from a mortgagee could not get any adhivasi rights in the lands in question.

From this common judgment of the Division Bench different civil appeals were filed before this Court on grant of special leave to appeal. The Civil Appeal No. 3316 of 1979 sought to challenge the common judgment of the High Court dealing with Special Appeal No. 332 of 1971 while another Civil Appeal No. 1772 of 1981 was filed against the very same judgment in Special Appeal No. 332 of 1971 by other set of respondents before the High Court. So far as the present Civil Appeal No. 1772 of 1980 is concerned, it was filed against the very same common judgment of the Division Bench of the High Court by which Special Appeal No. 257 of 1971 was disposed of. Both Civil Appeal Nos. 3316 of 1979 and 1772 of 1981 were allowed by a Bench of this Court consisting of Madan Mohan Punchhi, J. (as he then was) and Sujata V. Manohar, J. by their Order dated 22nd August, 1995. However, the present Civil Appeal No. 1772 of 1980 was not listed for disposal before that very Bench though it involved identical questions for consideration of the Court and arises from the very same common judgment of the Division Bench of the High Court. When this civil appeal reached final hearing on 27th July, 1999 before a Bench of two leaned Judges of this Court presided over by Mrs. Sujata V. Manohar, J., the aforesaid decision of this Court dated 22nd August, 1995 was pressed in service and it was contended that in the light of that decision, the present appeal was also required to be

allowed. However, learned counsel for the respondents pointed out that in those appeals the provisions of Section 21(l)(d) of the U.P. Act were not considered. Reliance was also placed on a decision of this Court in the case of Ram Adhar Singh (dead) through LRs. & Ors. v. Bansi (dead) through LRs. & Ors., reported in [1987] 2 SCC 482 and in particular, paragraph 4 of the said judgment at page 485. This judgment was not pointed out before the Bench which considered the earlier two appeals. The Bench of this Court, by its order dated 27th July, 1999, therefore, directed that it is necessary to constitute a larger Bench to consider the point in issue in this appeal. That is how, as noted earlier, this appeal has been placed before this larger Bench.

In order to resolve the controversy posed for our consideration in this appeal, it will be necessary to keep in view the factual matrix on which there is no serious dispute between the parties and which remains well sustained on record. Both the lands in question were occupied by Sri Narain & Ors., who were recorded as fixed rate tenants. They had mortgaged these lands in favour of Murat Singh & Ors. before the basic year referred to in the U.P. Act. It is also not in dispute between the parties that the said mortgage was not redeemed by the original mortgagers-fixed rate tenants prior to the basic year. It is also an admitted position on record that in Khasra 1356 and 1359 Fasli, Murat Singh & Ors. were recorded as mortgagees and the father of the appellant Shri Ram Harakh and Respondent No. 15 in the appeal - Devi Charan was recorded as sub-tenant of the mortgagees. The original mortga-gors-fixed rate tenants Sri Narain & Ors. had transferred their interest in the plots in favour of Ram Manawan. The said Ram Manawan in his turn executed a sale deed in favour of Respondent Nos. 1 and 2 on 10th February, 1961 for consideration of Rs. 4,000. These respondents filed a suit under Section 229-B of the U.P. Act for declaration and possession. It is this suit which, as noted earlier, was contested by Ram Harakh, father of the appellant and the Respondent No. 15. He submitted that as he was lessee from the mortgagees-Murat Singh & Ors., he became adhivasi. It is this claim of the appellant’s father that is on the anvil of scrutiny before us in the present proceedings. The High Court, in the impugned judgment, has held that the said Ram Harakh was not entitled to be declared as adhivasi taking the view that a sub-tenant from the mortgagee recorded as such in the Khasras of aforesaid two years was not entitled to get benefit of Section 20 of the U.P. Act. In the cognate matter arising from Special Appeal No. 332 of 1971 also similar view was taken. As noted earlier, a Division Bench of this Court by its order dated 22nd August, 1995 allowed civil appeals arising out of identical decision of the Division Bench of the High Court in the cognate matter. Question is whether the said decision rendered by the Division Bench of this Court is well sustained on the statutory scheme of the U.P. Act or not.

Before coming to the grips of the present question, the relevant statutory background has to be kept in view.

