courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 12/01/2026

(2004) 05 AHC CK 0198

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No''s. 46297 of 2002 and 6824 of 2003

Smt. Ram Wati		APPELLANT
	Vs	
Mahesh Chand and Others		RESPONDENT

Date of Decision: May 12, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 100, Order 21 Rule 102, Order 21 Rule 97, Order 21 Rule 98, Order 21 Rule 99
- Contract Act, 1872 - Section 19, 19A, 39, 6, 66
- Limitation (Amendment) Act, 1963 - Article 136
- Limitation Act, 1877 - Article 179
- Limitation Act, 1908 - Article 182, 183
- Specific Relief Act, 1963 - Section 31, 33
- Transfer of Property Act, 1882 - Section 52
- Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 12, 209, 229B, 49, 5
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 18, 20, 23, 23(1), 27
- Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - Rule 109A(2), 5

Citation: (2004) 97 RD 23

Hon'ble Judges: Janardan Sahai, J

Bench: Single Bench

Advocate: R.P. Gupta and Rajiv Gupta, for the Appellant; Manoj Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Janardan Sahai, J.

These two writ petitions raise common question of fact and law and arise out of the same orders and as such are being disposed of by a common judgement.

2. Illahi Bux and Chotey Lal the plaintiffs of Original Suit No. 32 of 1950 were zamindars of the disputed land. They had executed a lease deed dated 24.1.1949 in favour of Ram Riksh Pal the first defendant and had also executed an agreement to sell on the same date in favour of his son the second defendant and had received an advance of Rs. 10,000/--. Their suit for cancellation of the lease deed and for possession was decreed subject to the condition that the sum of Rs. 10,000/- received by the plaintiffs was refunded. Civil Appeal No. 533 of 1951 filed by the plaintiffs against the condition for refund of money and the cross objections by the defendants in that, appeal were dismissed on 27.8.1954. It appears that a sum of Rs. 3,000/- had been claimed by the plaintiffs for the damage done by the defendants to the leased land, and though it was held in the suit that the plaintiffs were entitled to damages for the loss, the amount was not adjusted against the amount to be refunded by the plaintiffs. As such an application for amendment of the decree was filed by the plaintiffs, which was allowed by the trial court by its order dated 15.11.1960. Revision No. 201 of 1961 against that order filed by the defendant was dismissed on 27.7.1961 by this court.

3. In the meanwhile it appears that during the pendency of the appeal in the Original Suit No. 32 of 1950, the U.P. Zamindari Abolition & Land Reforms Act (hereinafter called as the UPZA & LR Act) had come into force the effect of which was that the name of Ram Riksh Pal, the judgement debtor which on the basis of, the lease appears to have been entered as hereditary tenant in 1356 F came to be recorded as sirdar. On payment made by him of 10 times the land revenue, he acquired bumidhari rights under the Act. The land was also included in his chak in the consolidation proceedings On 29.12.1964 Ram Riksh Pal, the judgement debtor executed a sale deed in favour of Ram Lal and others. The petitioner Ram Vati in writ petition no. 46297 of 2002 and one Prem Singh obtained a sale deed of the disputed plots from Ram Lal and others on 30.8.1969 and then names were recorded, The petitioner Ved Ram Singh in writ petition no. 6824 of 2003 has purchased the share of Prem Singh after his death.

4. The decree of Original Suit no. 32 of 1950 aforesaid was then put into execution on 21.8.1.972 in execution case no. 107 of 1972. Objections u/s 151 Order 21, Rule 97, 99, 100 and 101 CPC against the execution of the decree were filed by Ram Wati. Separate objection was filed by Ved Ram Singh. The objections were registered as Misc. Case No. 59 of 2001 and 69 of 2001 respectively. Both these objections along with objections filed by one Subash son of Prem Chand were dismissed by a common order dated 19.5.2001 passed by the Civil Judge, Junior Division, Bulandshahar. An appeal against this order was preferred by Ram Vati and a revision by Ved Ram Singh. The appeal and the revision were dismissed by the Additional District Judge, Bulandshahar on -28.9.2002. The present writ petitions have been filed against these orders. The contesting respondents in these petitions are the successor heirs of the plaintiff-decree holders of OS 32 of 1950.

