

Supreme Court of India

Amar Singh Jagram (Dead) By Lrs vs Chandgi S/O Deep Chand on 2 November, 1988

Equivalent citations: 1989 AIR 413, 1988 SCR Supl. (3) 738

Author: M Thakkar

Bench: Thakkar, M.P. (J)

PETITIONER:

AMAR SINGH JAGRAM (DEAD) BY LRS.

Vs.

RESPONDENT:

CHANDGI S/O DEEP CHAND

DATE OF JUDGMENT 02/11/1988

BENCH:

THAKKAR, M.P. (J)

BENCH:

THAKKAR, M.P. (J)

RAY, B.C. (J)

CITATION:

1989 AIR 413

1988 SCR Supl. (3) 738

1989 SCC (1) 308

JT 1988 (4) 364

1988 SCALE (2) 1225

ACT:

East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948: Sections 26, 46 and Rule 13-- Allotment of land either to 'land owner' or 'occupancy tenant'--Rights are however transferred from the 'original holding' to the 'substituted holding' allotted to landowners--Right created in favour of encumbrance holder including a non-occupancy tenant.

HEADNOTE:

Pursuant to consolidation proceedings initiated under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, a scheme of repartition was framed, and the respondent-land owner was allotted alternative lands in lieu of his original holdings. The appellants-tenants who were in actual possession and were actually cultivating prior to consolidation two different parcels of land in the original holding of the land owner, as non-occupancy tenants, were not put back in possession of the corresponding parcels in the substituted lands.

The tenants initiated proceedings under section 21 j26 of the Consolidation Act. The Consolidation Officer upheld their claim and passed orders on 28.4.1960 that

corresponding parcels in the substituted lands should be restored to the tenants.

The land owner instituted two separate suits challenging the orders of the Consolidation Officer as without jurisdiction. The trial court and the lower appellate court held that the Civil Courts had no jurisdiction to entertain the suits. In the second appeals, the High Court held that the Civil Courts had jurisdiction to entertain the suits. and remanded the cases.

Upon remand, the Trial Court repelled the contention of the land-owner that the orders passed by the Consolidation Officer were without jurisdiction. The Lower Appellate Court confirmed the judgment and order of the Trial Court and, inter alia, rejected the contention of the land owner that the tenants should have pressed their claim when partition and re-partition Schemes were being framed under Sections

PG NO 738

PG NO 739

14 to 21 of the Consolidation Act.

The High Court, in second appeal, however took the view that the Consolidation Officer had no jurisdiction to exercise powers under section 26 of the Consolidation Act, that no right was created in favour of mortgagees, lessees or holders of encumbrances in respect of original holdings under section 26 read with Rule 13, and that such rights must be determined before the scheme is confirmed and if this has not been done the holders of such encumbrances cannot seek any relief under section 26 read with rule 13 or any other provision.

Allowing the appeals, it was,

HELD: (1) The Act contemplates the allotment of substituted lands in lieu of lands comprised in original holding on repartition only to two categories of landholders namely the landowners and the occupancy tenants. [748E]

(2) So far as the allotment of land is concerned it is either to the 'land owner' or to the occupancy tenant' who would under the Act become the owner in his own right having regard to the statutory provision for extinguishing the rights of the land owner in such land as is in possession of the occupancy tenant. [748G-H]

(3) So far as this basic scheme for allotment of the lands on repartition is concerned it does not take into account any rights of non-occupancy tenants, mortgagees, or holders of other encumbrances with which the original holdings of the land owners or the occupancy tenants were already burdened. [748H; 749A]

(4) So far as non-occupancy tenants are concerned the only provision which the Legislature has designed is Section 26 relating to encumbrances of the land owners and tenants. [749A]

(5) So far as non-occupancy tenants or mortgagees and other holders of encumbrances in respect of pre-repartitioned original holdings are concerned, their rights

stand transferred by virtue of the operation and effect of the statutory provision embodied in section 26 itself from the 'original holding' to the 'substituted holding' allotted to the land owners and the occupancy tenants under the scheme. [750C-D]

(6) Section 26 has been enacted with a view to provide for a statutory fastening of the right which subsisted in favour of the mortgagee or the non-occupancy tenant of the

PG NO 739

holder of other encumbrances, to the new holding which the land owner (or the occupancy tenant) is allotted under the scheme of consolidation and re-partition made Pursuant thereto. [750E-F]

