

LOCAL ACTS REPORTER

2014(2)

Volume 24

Reports

PUNJAB AND HARYANA HIGH COURT

Before: S.S. Saron, Rajive Bhalla & S.P. Bangarh, JJ.

Civil Writ Petition No.2318 of 2002

Decided on: 08.11.2013

Parkash Singh and others

Petitioners

Versus

Joint Development Commissioner, Punjab and others

Respondents

Present: Mr. P.K.Gupta, Advocate and Ms. Priya Gupta, Advocate and Mr. Munish Gupta, Advocate, for the petitioners.

Mr. Vishal Goel, Advocate, Mr. H.S.Sidhu, Addl. A.G., Punjab, Mr. Arihant Jain, Advocate, Mr. Ankur Soni, Advocate, for Mr. Amit Jain, Advocate.

Mr. Rishav Jain, Advocate, for Mr. Arun Jindal, Advocate, Mr. B.R.Mahajan, Advocate, for respondent no.3 in CWP No.2318 of 2002.

Mr. Ashok Singla, Advocate and Mr. Ravish Bansal, Advocate and Mr. Aakash Singla, Advocate, for respondent no.2 in CWP Nos.12034 of 2002, 6159 of 2002 and 7493 of 2002.

Mr. S.S.Salar, Advocate and Ms. Maninderpreet Kaur, Advocate for respondent-Gram Panchayat in CWP Nos.10246, 11261, 11638, 11644 of 2009.

Mr. Jatinder Singla, Advocate, for petitioners in CWP No.6074.

Mr. M.S.Bedi, Advocate, Mr. Sarjit Singh, Senior Advocate with Mr. Jagdev Singh, Advocate.

Mr. Arun Jain, Senior Advocate with Mr. Amit Jain, Advocate.

A. Revenue Estate – Abadi deh – Shamilat deh -- “Sharat Wazib-ul-arz” – History of – A revenue estate comprises of private agricultural land, besides common lands, called “Shamilat Deh” and land called “Abadi Deh” – Private agricultural land vests in individual proprietors – The common land was kept apart for common use and was called “Shamilat Deh” – Proprietary and possessory rights in “Shamilat Deh”, vested, in absolute terms, in proprietors – Purpose for which a particular parcel of “Shamilat Deh” could be used, the rights of proprietors and

non-proprietors therein were set out, in the “Sharat Wazib-ul-arz”.

(Para 17)

B. Sharat Wazib-ul-arz -- A document that records the bye-laws of a revenue estate also called a village administration paper.

(Para 17)

C. Shamilat deh -- “Sharat Wazib-ul-arz” – Common purposes land -- Right of Proprietors – History of – A proprietor was absolute owner of his share in “Shamilat Deh”, held in common with other proprietors and could, depending upon rights recorded in the “Sharat Wazib-ul-arz”, cultivate, sell, mortgage, lease and even partition the common land – The proprietors had a right to exclude non-proprietors from user of this land – The share holding of a proprietor was calculated as per his proprietary land holdings or the land revenue paid or the numbers of “ploughs” etc. and was represented by expression like “Hasab Rasad Paimana Malkiat”, “Hasab Rasad Raqba Khewat”, “Hissa Sola (16), Hasaab Rasad Malguzari etc. that generally followed the words “Shamilat Deh” -- The cultivated land in “Shamilat Deh” was cultivated by proprietors in accordance with their share holdings -- Large tracts of land were left for pastures called “Charagah” or “Charand” -- The “Shamilat Deh” of a revenue estate was used for common purposes like pasture (Charand), Johar (pond) or Chappar, streets paths, cremation grounds, school, chaupals etc., but more often than not its user was confined to proprietors -- The non-proprietors, though, an integral part of agrarian societies, were excluded from ownership and in many villages from the user of common land.

(Para 17)

D. Shamilat Taraf, Shamilat Patti, Pana or Thola – Right of Proprietor -- “Shamilat Taraf, Shamilat Patti, Pana or Thola”, land vests in members of the “Taraf, Patti, Pana or Thola” and not in the entire proprietary body of a village.