STATUTORY BACKGROUND :

The U.P. Act, by Section 4 in Chapter II, provides for vesting of estates in the State. Sub-section 1 thereof lays down that :

"(1) As soon as may be after the commencement of this Act, the State Government may, by notification, declare that, as from a date to be specified, all estates situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified (hereinafter called the "date of vesting"), all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encum-brances".

The specified date for the purpose of Section 4(1) is 1st July, 1952. Section 3 sub-section 8 defines "Estate" as under :

"(8) "Estate" means and shall be deemed to have always meant the area included under one entry in any of the registers described in clauses (a),

(b), (c) or (d) and, in so far as it relates to a permanent tenure holder in any register described in clause (e) of Section 32 of the U.P. Land Revenue Act, 1901, as it stood immediately prior to the coming into force of this Act, or, subject to the restriction mentioned with respect to the register described in clause (e), in any of the registers maintained under Section 33 of the said Act or in a similar register described in or prepared or maintained under any other Act, Rule, Regulation or Order relating to the preparation or maintenance of record-of-rights in force at any time and includes share in, or of an "estate"".

It is not in dispute between the parties that the plots in question were covered by the aforesaid definition of the term "Estate" and, therefore, were within the sweep of the Act, especially Section 4 thereof. Sub-section 26 of Section 3 provides as under :

"(26) words and expressions (land-holder), permanent tenure holder, thekedar permanent lessee in Avadh, grove-holder, rent, cess, sayar, sir, (tenant) hereditary tenant, khudkasht, fixed-rate tenant, rent-free grantee, exproprietary tenant, occupancy tenant, non-occupancy ten-ant, sub-tenant, holding and crops, not defined in this Act, and used in the United Provinces Tenancy Act, 1939 (U.P. Act XVII of 1939), shall have the meaning assigned to them in that Act."

The terms "tenant" and "sub-tenant" are not defined in the U.P. Act. Consequently, the meaning assigned to them in the United Provinces Tenancy Act of 1939 will govern the definition of these provisions.

Sub-section 22 of Section 3 of the United Provinces Tenancy Act, 1939 defines "sub-tenant" and Sub-section 23 defines "tenant" as under :

"(22) "Sub-tenant" means a person who holds land from the tenant there of other than a permanent tenure-holder or from a grove-holder or from a rent-free grantee or from a grantee at a favourable rate of rent and by whom rent is, or but for a contract express or implied, would be payable;

(23) "Tenant" means the person by whom rent is or but for a contract express or implied, would be payable and except when the contrary intention appears includes a sub-tenant but does not include a mortgagee of proprietary or under-proprietary rights a grave-holder a rent-free grantee a grantee at a favourable rate of rent or except as otherwise expressly provides by this Act, as under-proprietor a permanent lessee or a kadar;"

(Emphasis supplied)

As the appellant’s father staked his claim for getting occupancy rights as per Section 20 of the U.P. Act and as the respondents have relied upon Section 21(l)(d) in support of their rival contentions for displacing the case of the appellant, it would be appropriate at this stage to extract the aforesaid relevant provisions.

Section 20 clauses (a) and (b), in so far as they are relevant, read as under :

"20. Every person who -

(a) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act -

(i) except as provided in sub-clause (i) of clause (b), a tenant of sir (other than a tenant referred to in clause (ix) of Section 19 or in whose favour hereditary rights accrue in accordance with the provisions of Section 10), or

(ii) except as provided in (sub-clause (i) of clause (b)), a sub-tenant other than a sub-tenant referred to in proviso to sub-section (3) of

Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947), or in sub-section (4) of Section 47 of the United Provinces Tenancy Act, 1939 (U.P. Act XVII of 1939), of any land other than grove land,

(b) was recorded as occupant, -

(i) of any land (other than grove land or land to which Section 16 applies or land referred to in the proviso to sub-section (3) of Section 27 of the U.P. Tenancy (Amendment) Act, 1947) in the khasra or khatauni of 1356 F. prepared under Section 28 and 33 respectively of the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901), or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amend-ment) Act, 1947 (U.P. Act X of 1947), or

(ii) of any land to which Section 16 applies, in the (khasra or khatauni of 1356 Fasli prepared under Sections 28 and 33 respectively) of the United Provinces Land Revenue Act, 1901 (U.P. Act III of 1901), but who was not in possession in the year 1356F,

shall, unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under clause (h) of Section 21, be called adhivasi of the land and shall, subject to the provision of this Act, be entitled to take or retain possession thereof."