(7) On a true reading of section 26 read with Rule 13, a right has indeed been created in favour of an encumbrance holder including a non-occupancy tenant. And jurisdiction has been conferred on the Consolidation Officer to put the holder of the encumbrance in possession of the corresponding parts of the substituted holding allotted to the land owner in lieu of his original holding if he was in possession of the original holding. [750H; 751A]

(8) The High Court was wrong in taking the view that section 26 does not create any independent right and that it deals only with the rights of such persons to whom land is allotted under the scheme and the repartition made pursuant thereto. [751A-B]

(9) The High Court failed to realize that in fact section 26 would come into operation only subsequent to ;md only upon the re-allotment to the original owner being made and he being put in possession of the substituted holding in lieu of the original holding upon repartition. [751A-B]

Munshi v. Bhagwan, R.S.A. No. 81-T of 1961 decided by the Delhi High Court on 29.4.1964 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos 2014-2015 of 1973.-

From the Judgment and Order dated 13.12.1972 of the Delhi High Court in R S A No 93-D of 1966.

P P Juneja for the Appellants S K Bisaria for the Respondent The Judgment of the Court was delivered by THAKKAR, J. What is more difficult, regaining of possession of agricultural lands to which they had undisputed right Or passing through the eye of a needle, is the question the appellants may well ask in desperation. They may well add that while in theory for every right there PG NO 741 may be remedy in practice such tenants have no remedy if the interpretation of the scheme of the provisions of the Consolidation Act' made by the High Court is upheld. The original appellants, the tillers of the lands who have failed to regain possession for a quarter century after the Consolidation Officer upheld their claim in 1960, having died during the pendency of these appeals

instituted 15 years back without reaping the fruits of the order in their favour (now represented by their heirs) may well be justified in saying so. For, notwithstanding the finding of fact recorded by the Consolidation Officer in his order dated April 28, 1960 that the original appellants were in possession of these lands as non-occupancy tenants prior to consolidation in the course of which the concerned land- owner was allotted parcels of land other than the parcels comprised in his original holdings, and they were entitled to be put in possession of the parcels which the land-owner was so allotted in lieu of his original holdings, the tenants have been denied the possession thereof pursuant to the said order of 1960 directing the land-owner to put them in possession. The said order remained a paper-order upon its being challenged as being without jurisdiction in a Civil Court. It was so challenged notwithstanding a provision² contained in the Consolidation Act excluding the jurisdiction of Civil Courts. The trial court negatived the plea of the plaintiff land-owner (respondent herein) that the defendants-tenants were in reality his labourers or servants and not his tenants. The trial court recorded a finding of fact upholding the plea to the tenants which was confirmed by the lower appellate court. This finding being a pure finding of fact could not have been, and in fact was not assailed in the High Court in the second appeals under Section 100 of the Code of Civil Procedure, preferred by the land-owner. The High Court did not disturb this finding, as indeed it could not have in view of the statutory limitation of section 100 of the Code of Civil Procedure, and yet allowed the second appeals preferred by the land owner upholding his plea that the tenants had no remedy under the Consolidation Act in view of the interpretation of the scheme of the provisions of the said Act canvassed by the land-owner which was sustained by the High Court. The Chequered history of the litigation giving rise to the present appeals³ may now be traced.

One Chandgi (respondent herein) had inducted two tenants

1. East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948.
2. Section 44 of the Consolidation Act.
3. By Special leave granted by this Court.

PG NO 742 (Jagram and Amar singh) who were in occupation of two different parcels of land from out of khasra Nos. 3,8,9,12 and 18 Village Bawana in Delhi. In the consolidation proceedings initiated under the Consolidation Act, a scheme of repartition was framed in lieu of the aforesaid parcels of land he was allotted Kill Nos. 21 (4 bighas 16 biswas),²² (4bighas 2 biswas) and 23 (4bighas 16 biswas) of rectangle No. 2. Thus the lands originally comprised in his holding were substituted by the lands comprised in the aforesaid parcels which were allotted to him under the consolidation scheme. The tenants were in actual possession and were actually tilling two parcels out of the original holding prior to consolidation. However, after the allotment of the other parcels of land in substitution of the original parcels of land the tenants were not put back in possession of the corresponding parcels in the substituted land. Thereupon they approached the Consolidation Officer viz. the Naib Tehsildar at Delhi by initiating proceedings under Section 21/26 of the Consolidation Act. Each of them made a separate application on the premise that in lieu of the land which he was cultivating as a non-occupancy tenant prior to consolidation the corresponding parcels