(Para 18)

E. Abadi deh – Lal Lakir -- Shamilat deh – Common purposes land – Vesting of -- History of -- Though agricultural land of a revenue estate, was demarcated into khewats, khataunis and khasra numbers, the land that fell within the “Lal Lakir” and was called “Abadi Deh” (the residential area of a revenue estate) was, a “no mans land”, for a revenue officer -- A revenue officer did not venture into the “Abadi Deh” situated within the “Lal Lakir”, or demarcate khewats, khatonies or khasra numbers -- A single khewat, khatoni and khasra number was allotted to the “Abadi Deh” -- The normal rule of ownership of land within “Abadi Deh” was and is even today that ownership, follows possession -- However, paths, ponds, cremation grounds, graveyards, streets, chaupals, etc., used for common purposes by residents whether located within or outside the “Abadi Deh” were assigned separate numbers and as they were used for common purposes and were treated as “Shamilat Deh”.

(Para 19)

F. East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 2(bb)(iv), 18, 23-A --

Common purposes -- Jumla Mushtarka Malkan wa Digar Haqdarana Arazi Hasab Rasad Raqba -- Jumla Mushtarka Malkan -- Shamilat deh -- Vesting of -- Consolidation Act was enacted in 1948 brought into existence, a new variety of common land, distinct and separate from "Shamilat Deh", called "Jumla Mushtarka Malkan wa Digar Haqdarana Arazi Hasab Rasad Raqba" (for short "Jumla Mushtarka Malkan"), to be created after applying a pro-rata cut on the holdings of proprietors -- The Consolidation Act, amongst other matters provided for extension of village *abadi*, reservation of land for the village panchayat and other common purposes like village path, drains, village wells, ponds, tanks, schools, play grounds, dispensary, hospitals etc. -- Section 18 of the Consolidation Act placed a statutory obligation upon the Consolidation Officer to reserve land for common purposes, if common land in an estate was insufficient -- Section 23-A of the Consolidation Act provides that as soon as a scheme comes into force, "the management and control" of all lands assigned or reserved for common purposes of the village shall vest in the State Government relating to common purposes specified in sub-clause (iv) of clause (bb) of Section 2 and in case of any other common purpose, in the panchayat of the village.

(Para 20)

G. Shamilat deh -- Jumla Mushtarka Malkan -- "Shamilat Deh" and "Jumla Mushtarka Malkan" are two distinct varieties of common land, the former was in existence before consolidation whereas the latter was created during consolidation.

(Para 21)

H. Missal Haqiat -- Meaning of -- First jamabandi prepared after consolidation.

(Para 27)

I. Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g) -- Shamilat deh -- Panchayat deh -- Gram Panchayat deh -- Though, the generic term used for common land is "Shamilat Deh" but revenue authorities tend to use the expression "Panchayat Deh" and "Gram Panchayat Deh" etc., while describing "Shamilat Deh".

(Para 33)

J. Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g) -- Common land -- Shamilat deh -- Shamilat Patti, Pana, Thola & Taraf -- Jumla Mushtarka Malkan -- Common land of village can be divided into three separate and distinct categories, namely, "Shamilat Deh" i.e. land that existed prior to the Consolidation, prior to enactment of the 1953, 1954 and 1961 Acts and came to vest in a Gram Panchayat, under the 1953, 1954 and 1961 Acts, "Shamilat Patti, Pana, Thola & Taraf" etc., which vest in a Gram Panchayat only if this land is used for common purposes of the village, as per the revenue record and land described as "Jumla Mushtarka Malkan", which was created, under the Consolidation Act and came to vest in a Gram Panchayat or the State Government, for management and control, alone.

(Para 34)

K. Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g) -- East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 2(bb) -- Shamilat deh -- Jumla Mushtarka Malkan -- The 1961 Act does not enact any provision declaring land reserved as "Jumla Mushtarka Malkan" as "Shamilat Deh".

(Para 36)

L. Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g), 11, 13, 13-A -- East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 42 -- Shamilat deh -- Title dispute -- Power of Consolidating authorities -- Held,

- (a) Consolidation authorities, are tribunals of limited jurisdiction;
- (b) Consolidation authorities exercise powers of revenue officers, under the 1887 Act, a power to record and update fiscal entries and prepare record of rights;
- (c) but are not empowered to decide a question of title or vest/divest a party of its title;
- (d) the only authority empowered to determine a question, whether the land is "Shamilat Deh", between a Gram Panchayat and a private individual was the Civil Court but after enactment of Sections 11, 13 and 13-A of the 1961 Act, the Collector; and
- (e) if the land is "Jumla Mushtarka Malkan", an appropriate forum.