Section 20(b)(ii) is not relevant for our present purpose as it is not the case of any party that Section 16 of the Act applies in the facts of the present case as it deals with the occupancy rights of hereditary tenant. The other relevant provision is Section 21 which deals, amongst others, with the rights of tenant's mortgagees. The said provision, so far as it is relevant, reads as under :

"21. Non-occupancy tenants, sub-tenants of grove-lands and tenant's mortgagees to be asamis. - (1) Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as -

(a) a non-occupancy tenant of an intermediary's grove-land,

(b) a sub-tenant of a grove-land,

(c) a sub-tenant referred to in the proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947),

(d) (a mortgagee in actual possession) from a person belonging, to any of the classes mentioned in [clauses (b) to (e)] of sub-section (1) of section 18 or clauses [(i) to (vii) and (ix)] of Section 19,

(e) Xxxxxx xxxxxxx xxxxxxx Xxxxxx xxxxxxx xxxxxxx

shall be deemed to be an asami thereof."

A conjoint reading of the aforesaid relevant provisions leaves no room for doubt that if a person, like the appellant's father - Ram Harakh, was recorded as a sub-tenant of a mortgagee in the relevant records of right then, strictly speaking, he would not be treated to be a "sub-tenant" in the real sense of the term as he would not be a person claiming sub-tenancy as carved out from the larger interest of the head-tenant.

On the very definitions of "tenant" and "sub-tenant" a mortgagee, being not a tenant, cannot induct anyone as bis alleged sub-tenant. A sub-tenant has to claim through a tenant and not through a mortgagee. For the simple reason that head-tenant Sri Narain & Ors. had mortgaged the lands in favour

of Murat Singh & Ors. who were shown as mortgagees in the khasra or khatauni 1356 Fasli and as Ram Harakh, the appellant's father, was claiming as sub-tenant of the mortgagee and not as a sub-tenant of the original fixed rate tenants Sri Narain & Ors., his claim was outside the sweep of Section 20(b)(i) of the U.P. Act. When the term "sub-tenant" as employed by Section 20(a)(ii) is read in the light of the definition of "sub-tenant" as found in Section 3(22) of the United Provinces Tenancy Act, 1939 read with Section 3(26) of the present U.P. Act, it becomes at once clear that Ram Harakh, the appellant's father, was not a "sub-tenant" at all within the meaning of Section 20(a)(ii) read with Section 20(b)(i). On a conjoint reading of Section 20(a)(ii) and Section 20(b)(i) of the U.P. Act it has to be held that before recording anyone as an occupant in the khasra or khatauni 1356 Fasli prepared under Section 28 of the U.P. Land Revenue Act, 1901, on the basis of sub-tenancy, it has to be shown that the said entry is one of a genuine sub-tenant to enable him to get the status of adhivasi as per the said provisions. On the admitted facts on record, therefore, the appellants father Ram Harakh, who was shown to be a sub-tenant of a mortgagee and not as a sub-tenant of the original head tenants - Sri Narain & Ors., who were fixed rate tenants at the relevant time, could not get the benefit of being declared as adhivasi as per Section 20 of the U.P. Act. Such a benefit would have accrued to Ram Harakh in either of the following two contingencies : (1) if Ram Harakh was in fact a sub-tenant directly from head tenants - Sri Narain & Ors. and his name was recorded as such in khasra or khatauni 1356 Fasli, and (2) in the alternative, if Ram Harakh was recorded as a sub-tenant in the aforesaid khasra or khatauni 1356 Fasli after redemption of mortgage by head-tenant - Sri Narain & Ors. who were fixed rate tenant before the date of vesting resulting in elimination of mortgagees' rights in favour of Murat Singh & Ors. on the relevant date. In the latter contingency it could have been urged with some emphasis by the appellant that the entry as mortgagee in favour of Murat Singh & Ors. was of no consequence and that he, during the subsistence of the mortgage, as a prudent manager of the estate, had created sub-tenancy in favour of Ram Harakh, which after redemption prior to date of vesting entitled to latter to be recorded as sub-tenant of mortgagor head-tenants. This legal consequence would be followed as sub-tenancy created by mortgagee, on redemption would have remained binding on the erstwhile mortgagor. Such a contingency never arose on the facts of the present case. Consequently, none of the aforesaid two contingencies got attracted in favour of Ram Harakh on the facts of the present case immediately preceding the date of vesting. On the contrary, as laid down by Section 20 itself the accrual of adhivasi rights to persons listed in Section 20 would itself be subject to the operation of Section 21(h) wherein asami rights would be made available to persons covered by that provision. When we turn to Section 21 we find that tenant's-mortgagees are deemed to be asamis on the date of vesting, if on the date immediately preceding the date of vesting the lands were occupied or held by a person who was a mortgagee in actual possession from a person belonging to any of the classes mentioned in clauses (b) to (c) of Sub-section 1 of Section 18. When we turn to Section 18 sub-section 1 clause (c) we find listed therein a class of lands held by a fixed-rate tenant or a rent-free grantee as such. Thus on a combined operation of Section 21(l)(d) and Section 18(l)(c), on the date of vesting, the following situation arose. Head-tenants Sri Narain & Ors, who were fixed-rate tenants, had not created any sub-tenancy before that date. They had inducted mortgagee Murat Singh prior to that date. These mortga-gees had to be treated to be asamis. If these mortgagees in possession were asamis as per the aforesaid provisions, they could not be held to be tenants. Consequently, their alleged sub-tenant-Ram Harakh could not be treated to be a "sub-tenant" in the real sense of the term. Such purported sub-tenancy from mortgagee-in possession could not give any benefit to the appellant's father-Ram Harakh who was no better than a mere licensee from the mortgagee in actual possession on the date of vesting. The impugned decision rendered by me Division Bench of the High Court, therefore, remains well sustained on the scheme of the Act when applied to the admitted and well established facts on record.