should be restored to him from out of the re-allotted lands substituted in lieu of original holding under the Consolidation Scheme. The landowner, Chandgi, lodged an objection. He raised the plea that Amar Singh and Jagram no doubt were tenants in 1950 but that they had voluntarily given up the possession thereof prior to the consolidation and that the land-owner himself was in possession prior to consolidation. The parties produced oral and documentary evidence. After considering the relevant material including the land records and entries of khasra Girdawari the Court of the Consolidation Officer (presided over by Naib Tehsildar) recorded a finding in favour of each of the tenants. Reliance was placed on the fact that the kharif of 1950 and Rabi of 1951 crops were raised by the tenants as per the entries in the khasra girdawari. He also accepted the oral evidence adduced on behalf of the tenants and reached the conclusion that the tenants were in actual possession and that had not surrendered the tenancy as pleaded by the landowner. He, therefore, upheld the claim of the tenants and passed an order in their favour on 28th April, 1960 whereby he directed that the corresponding parcels of land in the substituted killa numbers be allotted to the tenants and that warrant for possession be issued in favour of the tenants. The land-owner did not challenge this order by way of a revision petition under Section 42 of the Act. Nor did he challenge the said order by way of a Writ Petition to the High Court. Thus the order became final as per

1. [Kill Nos. 21 to 23 to be allotted to Amar Singh and 4 Bighas and 4 Biswas out to Kill No. 18 to be allotted to Jagram.] PG NO 743 the submission of the tenants inasmuch as the jurisdiction of the civil court was excluded by section 44 of the Consolidation Act. Chandgi the common land-owner against whom the aforesaid two orders dated April 28, 1960 were passed by the Court of Naib Tehsildar, Delhi, exercising powers as Consolidation Officer, thereafter instituted two separate suits against Jag Ram and Amar Singh raising identical contention, challenging the said orders of the Consolidation Officer, as without jurisdiction and obtained an order of stay. The tenants contested the suits. The trial court came to the conclusion that the Civil Court had no jurisdiction to entertain the suits and dismissed the suits. The land-owner preferred appeals to the lower appellate court and upon failing in the appeals, preferred two second appeals to the High Court, which by its order dated April 1, 1965 remanded the matter back to the trial court to decide the other issues as in the opinion of the High Court the Civil Court had jurisdiction to entertain the suit. Upon remand, the trial court again recorded a finding in favour of the tenants and repelled the contention that the impugned orders dated April 28, 1960 were without jurisdiction. Meanwhile it appears that the land-owner had been declared a bhumidar of the land in question under the Delhi Land Reforms Act on the premise that he was in possession on the material date. The land-owner appealed to the Court of the Senior Sub-Judge, Delhi who disposed of both the appeals by an extremely well considered common judgment dated February 10, 1966 whereby he confirmed the judgment and order of the trial court upholding the contention of the tenants that the order passed by the Consolidation Officer was legal and valid. Before the learned Senior Sub-Judge the plaintiff-land-owner had raised the contention that the defendants were not the tenants of the land at all and were merely labourers or servants and were not entitled to be put in possession. The learned Senior Sub-Judge negated this contention of the plaintiff-land-owner and recorded a clear finding to the effect that the defendants were tenants of the pre-consolidation land prior to the commencement of the Consolidation proceedings in 1952 and that the defendants were in possession of the lands as tenants prior to the consolidation proceedings as reflected in the passage extracted therefrom:

"Learned counsel for the plaintiff then contended that the defendants were not the tenants of land, that they were merely helpers or servants and that, therefore, they were not entitled to be put in possession. But, as has been rightly