5. In its impugned order dated 28.9.2002 the appellate court in dismissing the appeal and revision of the petitioners relied upon the judgement in appeal No. 535 of 2001 preferred in Original Suit No. 32 of 1950 wherein despite the enforcement of UPZA & LR Act the court had decreed the suit for possession holding that the land in dispute were khud kasht of the plaintiffs and had been given on lease for manufacturing purposes. On the basis of this finding recorded in the appeal no. 535 of 1951 the appellate court in the present proceedings held that the land being khud kasht of the plaintiffs-zamindars, would not vest in the state but would be settled with the zamindars u/s 18 of the UPZA & LR Act. It was also held that the bar of Section 49 of the U.P. Consolidation of Holdings Act was not attracted. The contention that the execution proceedings were barred by limitation was repelled. Another finding for dislodging the petitioner is that the objections taking the same ground as are now being canvassed by the petitioners were taken by Mahesh Chand and another -the heirs of Ram Riksh Pal the judgement debtor and were dismissed by the executing court and the First Appeal against that order was also dismissed and the second appeal preferred by them was dismissed as having abated, and the decision in the case of Mahesh Chand operates as res judicata u/s 11 CPC read with explanations 4 and 7 thereto. The petitioner Ram Wati''s claim has also been dislodged on the ground that she had also filed objections u/s 47 CPC in which she had taken similar pleas as are now being pressed and her objections which were registered as Misc. Case No. 152 of 1977 were dismissed by the Munsif by his order dated 20.2.1978 and the appeal preferred there against was dismissed in default on 13.3.1987. An additional ground given by the appellate court against the petitioner Ved Ram Singh is that his revision against the order dismissing his objections was not maintainable.

6. I have heard Shri R.P. Gupta, learned counsel for the petitioner and Shri Manoj Kumar for the contesting respondents.

7. The first question, which falls for consideration is whether the decree of Original Suit no. 32 of 1950 has become inexecutable on account of the bar of limitation. In order to decide this question it is necessary to determine the starting point of limitation. If the contention of the contesting respondents that limitation would not start running until the condition of refund of Rs. 7,000/- under the amended decree was fulfilled by the decree holder is accepted it would have to be held that the execution proceedings are not barred by limitation because the execution was undisputedly filed within time from the date the payment was made. Shri R.P. Gupta, counsel for the petitioner submitted that the limitation would start running from 27.8.1954 the date of the appellate court''s decree as it was open to the decree holder to have made the payment immediately and to apply for executions.

8. In support of his submission Shri Gupta placed reliance upon Sri Narain Tiwari v. Brij Narain [1931 ALJ 319] . It was held in that case that where under the terms of a decree the right of the decree holder to recover possession of some property in the

hands of the defendants is contingent upon the decree holder paying certain sums of money to the defendants but no date for payment, is specified, the decree holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment has been made. "The right accrues to the decree holder immediately and at once, and the decree holder is not entitled to prolong the date of payment by his or her inaction or laches." This case was considered by a Full Bench of this Court in Abdul Rashid Vs. Sri Sitaramji Maharaj Brajman and Others, . It was held that although the correct provision of the Limitation Act viz,, Article 181 was relied upon and the case rightly states the principle of law but there was an error on facts that the right to apply for execution accrued at once. It, was. noticed that the decision was rightly dissented from in the later Division Bench in Lalji Koeri Vs. Gajadhar Koeri, , The Full Bench held that the basic test is whether there is a right available to the decree holder to apply for execution immediately or the fulfillment of some condition is a condition precedent and further whether the terms of the decree cast any obligation on the decree holder to comply with that condition within a specified period. Where no such period is specified, the execution of the decree must be deemed to remain in abeyance and the limitation would commence only from the time when the plaintiff chooses to comply with the condition. In view of this decision of the Full Bench, it has to be held that the limitation would start running from the date the payment was actually made by the decree holder as the decree of the trial court did not specify the time within which it was to be made.

9. Two other decisions on the question viz., Hameed Joharan (d) and Others Vs. Abdul Salam (d) by L.rs. and Others, were relied upon by the petitioner''s counsel. In the first of these cases the final decree for partition was to be prepared on the decree-holder furnishing stamp paper and it was held that as the decree holder did not furnish the stamp papers until after 12 years the execution was time barred. In the latter case the court fee on the amount found due was to be paid by the decree holder. It was held that there was nothing to prevent the decree holder from paying it then and there. These decisions are distinguishable. These were not cases where a conditional decree was passed on fulfillment of which condition alone the decree could be enforced. The starting point of limitation under Article 136 of the Limitation Act which applies to the execution of a decree is the date when the decree becomes enforceable. It was held that enforceability of a decree is a different concept from its executability and if stamp paper is not supplied the decree may not become executable but it does not cease to be enforceable. The Stamp Act, it was held was a fiscal enactment and though the decree may not be engrossed on stamp paper and therefore can not be received in evidence or be acted upon but the period of limitation will not remain suspended until it is engrossed on requisite stamp paper. What has been said in Joharan''s case about stamp duty applies equally to court fee. Under the Court Fee Act a document chargeable with court fee cannot be filed unless the court fee is paid.