As a necessary consequence an order passed by the Director Consolidation, u/s 42 of the Consolidation Act holding that the land in dispute vests or does not vest in a Gram Panchayat is an order passed on an illegal assumption or appropriation of jurisdiction rendering the exercise of powers by the Director Consolidation null and void in its inception and in its operation and at best an order passed by a tribunal of limited jurisdiction that is not binding on the proprietary or possessory rights of the Gram Panchayat or a private individual before a Court or a Tribunal statutorily empowered to decide such a dispute.

(Para 38-52)

M. Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g), 7, 11 (Punjab) -- East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 18, 44 -- Jumla Mushtarka Malkan land -- Dispute of Title -- Jurisdiction of Authorities under 1961 Act -- Jurisdiction of Civil Court -- "Jumla Mushtarka Malkan" land is not included in "Shamilat Deh" -- Collector, u/s 11 of the 1961 Act has no jurisdiction -- Jurisdiction of a Civil Court is not barred -- Only forum available to a person, who raises a dispute regarding title in "Jumla Mushtarka Malkan" is the principal Court of civil jurisdiction having jurisdiction in the matter, as provided by Section 9 of the Code of Civil Procedure, i.e., a Civil Court -- Where a party seeks to raise a plea that the land is not "Jumla Mushtarka Malkan" etc., he shall be obliged to approach a Civil Court, exercising jurisdiction in accordance with Section 9 of the Code of Civil Procedure till such time as the State does not provide an appropriate forum.

(Para 56-63)

N. East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 42 – Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g), 7, 11 (Punjab) – Title dispute -- Power of Consolidation Authorities – Decision by Consolidation officer affirmed by High Court and Supreme Court – Effect of --

- (1) The State or its delegate, exercising power under Section 42 and authorities under the Consolidation Act are tribunals of limited jurisdiction.**
- (2) Consolidation authorities have no power to decide disputed questions of title in respect of lands, or any right, title or interest therein.**
- (3) The State or its delegate, may in the exercise of power under Section 42 of the Consolidation Act order correction of errors, in accordance with law;**
- (4) While exercising powers under Section 42 of the Consolidation Act, if it is held that the land, in dispute, vests or does not vest in a Gram Panchayat such an order would be construed to be an opinion recorded by a Tribunal of limited jurisdiction and an order so passed would not operate as resjudicata to be binding upon parties or the Collector, exercising power under Section 11 of the 1961 Act, or the jurisdictional forum, constituted for deciding a question of title.**
- (5) If a writ petition or special leave petition filed to challenge an order passed under Section 42 of the Consolidation Act is dismissed without assigning any reason, by use of the words “dismissed”, “no merits, dismissed” or such like similar expressions, the order passed under Section 42 of the Consolidation Act shall not merge in the order passed by the High Court or the Hon'ble Supreme Court, so as to operate as resjudicata or prohibit the Gram Panchayat from approaching the jurisdictional forum, or.**
- (6) If an order passed under Section 42 of the Consolidation Act has not been challenged in a writ petition or before the Hon'ble Supreme Court, such order shall be ignored, by the Collector exercising power under Section 11 of the 1961 Act, as Section 13-B clearly postulates that notwithstanding anything to the contrary in any law or any agreement, instruments, custom or usage or any decree or order of any court or other authority, the provisions of the 1961 Act shall prevail.**
- (7) If, however, the order passed by the Director Consolidation has been affirmed, by the High Court or in a special leave petition or an appeal before the Hon'ble Supreme Court on merits, the order passed by the Director Consolidation shall be deemed to have merged in orders passed under Articles 226 and 136 of the Constitution of India and would, therefore, on the basis of the doctrine of rule estoppel, merger and the order of precedence among courts, prohibit the Gram Panchayat from filing a petition**

under Section 11 of the 1961 Act, the Collector from entertaining such a petition, or where the land is "Jumla Mushtarka Malkan" the Civil Court.