1. In R.S.A.No. 51D and 52 of 1962.

2. In R.S.A. Nos. 360 and 361 of 1965.

PG NO 744 held by the Lower Court, it does not stand substantiated that the defendants were merely servants or helpers. The plaintiff did produce some oral evidence in that connection. He when appeared as his own witness (PS 3) stated that the defendants acted as labourers for one year, that they got their wages in kind and that they went away. The entries in the Khasra Girdawari however, do not support the case of the plaintiff. They rather support the case of the defendants. A copy of the Khasra Girdawari is Ex. D.4. That shows Khasra Nos. 3, 8 and 12 were in possession of Amar Singh as a tenant in Khariff 1950 and 1951. Khasra No. 9 is shown to be in cultivation as a tenant of Jag Ram in Rabi and Khariff 1950 and 1951. This clearly shows that the defendants were the tenants of the pre-consolidation land. It was stated by the plaintiff Chandgi as PW 3 on examination-in-chief that consolidation proceedings started in the year 1952. That means that the defendants were continuing as tenants prior to the start of consolidation proceedings." (Emphasis added) Thus, a concurrent finding of fact was recorded in favour of the tenants by the trial court and the lower appellate court, that the defendants were tenants in respect of the lands in question and were in possession prior to the consolidation proceedings in the year 1952. The plaintiff- land-owner also raised on inconsistent alternative plea that even if defendants were tenants, they had relinquished and abandoned their tenancies. On this point also the lower appellate court recorded a clear finding in favour of the tenants. For the sake of preciseness the relevant passage from the judgment dated 10th February, 1988 deserves to be quoted:

"Learned counsel for the plaintiff then urged that even if it be taken for granted that the defendants were tenants, they had abandoned their tenancies, that therefore, they had ceased to be tenants and were not entitled to be put in possession of the post-consolidation land. He pointed out to the copy of the Khasra Girdawari Ex. D. 4. That copy shows that in Khariff 1951 the land mainly remained uncultivated. He urged that showed that the defendants had ceased to take any interest which raised a necessary inference that they had relinquished their tenancies. The argument is clearly conjectural. The mere fact that the land remained uncultivated for one crop, does not raise any inference about the relinquishment of the tenancy by the tenants. "

PG NO 745 Thus, the plea that the defendants-tenants had 'relinquished' or 'abandoned' their tenancies has been negated both by the trial court and the lower appellate court and the concurrent finding of these two courts is in favour of the tenants. The other contention that was raised was that the land-owner had meanwhile obtained Bhumidari rights under the Delhi Land Reforms Act and that the orders dated April 28, 1960 passed in favour of the two tenants under Section 26 of the Consolidation Act could be given effect to. The Lower Appellate Court rejected this plea on the ground that the provisions of the Consolidation Act were not repealed by the provisions of the Delhi Reforms Act and unhesitatingly the plea of the appellant land-owner. Lastly it was

contended that the Consolidation Officer had no jurisdiction to pass an order under Section 26 of the Consolidation Act in favour of the tenants and that tenants should have pressed their claim when partition and re- partition Schemes were being framed under Court rejected this plea also on the ground that the point was covered by a decision rendered by H.R. Khanna, J. of the High Court (as he then was) in R.S.A. No. 81-T of 1961 in the case of Munshi v. Bhagwan decided on April 29, 1964. the plaintiff- land-owner preferred a second appeal to the High Court. Ordinarily this appeal would have been heard by a learned Single Judge of the High Court under section 100 of the Code of Civil Procedure on a question of law. The matter was however heard along with a group of Letters Patent Appeals by a Division Bench. The High Court rendered its common judgment in L.P.A. No. 271/71 giving rise to the present appeals. The High Court took the view that the Consolidation Officer had no jurisdiction to exercise power under Section 26 of the Consolidation Act. The reasoning of the High Court is reflected in the following passage:

"The power of the Chief Commissioner or of any authority under the Act to revoke a scheme or vary an order must be read to mean during the consolidation proceedings. In other words, these powers cannot be exercised once the scheme is deemed to have come into force and the possession to the allottees covered by the scheme of consolidation or, as the case may be, by repartition has been given subject, of course, to any changes that may be ordered in pursuance of the provisions of sub-sections (2), (3) and (4) of Section 21 or an order passed under Sections 36 or 42 of the Act provided the power under sections 36 or 42 are invoked PG NO 746 during the consolidation proceedings. The orders of the authorities under the Act including the orders of the Chief Commissioner have to be passed to further scheme and the re- partition proposals and cannot be passed to order possession to be given to anyone who is not covered by section 26(1) of the Consolidation Act for Section 26 really reiterates the effect of the consolidation holdings which has to be carried out in the manner set out in Sections 14 to 23 read with the relevant rules. The Consolidation of holdings stands concluded as provided by Section 24 once the persons entitled to possession of holdings have entered into possession and thereafter the possession cannot be disturbed until a fresh scheme is brought into force or a change is ordered in pursuance of provisions of sub-sections (2), (3) and (4) of section 21 or an order passed under Section 36 or Section 42 of the Act in proceedings that may be pending prior to the persons entitled to possession entering into possession or being held entitled to possession as provided in sub-sections (1) and (2) respectively of Section 23. In view of the discussion hereinabove it is obvious that no independent right accrues to tenants or other persons under Section 26 of the Consolidation Act. If a person is not held entitled to possession as postulated by Section 26 in the first instance either when the Scheme is formulated or the repartition proposals are made or implemented, there is no fresh determination of rights to be made under Section 26 by invoking Rule 13 of the Consolidation Rules. The determination takes place earlier and the Consolidation Officer has merely to carry out what has already been determined. Further under Rule 13 only the right of possession is to be settled and not the question of transfer of encumbrance or allotment. It, follows. therefore, that if no determination of rights can be made under Section 26 and consequently no appeal lies from any order purported to have been passed under Section 26 even the Chief Commissioner cannot by virtue of Section 42 make an order at that stage."

Thus, the pre-consolidation tenants who had succeeded in securing an order for possession in their favour in 1960 in view of the finding in their favour that they were tenants in respect of the lands comprised in the pre-consolidation PG NO 747 holding of the land-owner prior to the consolidation and were accordingly entitled to be put in possession of the corresponding lands allotted to the land-owner in lieu of the original holding⁵, have been obliged to approach this Court by way of the present two companion appeals which have been directed to be consolidated by an earlier order of this Court. They have been obliged to approach this Court notwithstanding the fact that the aforesaid order passed by the Consolidation Officer was not challenged by way of appeal or revision under the Consolidation Act or assailed by way of a Writ Petition and notwithstanding the fact that the trial court and the lower appellate court have recorded a concurrent finding in their favour that they were tenants in respect of the pre-consolidation holdings of the plaintiff-land-owner and that his plea that they were labourers was untenable and his alternative plea that they had relinquished or abandoned the tenancy was also unsustainable.

The structure of the reasoning of the High Court, as is evident on an analysis of the passage extracted from its judgment, is built on six premises viz:

1. Exercise of powers under section 26 to put the mortgagees or lessees of original owners in possession amounts to variation or modification of the scheme and the authorities under the Act have no jurisdiction to pass orders in this behalf 'after' the commencement of the scheme.
2. Section 26 reiterates the effect of the re-partition proposals embodied in the scheme and those who are not allottees under the scheme can not invoke powers under Section 26.
3. Unless a fresh scheme is brought into force or alteration is made under Section 21(2), (3) and (4) or an order is passed under Section 36 or 42 pending proceedings, the possession of persons in whose favour allotment is made can not be disturbed. It can not be disturbed in exercise of powers under Section 26.
4. No right is created in favour of mortgagees, lessees or holders of encumbrances in respect of original holdings under Section 26 read with Rule 13. Such rights must be determined before the scheme is confirmed and if this has not been done the holders of such encumbrances can not seek any relief under Section 26 read with Rule 13 or any other provision.

PG NO 748

5. No determination of rights of holders of encumbrances in respect of original holdings can be made under Section

26.

6. The right of transfer of encumbrance from original holding to substituted holding cannot be determined under Rule 13. All that is done under the said rule is to direct possession if right is already determined as per the scheme. The perspective of the Consolidation Act has to be