However, in the cognate matter, the Division Bench of this Court, by its Order dated 22nd August, 1995 took a contrary view. A mere look at the said decision makes it clear that the Division Bench, with respect, had not noticed the correct legal position on the conjoint scheme of Sections 20, 21(l)(d) read with Sections 18(l)(c) and 3(26) of the U.P. Act. In fact, the observation of the Division Bench that the question of law as raised therein was covered by three decisions of this Court in Nath Singh and Others v. The Board of Revenue and Others, reported in [1968] 3 SCR 498, Wall Mohammad (Dead) through Lrs. v. Ram Surat and Others, AIR (1989) SC 2296, and Uday (Dead) through Lrs. v. Deputy Director of Consolidation, Varanasi and Others, [1989] Supp. 2 SCC 722 cannot be said to be well sustained on the peculiar facts of these cases. Reasons are obvious. The aforesaid three decisions relied upon in the judgment of the Division Bench, as we shall see presently, have not ruled on the legal rights of any sub-tenants from mortga-gees nor have they held them to be treated as adhivasis as per the scheme of the Act. It is, therefore, necessary for us to refer to these judgments which were made the sole basis of the decision of the Division Bench in the cognate matter decided on 22nd August, 1995.

In Nath Singh and Others (supra), the two learned Judges of this Court had an occasion to consider the scheme of Section 20(b)(i) of the U.P. Act. Mitter, J. speaking for the Bench relying on earlier decisions of this Court took the view that when the main-tenant had created sub-tenancy in favour of the claimant, who were recorded as sub-tenants in the record of rights for 1356 Fasli, such sub-tenants could get the benefit of being given the status of adhivasis under Section 20(b)(i) of the Act. Now, it becomes at once clear that before Section 20(b)(i) can be pressed in service by the claimant it has to be shown that immediately before the date of vesting the claimant’s name was recorded as an occupant being sub-tenant of the lands. In the aforesaid case, the claimant was recorded as a sub-tenant from the original tenant and his occupancy was so recorded in the year 1356 Fasli. It is in the background of these facts that it was held that adhivasi rights were correctly made available to such a claimant who was an admitted sub-tenant of the head-tenant and whose name was so recorded in 1356 Fasli. Once that conclusion was reached obviously Section 20(b)(i) of the Act came to the assistance of such claimant. It must, therefore, be observed that the ratio of the aforesaid decision can have no application for sustaining the claim of a sub-tenant from the mortgagee who is recorded as such in the year 1356 Fasli as it will be the mortgagee who will become the asami under Section 21(l)(d) of the U.P. Act and if he becomes asami a person inducted by him as a purported sub-tenant from him cannot claim any interest as adhivasi vis-a-vis such asami. In fact such a mortgagee’s-sub-tenant cannot be considered to be a "sub-tenant" at all within the meaning of Section 3(26) of the U.P. Act read with Section 3(23) of the United Provinces Tenancy Act of 1939, as seen above. The aforesaid decision of the Division Bench, therefore, cannot be said to have concluded the matter as with respect, wrongly assumed by the Division Bench of this Court in its order dated 22nd August, 1995.