10. A decree is a formal expression of an adjudication, which conclusively determines "the rights of the parties". A decree" which imposes an obligation upon one party in favour of the other the performance of the obligation being a condition for enforcement of the decree against the other party is therefore a conditional decree as the condition relates to "the rights of the parties" to enforce the decree. But the payment of stamp duty or court fee is not a condition relating to the rights of the parties to the suit. It is not an obligation which one party is required to perform in favour of the other party to the suit as a condition for the enforcement of the decree. It is a payment of a fee or duty made to the state without which the decree cannot be executed under the law even though it is enforceable by the parties. An obligation under the decree to pay money to the judgement debtor as a condition for obtaining possession from him such as in this case is a condition which relates to the rights of the parties and therefore postpones the enforceability of the decree until the condition is performed. Joharan''s case and Yashwant''s case supra are therefore distinguishable.

11. The question of limitation can be examined from another point. It was contended by Shri Manoj Kumar counsel for respondent that the decree in this case was amended and the limitation would run from the date of dismissal of the revision against that order filed by Ram Riksh Pal the judgment debtor. That date was 27.7.1961 and if it is taken that limitation would run from this date, the period of three years limitation under Article 182 of the Limitation Act, 1908 which was applicable then had not expired when the new Limitation Act 1963 was enforced and under Article 136 of this Act, a 12 year period of limitation has been provided which became applicable before the limitation under the old Act had run out and consequently the execution filed within this extended period was within time. The starting point of limitation under Article 136 of the Limitation Act 1963 is the cite when the decree becomes enforceable. When a decree is amended it is the amended decree that is enforceable. Limitation would therefore begin to run from the date of the amended decree. The order allowing the amendment was challenged in revision and merged in the order of dismissal in the revision Limitation would therefore run from the date of the order in the revision, Learned counsel for respondent relied upon the decision in Fatimunnisa Begum Vs. Mohammed Zainulabuddin Saheb (deceased by Lrs) and Others, , It was held in this case that when an amendment is made, the original decree no longer retains its form and what is sought to be executed is the amended decree. Therefore, the word'' enforceable'' in Article 136 must be construed with reference to the decree that is sought to be enforced. If there is an amendment, the period has to be reckoned from the date of the amended decree. Shri Gupta, counsel for the petitioner, on the other hand, relied upon a decision of this Court in Oudh Bihari Pande and Anr. v. Mahadeo Sahai and Ors. 1907 ALJ R 422]. It was held in this case that when a decree is amended u/s 206 CPC to bring it in accord with the judgement, the amendment relates back to the date of the decree and the decree

must be dealt with as if it had been made originally and the amendment of a decree does not. give a fresh start to the period of limitation. The court was applying the principle of relation back in reference to the provisions of the Limitation Act XV of 1887, which was then in force. The starting point of limitation under Article 179 of the second schedule of the Limitation Act of 1877 was the date of the decree and not the date when it becomes enforceable as now provided under Article 136 of the Act of 1963. The principle that an amendment of a clerical mistake in the decree relates back to the date of the original decree so that the starting point of limitation is the date of the original decree does not apply to Article 136 of the Limitation Act of 1963 under which the limitation commences not from the date of the decree but from the date it becomes enforceable. The effect of the word ''enforceable'' is determinative.

12. In the Limitation Act of 1908 Article 182 provided for a 3-year period of limitation for execution of a decree of the civil court not provided for by Article 183 or by Section 48 CPC - the limitation to run from the date of amendment of the decree. This new provision was interpreted in Faqir Chand and Another Vs. Kundan Singh and Others, and it was held that Article 182 was subject to Section 48 CPC, which provided for a twelve year period of limitation for execution. The court noticed that while Article 182 specified that the time would run from the amended decree there was no such specification in Section 48 CPC and therefore for the purpose of computing the outer limit of 12 years u/s 48 CPC the starting point would be the date of the original decree and not of the amended one and an execution filed more than 12 years after the original decree would be barred by limitation even though the 12 year period 1 had not run out from the item of the amended decree. Section 48 CPC was repealed by the Limitation Act of 1963, which came into effect from "1.1.1964 . Article 182 of the Limitation Act 1908 was substituted by Article 136 of the 1963 Act with the difference that while Article 182 provided that limitation was to commence from the date of the decree, the new Article 136 provides that it would commence from the date it becomes enforceable. In view of the statutory changes that have since been made the aforesaid decisions of this Court cited by Shri Gupta are therefore not very helpful in determining the question and in my opinion the Andhra view lays down the correct law. The enforceable decree would be the amended one and therefore limitation would start running from the date of the amended decree.

13. The effect of Sections 4 & 6 of the UPZA & LR Act upon the rights of parties may now be examined. The suit filed by Illahi Bux and Chote against Ram Riksh Pal for cancellation of the lease was decreed by the trial court in the year 1951 i.e. before the UPZA & LR Act came into force. The decree was affirmed in appeal. Mr. Gupta contends that the lease not being void ab initio the cancellation of the lease takes effect from 27.8.1954 the date of the appellate decree into which the trial court''s decree had merged and Ram Riksh Pal having in the meanwhile already acquired sirdari rights by operation of law under the UP ZA & LR Act, 1951 which was

enforced before the appellate decree was passed, the decree has no effect upon his rights.