comprehended before examining the validity of the opinion formed by the High court. The object of the Consolidation Act as revealed by the preamble is "to provide for the compulsory consolidation of agricultural holdings and for preventing the fragmentation of the agricultural holdings in the State of Punjab". The main objective of the Act is to secure that the agricultural operations are carried on in a more efficient manner with the end in view to promote public good by putting the agricultural land to the optimum use so that it is a viable unit for purposes of carrying on agricultural operations in a more efficient and economic manner. For this purpose the Consolidation Officer may frame a scheme. The scheme may visualise repartitioning of the lands so that the land holder may get some other parcels of land in lieu of the parcels of land originally held by him. The repartition as envisaged by the scheme would have to be made by the Consolidation Officer in the light of the scheme. The Act contemplates the allotment of substituted lands in lieu of lands comprised in original holding on repartition only to two categories of land-holders namely the land-owners and to the occupancy tenants. Section 16 of the Act contemplates distribution of land held under occupancy tenancy between the tenants holding the right of occupancy of the one hand and the land-owners on the other in such proportions as may be agreed upon. When the scheme is confirmed under Section 20, the lands so allotted to the occupancy tenants and land owners would be held by them in full right of ownership and the occupancy tenancy of the owner would be deemed to be extinguished as contemplated in Section 16(2). Section 16A provides for partition of land between joint owners of land or between joint tenants of a tenancy in which a right to occupancy subsists in accordance with the share of each owner and each occupancy tenant. Thus, so far as the allotment of land is concerned it is either to the 'land owner' or to the 'occupancy tenant' who would under the Act become the owner in his right having regard to the statutory provision for extinguishing the rights of the land owner in such land as is in possession of the occupancy tenant. So far as this basic scheme for allotment of the lands on repartition is concerned it does not take into account any rights of non-occupancy tenants, PG NO 749 mortgagees, or holders of other encumbrances with which the original holdings of the land owners or the occupancy tenants were already burdened. So far as non-occupancy tenants are concerned the only provision which the Legislature had designed in Section 26 relating to encumbrance of the land owners and tenants which deserves to be quoted:

Section 26(1) "If the holding of a land or the tenancy of a tenant brought under the scheme of consolidation is burdened with any lease, mortgage or other encumbrance, such lease, mortgage or other encumbrance shall be transferred and attached to the holding or tenancy allotted under the scheme or to such part of it as the Consolidation Officer subject to any rules that may be made under Section 45, may have determined in preparing the scheme; and thereupon the lessee, mortgagee or other encumbrancer, as the case may be, shall cease to have any right in or against the land from which the lease, mortgage or other encumbrance has been transferred.

(2) If the holding or tenancy to which a lease, mortgage or other encumbrance is transferred under sub-section (1) is of less market value than the original holding from which it is transferred, the lessee, mortgagee or other encumbrancer, as the case may be, shall be subject to the provisions of section 34 be entitled to the payment of such compensation by the owner of the holding, or as the case may be, the tenant as the Consolidation Officer may determine. (3) Notwithstanding anything contained in section 23, the Consolidation Officer shall if necessary put any lessee or any mortgagee or other encumbrancer entitled to possession, in possession of the holding or tenancy or part of the

holding or tenancy to which his lease, mortgage or other encumbrance has been transferred under sub-section (1)."

As indicated in Section 26, Rule 13 has been made under the authority of Section 46 which provides:

"Putting the encumbrancer in possession-If the lessee, mortgagee or other encumbrancer appears to the Consolidation Officer to be entitled to possession of a holding under Section 26, the Consolidation Officer shall issue a notice PG NO 750 to the owner to show cause within fifteen days of the receipt of the notice why the lessee, mortgagee or other encumbrancer, as the case may be, should not be put in possession of such holding. If the owner fails to show cause or if the Consolidation Officer is satisfied that the cause shown by the owner is not adequate, he shall put the lessee, mortgagee or other encumbrancer as the case may be into possession of the holding, and the record of rights in respect of the holding shall be corrected accordingly."

It is therefore clear that so far as non-occupancy tenants or mortgagees and other holders of encumbrances in respect of pre-repartition original holdings are concerned, their rights stand transferred by virtue of the operation and effect of the statutory provision embodied in section 26 itself from the 'original holding' to the 'substituted holding' allotted to the land owners and the occupancy tenants under the scheme. This provision has been made for the obvious reason that the mortgage or the non-occupancy tenant would have no right in the lands comprised in the substituted holdings as per the contract referable to the lands comprised in the original holding. Since the original holding would be no more in existence upon repartition they cannot assert their rights against the original holdings. What would then happen to their preexisting right? Would such right stand extinguished? Such unjust result cannot lawfully be brought about without offending the constitutional rights of the mortgagees or the non-occupancy tenants. That is the reason why section 26 has been enacted with a view to provide for a statutory fastening of the right which subsisted in favour of the mortgagee or the non- occupancy tenant or the holder of other encumbrances, to the new holding which the land owner (or the occupancy tenant) is allotted under the scheme of consolidation and repartition made pursuant thereto. Sub-section (2) of Section 26 provides for payment of compensation to the person holding encumbrance if the value of the land which has been allotted to the land owner in lieu of his original holding is less than market value of the original holding. And sub-section (3) confers the jurisdiction on the Consolidation Officer to put in possession of substituted holding such a lessee or mortgagee or holder of encumbrance of the original holding of the land owner (or occupancy tenant) who has become the owner of the substitution land on confirmation of the scheme and repartition made pursuant thereto. On a true reading of section 26 read with Rule 13, a right had indeed been created in favour of an encumbrance holder including a non-occupancy tenant. and jurisdiction had been conferred on the Consolidation Officer to put the holder of the encumbrance in possession of the corresponding PG NO 751 part of the substituted holding allotted to the land owner in lieu of his original holding if he was in possession of the original holding. The High Court was therefore clearly wrong in taking the view that section 26 does not create any independent right and that it deals only with the rights of such persons to whom land is allotted under the scheme and the repartition made pursuant thereto. The High Court failed to realize that in fact section 26 would come into operation only subsequent to and only upon the re-allotment to the original owner being made and he being put in possession of the