The second decision on which reliance was placed by the aforesaid Division Bench of this Court was rendered in the case of Wall Mohammad (Deceased by Lrs.) v. Ram Surat & Ors. (supra). The aforesaid decision rendered by another Division Bench of two learned Judges of this Court consisting of M.H. Kania (as he then was) and S. Ranganathan, JJ. is not relevant for deciding the present controversy as that decision had also not touched upon the question whether the purported sub-tenant of a mortgagee in possession could claim any adhivasi rights under Section 20(b) of the Act. In para 2 of the Judgment, Kania, J., who spoke for the Bench, clearly indicated that though one Wali Mohammad had executed a usufructuary mortgage in favour of Ram Kumar and Shiv Kumar in respect of two plots on 22nd May, 1928, he had redeemed the said mortgage and took possession of the said plots prior to Fasli Year 1356 precisely in the Fasli Year 1354 and had continued to be in possession. Thus by the Fasli Year 1354 entries of mortgagor and mortgagee recorded between Wali Mohammad on the one hand and Ram Kumar and Shiv Kumar on the other, had come to an end. Despite this fact, the name of Ram Kumar

was recorded in the Khasra or Khatauni 1356 Fasli. It becomes obvious that in Fasli Year 1356 the name of Ram Kumar could not have been shown as a subsisting mortgagee as his mortgage was already redeemed two years back by Wali Mohammad, the original mortgagor. It is on the basis of this entry in favour of Ram Kumar, the erstwhile mortgagee, that it was held that Section 20(b) got attracted in favour of Ram Kumar. The observations made in paras 4 and 5, in this connection, are required to be extracted :

"4. The said section deals with the question as to who is entitled to take or retain possession of the land in question. The plain language of the aforesaid Cl. (i) of sub-sec, (b) of S.20 of the said Act suggests that this question has to be determined on the basis of the entry in the Khasra or Khatauni of 1356 Fasli Year prepared under Ss. 28 and 33 respectively of the U.R Land Revenue Act, 1901. An analysis of the said section shows that under sub-sec, (b) of S.20 the entry in the Khasra-or Khatauni of the Fasli Year 1356 shall determine the question as to the person who is entitled to take or retain possession of the land. It is, of course, true that if the entry is fictitious or is found to have been made surreptitiously then it can have no legal effect as it can be regarded as no entry in law but merely because an entry is made incorrectly that would not lead to the conclusion that it ceases to be an entry. It is possible that the said entry may be set aside in appropriate proceedings but once the entry is in existence in the Khasra or Khatauni of Fasli Year 1356, that would govern the question as to who is entitled to take or retain possession of the land to which the entry relates.