14. Reliance was placed by Sri Gupta on certain decisions determining the effect of the U.P. Zamindari Abolition and Land Reforms Act. In State of Uttar Pradesh v. Sarju Devi AIR 1971 SC 2196 it was held that the lessee of the intermediary who was paying revenue to the State and was holding the land as a hereditary tenant would become a sirdar. In Ram Rana Sheo Ambar Singh Vs. Allahabad Bank Ltd., Allahabad, a simple mortgage of property rights in favour of the Bank before the commencement of the UPZA & Land Reforms Act was held to be unenforceable by the sale of mortgaged property on the ground that after the UPZA & LR Act the proprietary rights in the sir, khud kaslit and grove land of the mortgager had extinguished in favour of the State and an entirely new class of bumidhari rights u/s 18 the UPZA & LR Act had come into existence. In Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, the apex court also held that the three classes of tenure bhumidar, sirdar and asami were entirely new classes of tenure. In Sri Vidya Sagar Vs. Smt. Sudesh Kumari and Others, it was held that a decree for pre-emption of proprietary interest of the suit lands obtained before the UP ZA & LR Act could not be executed for obtaining possession after the enforcement of the Act because the interest of the proprietors had in the meanwhile been extinguished by operation of law and the property had vested in the State. In Sabitri Dei and Others Vs. Sarat Chandra Rout and Others, it was held that a decree for possession of property which was an intermediary''s estate passed after the property had vested in the State under the Orissa Estate Abolition Act was a nullity.

15. If the lease stands cancelled from the date of the decree of the appellate court in suit No. 32 of 1950 the claim that Ram Riksha Pal had acquired sirdari rights by operation of law would be justified in view of the aforesaid decisions cited by the learned counsel for the petitioner. Sri Gupta relied upon a decision of the Apex Court Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, in which the concept of void and voidable transactions has been explained. It has been held that while some of the voidable transactions such as fraud are avoided from their inception, others are avoided from the date the option to rescind is exercised.

16. The distinction between void and voidable agreements and the effect of the cancellation of a voidable agreement was considered in Gopala Pillai Vs. The State Bank of Travancore and Another, . The following passage from Salmond''s jurisprudence and the preposition stated in Law of Contract by Cheshire and Fifoot were referred to:-

Salmond: In respect of their legal efficacy agreement are of three kinds, being either valid, void or voidable. A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one, which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between the

two cases. It is not a nullity, but its operation is conditional and not absolute. By a reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void ab initio. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it....

Void or voidable agreements may be classed together as invalid."

The avoidance of a voidable agreement may in certain cases (such as those arising from want of cover and governed by the doctrine of ultra vires - See. Cheshire and Fifoot "The Law of Contract," Ch.II) relate back to the making of it; but such avoidance can not divest third parties of that vested rights. When invalidity of a voidable transaction is declared, on the ground of lack of capacity (as in the case of a minor or a junior member), at the instance of persons entitled to challenge it, the transaction is void against them (in the sense that it is unenforceable) and not void against persons who have acquired rights under the transaction. Unlike a void agreement, a voidable agreement is not a nullity. It is at once void for certain purposes and valid for other purposes."

17. In the case of certain voidable transactions such as in the case of fraud or coercion and the like under Sections 19 and 19A of the Contract Act it has been held that no benefit under the transaction can be given to the offending party and if the transaction is cancelled the cancellation will relate back to the inception of the transaction vide Official Receiver, Jhansi Vs. Jugal Kishore Lachhi Ram Jaina, Hyderabad and Others, relying upon the Privy Council decision in AIR 1943 34 (Privy Council) . In such cases there is an absence of consent and as such the invalidity lies in the formation of the contract itself but in case of certain other voidable transactions such as u/s 39 of the Indian Contract Act when a party has refused to perform his promise the contract is avoided from the date of recission. In such a case the invalidity is not in the formation of the contract itself but the contract is sought to be avoided on account of a subsequent breach. Section 39 of the Indian Contract Act reads as follows: -

"39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an, end to the contract, unless he has signed, by words or conduct, his acquiescence in its continuance."