substituted holding in lieu of the original holding upon repartition. the High Court was also in error in failing to realize that:

(1) the scheme of the Consolidation Act accords different treatment to occupancy tenants and non-occupancy tenants. Under the scheme allotment of substituted holding is made only in favour of occupancy tenant and not in favour of non-occupancy tenants:

(2) what becomes final upon the scheme coming into operation under the Consolidation Act is the right of the owners and occupancy tenants in regard to the lands which are allotted to them in lieu of and in substitution of their original holdings. In other words finality is attached to the question as to which land should be allotted to whom in lieu of and in substitution of the original holdings;

(3) The reading of the relevant provisions of the scheme of the Consolidation Act in the unwarranted manner which commended itself of the High Court would result in gross injustice. The mortgagees, the non-occupancy tenants and other holders of encumbrances in relation to the original holding would completely lose their rights, and sections 26(1),(2) and (3) would become meaningless. So also Rule 13 would become lifeless and purposeless;

(4) there is no question of the non-occupancy tenants or the mortgagees etc. having any voice or being concerned in the matter of framing of the scheme or in the matter of allotment of lands on the repartition of the lands. Only the land owners and the occupancy tenants would be concerned with regard to this matter;

PG NO 752 (5) the Consolidation Act itself would be exposed to challenge on constitutional grounds if the rights of the mortgagees and non-occupancy tenants etc. were to be extinguished as they do not figure in the scheme of repartition as confirmed under the relevant provisions. In the framing of the scheme neither the mortgagee nor the non- occupancy tenant can figure for they were not persons who were entitled to become the owners of the land allotted in lieu of the original holding in respect of which they were only holding an encumbrance. Section 24 would come into play only with regard to those persons who are owners of the land or occupancy tenants who were entitled to become owners of the substituted land under the relevant provisions of the Consolidation Act;

(6) there is no question of creating any new right in favour of a mortgagee or a non-occupancy tenant or other holder to encumbrance. Section 26 has been designed in order to give effect to the existing right of such persons by transferring these rights to the parcels of lands which are substituted in lieu of the original holding by virtue of the repartition:

(7) what the Consolidation Officer does under the said section is to to define the portion of the land newly allotted under the scheme to which the right of the holder of the encumbrance would be attached by operation of law by virtue of section 26. The right already existed. But it existed in respect of the original holding. In order to resolve the problem arising in the context of the original holding being substituted by a different holding, what section 26 does is to statutorily transfer the right from the original owner, since the newly allotted holding might be of inferior land or of smaller size, the Consolidation Act provides for payment of compensation to the holder of the encumbrance.

The view taken by the High Court that the order of April 28, 1960 was without jurisdiction is thus altogether untenable in the eye of law apart from the fact that it results in wholly unjust and disastrous consequences and cannot accordingly be sustained. The order passed by the Court in so far as it affects the appellants, and only limited to the extent that it affects the appellants, is PG NO 753 therefore set aside. The order passed by the Senior Sub- Judge, Delhi on February 10, 1966 is restored. In view of the extraordinary delay which has been occasioned and the great injustice which has been suffered by the appellants, they shall be put in possession of the lands allotted to them as per the order of the Consolidation Officer dated April 28, 1960 at the earliest. In any case they should be put in possession on or before March 31, 1989. Both appeals are allowed accordingly.

The respondent shall pay to the appellants costs throughout.

R.S.S.

Appeals allowed.