5. It was submitted by learned counsel for the appellants that if entry was not correct, it could not be regarded as an entry made according to law at all and the right to take or retain possession of the land could not be determined on the basis of an incorrect entry. He placed reliance on the decision of this Court in Beckan v. Kankar,[l973] 1 SCR 727 : AIR (1972) SC 2157. in that judgment the nature of the entries in Khasra or Khatauni is discussed and it is also discussed as to how this entry should be made. This Court held that entries which are not genuine cannot confer Adhivasi rights. It has been observed that an entry under S.20(b) of the said Act, in order to enable a person to obtain Adhivasi rights, must be an entry under the provisions of law and entries which are not genuine cannot confer Adhivasi rights. In that judgment it has been stated that the High Court was wrong when it held that though the entry was incorrect, it could not be said to be fictitious. That observation, however, has to be understood in the context of what follows, namely, that an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis. This judgment, in our view, does not lay down that all incorrect entries are fictitious but only lays down that a wrong entry or incorrect entry which has been made by reason of ill-will or hostility cannot confer any right under S.20(b) of the said Act. This decision is clarified by a subsequent judgment of this Court in Vishwa Vijai Bharti v. Fakhrul Hassan, [1976] Suppl SCR 519 : AIR (1976) SC 1485 where it has been held as follows (at p. 1488 of AIR) :

"It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a docu-ment of all its legal effect and cannot found a claim to possessory title.".

(Emphasis supplied)

In the background of fact situation in that case, it was then observed in para 6 of the report firstly, that there was nothing to show that the entry

of Ram Kumar as the occupant was fictitious, or was made fraudulently or was incorrectly introduced by reason of ill-will or hostility towards Wali Mohammad. Secondly, it was held that Ram Kumar, being noted as occupant on the relevant date, was entitled to the benefit of Section 20(b) of the U.P. Act. We fail to appreciate how this decision also could have persuaded that Division Bench in its order dated 22nd August, 1995 to come to the conclusion that the law on the point in question was concluded by the said decision, amongst others. It has to be kept in view that, on the facts of the present case, there is no escape from the conclusion that the entry of mortgagee, Murat Singh, clearly indicated that the so-called entry of Ram Harakh as sub-tenant was a fictitious one as Ram Harakh, as already seen earlier, was by no stretch of imagination could have been treated to be a sub-tenant from the head-tenant Sri Narain & Ors. On this finding even the ratio of the decision in Wali Mohammad v. Ram Surat and Others (supra) also, instead of helping the appellant, would go against him. That takes us to the consideration of the last of the trinity of the judgments relied upon by the Division Bench of this Court for supporting its conclusion in its order dated 22nd August, 1995. In the case of Uday (Dead) through Lrs. v. Deputy Director of Consolidation, Varanasi and Others (supra), a Division Bench consisting of two learned Judges, S. Ranganathan and M.M. Punchhi, JJ. (as he then was), has to consider a fact situation which is entirely different from the one before us. The original appellants before this Court, Udai and Pargash, claimed to be sub-tenants of the land who were recorded as such in the year 1357 Fasli which was a relevant year for areas situated within the Varanasi District. They were not claiming to be sub-tenants of any mortgagees-in possession as is the claim of Ram Harakh in the present case. Relying on the entries as sub-tenants so far as Udai and Pargash were concerned, it was held by this Court upholding the decision of the High Court, that both Udai and Pargash were entitled to get the benefit of Section 20(b)(i) of the U.P. Act. Ranganathan, J., speaking for the Bench, made the following pertinent observation in para 5 of the report.

"5. The answer to the above question seems self-evident if one were to go by the purely etymological meaning of the word "occupant". In the absence of any statutory definition; that word would clearly cover any person who has been recorded as having been in occupation of the land in question in the relevant fasli irrespective of the capacity in, or title under, which he so occupied it. There will therefore be no reason, normally speaking, to exclude a person whose occupancy is recorded on the basis of his sub-tenancy..."

It becomes at once clear that the aforesaid decision also had no occasion to consider the question of right of any alleged sub-tenant from a mortgagee-in possession who was recorded as such in the relevant year 1356 Fasli. It was also a case of a sub-tenant from the original tenant and not a case of alleged sub-tenant from a mortgagee-in possession. This decision, therefore, also falls in line with the decision of this Court in Nath Singh and Others v. The Board of Revenue and Others (supra). The aforesaid three decisions, therefore, cannot said to have covered the question of law raised in the present case or in a similar case before the Division Bench which, with respect, wrongly assumed them to have so ruled. On the scheme of the Act and the background of the relevant facts which were established on record it has to be held that the alleged sub-tenant-Ram Harakh through whom the appellant claims seeking his right to possession on the relevant date through mortgagee-in possession cannot get the benefit of Section 20(b)(i) of the Act read with Section 20(a)(ii) of the Act and the entry of sub-tenancy in his favour in the year 1356 Fasli had to be treated to be fictitious and not a genuine one. On this finding even the ratio of me decision of this Court in Wali Mohammed v. Ram Surat and Others (supra) would get squarely attracted against the appellant.