18. Counsel for both parties referred to the findings in the appeal in OS No. 32 of 1968. The appellate court in its judgement in that appeal held that the lease and the agreement of sale were part of one transaction. The contention that the contract was unenforceable in view of Section 23 of the UPZA & LR Act which did not

recognize transfers made after a particular date was not accepted by the appellate court in Original Suit No. 32 of 1950 and it was noticed that there was a distinction between a void transaction and one which "shall not be recognised" and the contract had not become void as being unenforceable - an inference which the appellate court supported by its finding that the Zamindari Abolition Act had not been enforced. The reference in the judgment to the enforcement of the UPZA & LR Act in the context is in relation to the date when the defendants had abandoned the contract. It was held that the agreement had not become incapable of performance nor was it unenforceable by law. The lease and the agreement to sell being part of the same transaction the failure to get the sale deed executed was a breach of contract by the defendants and the lease which was an inseparable part of the contract was therefore liable to cancellation. What in substance was held in the appeal in Original suit No. 32 of 1950 was that the contract was not void or voidable under the UPZA & LR Act but the defendants had repudiated it (the appellate court has used the expression rescinded). On this finding the contract would become voidable at the option of the innocent party. Although it has been some times doubted whether Section 39 of the Contract Act is applicable to conveyances which are executed contracts the performance of which has been completed, the section being applicable only to executory contracts the performance of which has yet to be completed but that question does not arise in this case as it was found that the lease and agreement to sell were part of a single transaction and were not independent of each other. Although the lease was a completed transaction the contract is a whole therefore was an executory one so long as the sale deed was not executed in pursuance of the contract of sale, which was also part of the same contract. The court regarded the lease as an inseparable part of the contract of sale and therefore had put to an end the whole contract directing the parties to restore the benefits received by them to the other party. Section 39 of the Indian Contract Act though not referred to in the judgment in the appeal is 0532 of 1950 was therefore applicable, as the defendants had refused to perform their promise. In the case of repudiation of the contract by one party the other party has an option to accept the repudiation and rescind the contract or to ignore the repudiation and insist upon the performance of the contract. The plaintiff had treated the contract as at an end and therefore filed the suit for cancellation of the lease deed and for possession.

19. A suit for cancellation of an instrument, which is void or voidable lies u/s 31 of the Specific Relief Act. Section 66 of the contract Act provides that a voidable contract may be revoked in the same manner as the revocation of a proposal. One of the modes of revoking a proposal u/s 6 of the Contract Act is by notice. The filing of a suit to set aside the contract is one of the clearest forms of an express and unequivocal rescission vide page 696 of Pollock and Mulla''s Commentary on Indian Contract and Specific Relief Act, 11th Edition. The filing of the suit for cancellation is a notice of revocation of the contract. The lease was thus avoided at least from the

date the suit was filed. When an instrument is cancelled by a decree the court may u/s 33 of the Specific Relief Act direct the party to whom relief is granted to restore to the other party such benefit that he may have received - the obvious purpose is to put the parties back to the position they enjoyed before the instrument was executed. Indeed even in the decree passed in Original Suit No. 32 of 1950 such a direction for refund was given. It is not the petitioner''s case that any right in favour of Ram Riksh Pal by operation of law or any rights in favour of any third party had been created till the date of the institution of the suit. The appellate court had directed the parties to restore the benefit that they had received under the contract. The result of the avoidance of the contract and cancellation of the lease is that no right in favour of any party has been created thereunder. For it cannot be accepted that although the consideration paid by the defendant was ordered to be refunded and the lease cancelled the defendant had yet acquired rights in the land by operation of law on the basis of the lease. A person cannot lose his land as well as the money that was to be paid to him for the transfer. That situation can arise only in certain cases of illegal contracts, which is not the case here. The cancellation of a conveyance by a decree u/s 31 of Specific Relief Act destroys the essential feature of a conveyance namely the transfer of rights, which it brings about. The cancellation therefore goes to the root of the contract - the result being that it is avoided as between the parties to it from its very inception, but not as regards innocent third parties. A determination of the lease by the lessor for breach of any condition in the lease, which gives the lessor a right to forfeiture and reentry stands on a different footing. In such a case the relationship comes to an end from the date the lease is determined. The benefits enjoyed by the parties under the contract such as rent received by the lessor for the period the lease was subsisting are not required to be restored. The foundation for the exercise of the right of forfeiture is the condition in the contract itself. A party therefore cannot exercise a right under the contract itself and simultaneously treat the contract as of no effect from its inception. The cancellation of the lease in the present case was made by the court on the ground that the lease was an integral part of a transaction for sale and therefore the repudiation of the contract for sale had if at the plaintiff''s option put to an end the entire transaction and therefore the lease itself. The infirmity goes to the very existence of the lease. It would have been a different matter if the contract was not rescinded until after the Zamindari Abolition Act was passed. The reason as we have noticed is that when a contract is repudiated by one party it is optional for the other party to accept the repudiation and to rescind the contract or to treat the contract as subsisting and to enforce it. So long as the contract is not rescinded it continues to subsist on the foundation that the option to treat the contract at an end has not been exercised. Any rights therefore created by operation of law that bring about a change in the position of the parties can not be defeated by an exercise of the right of rescission subsequent to the acquisition of new rights. If by operation of law Ram Riksh Pal had acquired rights under the Zamindari Abolition Act the lease could not have been cancelled at all by the court and the plaintiff''s IG could be left to pursue

some other remedy as compensation by money for non performance of the contract by the defendants. When however the court decreed cancellation the cancellation as between parties would relate back to the inception.