(Para 64-96)

O. East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (50 of 1948), Section 42 – Punjab Village Common Lands (Regulation) Act, 1961 (18 of 1961), Section 2(g), 7, 11 (Punjab) – Title dispute -- Fraud – Order of Consolidation officer affirmed by High Court and Supreme Court – Effect of – Jurisdiction of Collector – An order obtained by fraud cannot be said to have merged into an order passed by the High Court or the Supreme Court -- Aggrieved party may validly raise a plea of fraud and collusion before the Collector, exercising power u/s 11 of the Act -- If the aggrieved party fails to prove its plea of fraud or collusion, such an order shall be deemed to have merged in orders passed by the High Court or the Hon'ble Supreme Court.

(Para 97-103)

Cases referred:

1. Ranjit Singh and others v. State of Punjab and others, AIR 1965 (SC), 632.
2. Ajit Singh v. Smt. Subaghan and others, AIR 1970, Punjab and Haryana, 93.
3. Jit Singh v. State of Punjab, (a) CW 538 of 1962, decided on 11th November, 1962.
4. Beg Raj v. The Additional Director, Consolidation of Holdings 1966 Curr. LJ (Pb.) 134.
5. Bhajan Lal v. The Punjab State, CW 439 of 1965, decided on 19th May, 1966.
6. Beant Singh and others v. State of Punjab and others, 1966 P.L.R., 221(DB).
7. Karam Singh v. Harpal Bahadur Singh and others, 1970 P.L.J., 99.
8. Gram Panchayat, Village Sidh v. Additional Director, Consolidation of Holdings, Punjab, (SC), 1997 (3) R.C.R.(Civil) 491.
9. Gram Panchayat, Nurpur v. State of Punjab, (SC), 1997(2) P.L.R., 694.
10. Daryao and others v. State of U.P and others, AIR 1961 SC, 1457.
11. Ramesh and another v. Seth Gendalal Motilal Patni and another, AIR 1966 SC, 1445.
12. Dayawanti v. Yadvindra Public School, 1996(1) RRR, 111.
13. Gurdev Kaur v. Gram Panchayat Balad Kalan and others 2009(1) RCR (Civil), 550 (DB),
14. L. Chandra Kumar v. Union of India and others, 1997(3) SCC 261.
15. Sivathanu Pillai v. Lakshmi Rajamma, AIR 1981 Kerala, 214.
16. Bindeswari Charan Singh v. Bageshwari Charan Singh, Privy

Council, AIR 1936 PC 46.

17. Isher Singh v. Sarwan Singh, AIR 1965 SC, 948 and 1966 SC, 1145.
18. Sushil Kumar Mehta v. Gobind Ram Bohra, 1990(1) Supreme Court Cases, 193.
19. Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar and others, 2008(9) Supreme Court Cases 54.
20. Shankar Ramchandra Abhyankar v. Krishanji Dattatreya Bapat, AIR 1970, page 1.
21. Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust and another, 1978(3) SCC, 119.
22. Kunhayammed and others v. State of Kerala and another, 2000(6) SCC, 359.
23. Chandi Prasad and others v. Jagdish Prashad and others 2004(8) SCC, 724.
24. Gram Panchayat of Village Naulakha v. Ujagar Singh, 2000(4) RCR, (Civil) 749.
25. Union of India and others v. Ramesh Gandhi, 2012 (1) Supreme Court Cases, 476.
26. Gram Panchayat, Jamalapur v. Malwinder Singh, AIR 1985 SC 1394.
27. Ajit Singh v. State of Punjab, AIR 1967 SC 856.
28. Bhagat Ram and others v. State of Punjab and others, AIR 1967 SC 927.
29. Director of Consolidation v. Johri Mal, AIR 1961 Punjab 208.
30. Johri Mal v. The Director of Consolidation of Holdings, Punjab and another AIR 1967 SC 1568.

JUDGMENT

RAJIVE BHALLA, J. –

1. By way of this order, we shall answer a reference made by a Hon'ble Division Bench. An extract from the reference reads as follows:-

- "1. Whether a Director Consolidation, exercising power under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 can decide whether land vests or does not vest in a Gram Panchayat?
2. If answer to the first question is in the negative, then whether an order passed by a Director Consolidation, determining ownership of a Gram Panchayat, affirmed by the High Court and the Supreme Court operates as res-judicata in a subsequent petition, filed under Section 11 of the Act?
3. Whether Section 13-B of the Act empowers the Collector, exercising jurisdiction under Section 11 of the Act, to disregard an order passed by the Director Consolidation, that has been affirmed by the High Court and the Hon'ble Supreme Court.
4. Whether a plea that the order passed by the Director

Consolidation was obtained by fraud can be raised after the order has been affirmed by the High Court and the Hon'ble Supreme Court?