This discussion puts and end to the dispute in controversy and clearly indicates that the impugned decision of the Division Bench of the High Court against the appellant is well sustained. However, we may also refer

to other decisions of this Court to which our attention was invited by learned counsel for the contesting parties in support of their respective cases. In the case of Ram Adhar Singh (dead) through Lrs. & Ors. v. Bansi (dead) through Lrs. & Ors. (supra) another two-Judge Bench of this Court, speaking through Sen, J., held that usufructuary mortgage of an occupancy holding is invalid. A mortgagee acquires no right other than the right to retain possession and fall back upon the stipulation in the so-called mortgage bond till his money is paid. There is no transfer of an interest by the occupancy tenant The right of an occupancy tenant under Section 6 of the Recovery of Rents (Bengal) Act was not transferable. However, under the U.P. Debt Redemption Act, 1940 all usufructuary mortgages became self-liquidating mortgages. Observations in para 4 of the report were pressed in service by learned counsel for the respondents. They read as under :

"4. We find that it has been the consistent view of the Allahabad High Court that a usufructuary' mortgage of an occupancy holding was not valid as a mortgage with all its incidents and subject to the provisions of law relating to usufructuary mortgage but was valid only in a qualified sense i.e. in the sense of subletting with a covenant that the mortgagor will not be entitled to recover possession without payment of the mortgage money, and further that under such a mortgage there is no transfer of the right of an occupancy tenant and consequently no suit for redemption was maintainable nor was there any extinguish-ment of the right of an occupancy tenant upon the expiry of the period of limitation fixed for redemption under Article 148 of the Limitation Act, 1908. There is a long catena of decisions dealing with the question starting from Khiali Ram v. Nathu Lal, down to Samharu v. Dharamraj Pandey. It follows that it has been the settled law as administered in the then United Provinces that a usufructuary mort-gage of an occupancy holding was invalid and there was no transfer of an interest by the occupancy tenant and the mortgagee acquired no right other than the right to retain possession and fall back upon the stipulation in the so-called mortgage bond till his money was paid. As pointed out in the Full Bench decision in Samharu v. Dharamraj Pandey, the view that a usufructuary mortgage by an occupancy tenant was not valid in the eye of law has been accepted by the legislature in clause (d) of Section 21(1) the U.P. Zamindari Abolition & Land Reforms Act, 1951. The matter stands concluded by the doctrine of stare decisis. If we were to subscribe to the contention advanced by the learned counsel for the appellants, it would imply not only unsettling the law which has stood the test of time for over 100 years but have the effect of reopening transactions past and closed and unsettling titles over the State".

This decision clearly indicates that mortgagee-in possession is no better than an asami and has no right to create a genuine sub-tenancy. His alleged sub-tenant will be no better than a pure licensee from him.

On the facts of that case it was, therefore, held that successor-in-interest of the original mortgagees had no right to get the benefit of occupancy under the Act. Even though the said judgment had no occasion to examine the occupancy rights of the sub-tenant from a mortgagee, its ratio can rightly be pressed in service by the respondents for submitting that when Section 21(l)(d) of the U.P. Act is given its full play, the mortgagee-in possession cannot be treated to be on a higher level than an asami and consequently the alleged sub-tenancy created by him will not enure for the benefit of the so-called sub-tenant to claim any independent adhivasi rights.

In the case of Amba Prasad v. Abdul Noor Khan & Ors., [1964] 7 SCR 800, Hidayatullah, J. (as he then was), speaking for the Bench of two learned Judges, had to interpret the words "recorded as occupants" as found in Section 20 of the U.P. Act. It was held on the facts of that case that the appellant before this Court was not entitled to raise the plea of the correctness of the entry in khasra because the entry was not corrected before the date of vesting as required by Explanation (ii) to Section 20 of the U.P. Act. It was further observed that the title to possession as