20. No rights on the basis of the lease would therefore accrue. The basis of the entry of 1356 Fasli was lost and consequently the defendant would not become a sirdar. The decisions cited by the petitioner''s counsel have no application to the facts of the present case as the lease of the petitioner had been cancelled, the effect of which was to nullify the entry of tenancy of 1356 fasli in favour of Ram Riksh Pal - the sheet anchor of the petitioner''s claim for the rights created by U.P. Z.A. & L.R. Act. Sri Gupta relied upon certain decisions which draw a distinction between a void transaction and a transaction which "shall not be recoganised for any purpose" u/s 23(1)(b) and submitted that the lease in favour of Ram Rachpal was neither void nor voidable. Nothing turns upon this point as the lease was not cancelled on the ground that the transaction was void or voidable under the U.P. Zamindari Abolition and Land Reforms Act but on the ground that the defendant had committed a breach of contract. I have already considered this aspect. The decisions cited by Sri Gupta on the interpretation of Section 23 of the U.P. Zamindari Abolition and Land Reforms act do not help him. The decision in Kesar Singh and Others Vs. Sadhu, is also distinguishable. In that case a customary right was taken away by statutory Amendment when the suit was pending at the stage of appeal. Relying upon an earlier decision in Darshan Singh Vs. Ram Pal Singh and another, that Section 7 of the Principal Act as amended in 1973 is retrospective and was applicable to a suit pending at the stage of appeal it was held that the decree was a nullity and the point could be raised in execution as ''it goes to the root.'' The date of vesting under the Zamindari Abolition Act is not retrospective.

21. There is one more aspect of the matter relating to the rights created by U.P.Z. A. & L.R. Act. It was held by the appellate court in Original Suit 32 of 1950 that many of the lands were khud kasht of the plaintiffs. On that basis it has been held by the appellate court in its impugned order in the present proceedings that the plaintiffs were entitled to bumidhari right u/s 18 of the UPZA & LR Act. No objections were taken in that suit no. 32 of 1950 that it was liable to abate under Rule 5 of the UPZA & LR Rules nor did the defendant Ram Riksh Pal put forward any claim in that suit that he had acquired sirdari rights by operation of law to resist the decree for possession being passed. In view of these facts I am of the view that the courts below were right in holding that the claim now being made that Ram Riksh Pal had acquired sirdari rights is barred by principles of constructive res judicata.

22. It was urged that the civil court decree is a nullity as a suit for possession of bhumidari land would lie in the Revenue Court. Reliance was placed by Sri Gupta upon Sayeedur Rehman Vs. The State of Bihar and Others, . The argument has no force because neither the Revenue court nor the Consolidation Court can pass a decree or order to set aside an instrument, which is voidable. No proceedings for

avoiding a voidable instrument in this respect could be taken under the Consolidation of Holdings Act.

23. The effect of Section 49 of the Consolidation of Holdings Act may now be considered The bar is operative only if a proceeding could or ought to have been taken under the U.P. Consolidation of Holdings Act but was not taken. It has already been found above that the lease was cancelled by the decree in Original Suit No. 32 of 1950 for breach of contract by the defendant. Such a transaction is voidable. A Consolidations Court has no jurisdiction to cancel a voidable document. Where rights in land subject to consolidation operations are dependant upon the validity of a voidable document no declaration of rights over the land can be made by the consolidation authorities. In such cases it cannot be said that proceedings could or ought to have been taken under the Consolidation of Holdings Act. Such a suit for cancellation would not abate even if it was pending when the consolidation operations commenced. In the present case the suit was filed before the village was notified for consolidation operations and therefore there can be no doubt that the decree was valid and not affected by the consolidation proceedings. A decree in favour of a party creates a vested right, which he cannot be deprived of except by law. In the absence of any provision in the Consolidation of Holdings Act for abatement or stay of execution proceedings the decree holder can execute the decree even during the pendency of the consolidation proceedings or thereafter and no question of bar of Section 49 arises. It has been held in Smt. Ram Kuar v. Jangi 1964 RD 310 that an execution proceeding is not a suit and is not to be stayed u/s 5 as it then stood. The Section has now been amended and the effect of notification of consolidation operations is to abate pending suits and proceedings relating to declaration of rights and interest in any land in regard to which proceedings can or ought to be taken under the Act. Even after the amendment in Section 5 it has been held that execution proceedings do not abate vide Ram Nath and Another Vs. Sampat, The provisions of Section 5 and Section 49 apply at different stages but are supplementary and deal with the same kind of cases vide Kanchan Kumar Chaudhry v. District Judge, Mau 1998 RD 610. For determining the application of Section 49 one of the tests that can therefore be adopted is to examine whether the nature of the proceedings in respect of which the bar is being set up are such as would have abated u/s 5 had they been pending. As an execution proceeding would not abate u/s 5 the bar of Section 49 would not be attracted to affect their maintainability. In Ashok and Another Vs. Superintendent, District Jail and Another, it was held "Finalization of consolidation proceedings do not effect the suit for cancellation or specific performance etc. In case consolidation proceedings are finalized in favour of A on the-strength of sale deed but the same is cancelled or suit for specific performance is decreed in favour of B no difficulty can arise and the name of B can be substituted in place of A and possession be delivered under rules." In Abdul Salam Vs. Deputy Director, Consolidation and Others, it was held in respect of a suit for cancellation of a voidable sale deed