adhivasi depends on the entries in the khasra or khatauni for the year 1356 Fasli. Section 20 of the U.P. Act does not require the proof of actual possession. These observations, on the facts of that case, cannot be of any assistance to the appellant for the simple reason that this Court, in the aforesaid cases, was not concerned with the examination of a situation like the present one wherein alleged sub-tenant of a mortgagee-in possession claimed the benefit of Section 20 of the U.P. Act. Learned counsel for the appellant vehemently relied upon a decision of the Constitution Bench of this Court in the case of Prabhu v. Ramdeo & Ors., AIR (1966) SC 1721. In that case the Constitution Bench was concerned with the interpretation of the relevant provisions of the Rajasthan Tenancy Act. In the light of the said statutory scheme, it was observed that rights of tenants inducted by mortgagee-in possession, under the provisions of Transfer of Property Act, 1882, may conceivably be improved by statutory provisions which may meanwhile come into operation. The definition of "tenant" under Section 5(43) of the Rajasthan Tenancy Act was pressed in service for deciding the legal rights of three respondents before the Court. The contention of the appellant, Prabhu, before the Court for treating the respondents as "trespassers" as defined by Section 5(44) of the Rajasthan Tenancy Act was repealed. The relevant observations made in paras 6 and 7 deserve to be re-produced to appreciate and ratio of the Constitution Bench decision in this case. They read as under :

"(6) Before dealing with the specific provisions of the said section we may refer to two definitions which are relevant. "Tenant" has been defined by S.5(43) of the Act as meaning a person by whom rent is or but for a contract, express or implied, would be payable and except when the contrary intention appears, shall include a co-tenant or a groveholder or a village servant or a tenant of khudkasht or a mortgagee of tenancy rights but shall not include a grantee at a favourable rate of rent or an ijaredar or a thekedar or a trespasser. That is how the definition stood at the relevant time. The test prescribed by this definition is that the person can claim to be a tenant if it is shown that rent is payable by him in respect of the land. That test is clearly satisfied by three respondents in the present case.

(7) The next definition to which it is necessary to refer is that of a trespasser. The appellant, in his present suit, has contended that the respondents are trespassers. A "trespasser" has been defined by S.5(44) of the Act as meaning a person who takes or retains possession of unoccupied land without authority or who prevents another person from occupying land duly let out to him. That is how the definition read at the material time. It is plain that the respond-ents do not fall within the definition of "trespasser" as prescribed by this clause."

A mere look at these observations shows that on the peculiar scheme of Sections 5(43) and 5(44) of the Rajasthan Tenancy Act, it was held that a tenant of the mortgagee-in possession could not be treated as a trespasser. As already seen earlier, the statutory scheme of the U.P. Act is entirely different. The aforesaid decision, therefore, also cannot advance the case of the appellant.

Reliance was also placed on another Constitution Bench judgment of this Court in Dahya Lal & Ors. v. Rasul Mohammed Abdul Rahim, [1963] 3 SCR 1. That was a case under the Bombay Tenancy and Agricultural Land Act, 1948. Question was whether tenant of a mortgagee-in possession could be treated to be a deemed tenant under Section 4 of the Bombay Act, 1948. Section 4 of the said Act, in so far as it is material, provided :

"A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not (a) a member of the owner’s family, or (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner’s family, or (c) a mortgagee in possession...."

In the light of the aforesaid statutory scheme, it was observed that only a mortgagee-in possession could not be a deemed tenant but tenant of a mortgagee-in possession, being not falling in the excluded category, would be covered by the main part of Section 4, being a person lawfully cultivating and land belonging to another person. It becomes at once clear that the aforesaid decision rendered in the light of an entirely different statutory scheme cannot advance the case of the appellant for getting his father, Ram Harakh, the so-called "sub-tenant" of the mortgagee-in possession, to be treated as an adhivasi under Section 20 of the U.P. Act.

As a result of the aforesaid discussion, therefore, it must be held that the impugned decision of the High Court lays down the correct legal position in the background of the admitted and well established facts on record and calls for no interference. On the contrary, the decision rendered in the cognate matter by the Division Bench of this Court on 22nd August, 1995, with respect, must be held to be not laying down the correct law and would remain binding only as res judicata between the parties to that decision and cannot bind the present respondents.

The appeal, therefore, fails and is dismissed with no order as to costs.