"The suit which is pending in the civil court will not abate u/s 5(2) of the U.P. Consolidation of Holdings Act nor it would be barred u/s 49 of the Act and will have to be decided on merits irrespective of the entries made in favour of the opposite parties nos. 1 to 3 on the basis of the sale deed in these proceedings before the consolidation authorities, although . the petitioner may not pursue his remedy before the consolidation authorities after losing before the Consolidation Officer."

24. The entry of the name of the petitioners or their predecessors in the consolidation proceedings would therefore not affect the decree for cancellation of the lease deed and for possession in favour of the respondents or the proceeding for execution of the decree in that suit.

25. There is another aspect of the matter. The right to obtain possession under the decree of Original Suit no. 32 of 1950 was available to the decree holder only on payment of Rs. 7, 000/-. to the judgement debtor. That amount having not been paid upto the time the consolidation proceedings were pending no objection at the instance of the decree holders in the consolidation proceeding was maintainable as the precondition under the decree for obtaining possession had not been complied with for which there was no time prescribed. The bar of Section 49 of the U.P. Consolidation of Holdings Act, therefore, does not operate. Similar objection was taken by Mahesh Chand u/s 47 CPC and was repelled by the executing court and the order was affirmed in appeal.

26. In Chakat v. Babu Ram 1984 (2) L.C.D. 1987 relied upon by Shri Gupta all that was held was that under the scheme of Consolidation of Holdings Act the tenure holders were entitled to file objections u/s 20 of the Act against the provisional consolidation scheme, which are to be decided by the Consolidation Officer, whose order is appealable and the appellate order of the Settlement Officer Consolidation is final subject to the order of the Deputy Director of consolidation and that it is the khatauni in CH Form 45 prepared u/s 27 of the Act, which would prove the final allotment of land to any person. It was held on facts that as the land was abadi and ''hence was left out of consolidation without any decision of title the bar of Section 49 was not attracted. The decision is relevant in the present case only to show that a chak was allotted in the name of Ram Lal and others who were entered in CH form 45. In Zafar Khan and Others Vs. Board of Revenue, U.P. and Others, there was an order of the Consolidation Court deciding the case on the foundation of an order of the Additional Commissioner, which was reversed by the Boan of Revenue. It was held by the Apex court that though the decision may appear to be erroneous as it was founded upon an order which had been reversed but a subsequent suit u/s 209, 229-B by the party who allowed the order of the Consolidation Court to become final was not maintainable as the bar of Section 49 was operative. The Full Bench in Dalel v. Baroo 1963 R.D. 67 holds that ''an application involving question of title in respect of grove land could be filed u/s 12 of the U.P. Consolidation of Holdings Act and therefore the bar of Section 49 would operate. All these cases cited by Sri Gupta are

distinguishable and do not support his contention that the bar of Section 49 was operative in this case. As there was a valid decree in favour of the predecessors of the contesting respondents, which could also be executed had even the Consolidation operations been pending the bar of Section 49 would not operate and the name of the contesting respondents can be substituted in the chak allotted to the petitioner. The new plot numbers given in consolidation in the chak allotted have already been introduced by amendment in the Execution case. Though that is not the case here even where the land is allotted in consolidation proceeding to other tenure holders effect can be given to the civil court decree by the consolidation authorities by making necessary adjustment in the chaks in much the same way as is done when objections u/s 9 of Consolidation of Holdings Act are decided after the chaks have been carved out and the land has been allotted to. other tenure holders. This can be done even after the close of Consolidation in view of Section 52(2) of the Act read with Rule 109A(2) of the Rules

27. It is submitted by Shri Gupta that Mohd. Umar, the successor of the plaintiffs and the predecessor of the contesting respondents had filed insolvency case no. 10 of 1965 against the. judgement debtor Ram Riksh Pal. In that case Mohd. Umar had conceded that Ram Lal, the transferee of the judgement debtor from whom the petitioner Ram Wati has obtained a sale deed be declared ''Maalik''. This admission is being set up as an estoppel against the contesting respondents'' right to challenge the title of Ram Wati. The admission is in the form of an application dated 9.8.1969 filed by the counsel of Mohd. Umar. The circumstances in which the admission was made are given in the application itself. It appears that in the aforesaid insolvency case Ram Riksh Pal was adjudged insolvent and the official receiver was appointed over his property but subsequently the appeal filed by Ram Riksh Pal was allowed and the order adjudging him insolvent was set aside. The question, therefore, arose in whose favour the property was to be released. In these circumstances when the order adjudging Ram Riksh Pal insolvent was set aside Mohammad Umar could not have impeached the sale deed as an act of insolvency and therefore it appears the application, which is alleged to have been made by the counsel was submitted. The effect of the order upon the sale deed of Ram Lal on account of it being an act of insolvency is quite distinct and is based on a different cause of action. The admission in the context only means that the entitlement of Ram Lal to get the property released in his favour in the insolvency proceedings, was accepted. It appears reading the application as a whole that inference was drawn by the counsel that the result of the insolvency appeal being allowed would entitle Ram Lal to be declared Maalik. This was a matter of opinion based upon the effect of the insolvency appeal being allowed which is an inference made from application of law and not an admission of a fact and is not binding in subsequent proceedings. In Kamta Prasad Misir and Another Vs. Chait Narain Singh and Others it was held that the statement of the counsel''s opinion is not an admission by the party and is not binding upon him. I do not think that the alleged admission in the

application filed by the counsel of Mohd. Umar would operate as an estoppel in the present proceeding based on a different cause of action. That admission if it be so termed in the circumstances in which it was made is explainable as being in the context of the insolvency proceedings in which it was made and has to be understood in that light. In Bhurey v. Pir Bux 1974 R.D. 259 it was held by a Division bench that an admission made in a mutation case is not relevant in a title suit.

28. That apart although, a counsel may have implied authority to admit a doubtful claim against his client even beyond the subject matter of the case on the theoretical foundation that that may be justified in the overall interest of his client in the case but when the litigation for which he had been engaged had as in this case come to an end when the insolvency appeal was decided a fact which was accepted by the counsel by moving the application for releasing the property in favour of Ram Lal, the counsel was left with no right to make if any admission to bind his client as there was no dispute pending in the insolvency case for which he was engaged and only consequential orders were to be passed The admission of the title of Ram Lal by the counsel at that stage in the absence of proof of express authority by his client is therefore not binding upon the client Mohammad Umar.

29. It has also been seen that no rights were created in favour of Ram Riksh Pal under the Zamindari Abolition and Land Reforms Act and the legal effect of the decree of cancellation of the lease and for possession was to put an end to the rights of Ram Riksh Pal - the predecessor in interest of Ram Lal. The admission being set up is against the legal position and the statutory provisions of the Zamindari Abolition and Land Reforms Act and against the effect of the decree and therefore can not operate as an estoppel. No title can be created by a mere admission. No question of estoppel arises in this case also because the transfers as we shall see were pendente lite.

30. On the question whether the petitioners are transferee pendente lite, the courts below have relied upon the explanation to Section 52 of the Transfer of Property Act, which provides that the suit would be deemed to be pending until the decree is satisfied or has become inexecutable. I have already repelled the ground that the decree was inexecutable. As such it has also to be held that the petitioners who are purchasers from the transferee of the judgment debtor are transferee pendente lite. Order 21 Rule 102 CPC in such cases provides that nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of Immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. The explanation to this Rule says that transfer would include the transfer by operation of law. In view of this provision, the application filed by the petitioners who are transferee pendente lite was not maintainable.

31. For these reasons both the writ petitions lack merit. The writ petition no. 46297 of 2002 of Ramwati is liable to be dismissed on an additional ground. Ramwati had filed objections u/s 47 CPC on the same grounds. These objections were dismissed on 20.2.1978. An appeal against the order was dismissed in default on 13.3.1987. The restoration application filed by the petitioner Ramwati in the appeal was dismissed on 28.9.2002 on the ground that the explanation for the delay of 13 years in filing the restoration application was concocted. The finding is that counsel for the petitioner Ram Wati had knowledge about the date 6.3.1987, which was fixed in the appeal. It has been found in the impugned order dated 28.9.2002 that orders had been passed for informing the counsel for the parties and they were so informed and the signatures of Ram Wati''s counsel are present. The delay of 13 years is inordinate and good reasons have been given by the court below in its order dated 28.9.2002 dismissing the restoration application. The finding is one of fact. I do not find any ground for interference in the order dated 28.9.2002 dismissing the restoration application. In view of the long delay since 20.2.1978 and the dismissal in default of the petitioner''s appeal on 6.3.1987 it is also not a fit case where extraordinary jurisdiction can be exercised to entertain the petition directly against the orders dated 20.2.1978 and 6.3.1987. The order dated 20.2.1978 dismissing the objection filed by Ram Wati u/s 47 has therefore become final and operates as res judicata and her objections under Order 21 filed in the year 2001 and registered as Misc. Case 59 of 2001 were therefore not maintainable. In the result both the writ petitions are dismissed.