In addition to the questions framed, ancillary issues relating to merger of orders passed by Director Consolidation, in orders passed by the High Court and the Hon'ble Supreme Court, the principles of primacy of judicial precedents, the question whether Consolidation authorities in the garb of making good deficiency of allotment to a landowner, can direct that such deficiency be made good from "Shamilat Deh" or "Jumla Mushtarka Malkan", the difference between "Jumla Mushtarka Malkan" and "Bachat Land", the nature and the manner of vesting of "Jumla Mushtarka Malkan" in a Gram Panchayat and proprietors and other questions of general importance arise for consideration.

2. During the course of arguments, certain other questions both significant and incidental arose, namely:- the nature of "Shamilat Deh", "Jumla Mushtarka Malkan" and the forum to decide disputes regarding rights in "Jumla Mushtarka Malkan" etc. also came up for consideration."

3. Before we proceed to answer these questions, it would be appropriate to narrate the facts.

4. The land, in dispute, was admittedly described, in the relevant revenue record as "Shamilat Deh Hasab Rasad Malguzari", before consolidation and during consolidation was assigned to the Gram Panchayat. After three decades or more, the petitioners (land owners/proprietors), filed a petition under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948(hereinafter referred to as 'the Consolidation Act'), before the Additional Director Consolidation, Punjab, praying that as the land vests in proprietors, it should be partitioned amongst them. The Gram Panchayat was arrayed as respondent no.3. Vide order dated 03.09.1996, the petition was allowed by holding that the land does not vest in the Gram Panchayat and the land was or deemed to be partitioned amongst right holders.

5. Aggrieved by this order, the Gram Panchayat filed Civil Writ Petition No.9162 of 1996, which was dismissed by a Division Bench on 03.07.1996, by passing the following order:-

"No merit, dismissed".

6. The Gram Panchayat, filed Special Leave Petition No.16450 of 1996, which was dismissed on 02.09.1996, by passing the following order:-

"Upon hearing counsel the court made the following order:-

The Special Leave Petition is dismissed."

7. Ram Lal etc., claiming to be tenants, filed Civil Writ Petition No.10113 of 1996, impugning the order, dated 03.09.1996, passed by the Additional Director Consolidation. The writ petition was dismissed on 21.03.1997, by passing the following order:-

"On 3.3.96 Hon'ble Mr. Justice A.S.Nehra and Hon'ble Mr. Justice V.K.Jhanji, JJ have already upheld the impugned order of the Additional Director in Civil Writ Petition No.9162 of 1996 by passing the following

order in limine:-

No merit. Dismissed.

The aforementioned order was upheld by Hon'ble Supreme Court in SLP No.16450 of 1996. No interference in writ jurisdiction is called for. Dismissed at this stage of motion hearing.

Sd/- N.C.Jain, Judge.

Sd/- Sarojini Saksena, J

Dated: 21.3.1997

Judges."

8. Ram Lal etc., filed Special Leave Petition No.9237 of 1997, which was dismissed on 07.05.1997 and the following order was passed:-

"Upon hearing counsel the court made the following order:-

The Special Leave Petition is dismissed."

9. Another set of residents, namely, Chunni Lal and others filed Civil Writ Petition No.7263 of 1997, challenging order dated 03.03.1996, passed by the Additional Director Consolidation, Punjab, which was also dismissed on 10.02.1998 and the following order as passed:-

"Challenge in this writ petition under Articles 226 and 227 of the Constitution of India is to the order dated 3.6.1996 Annexure P.6, passed by the Addl. Director Consolidation of Holdings at the instance of some of the tenants allegedly in possession of a part of the land in dispute. By the impugned order the Addl. Director Consolidation of Holdings came to the conclusion that there was a document of transfer of title with the respondent-gram panchayat as required by law and thus the mutation sanctioned in its favour is illegal, null and void and the same has no effect on the rights of the petitioner therein. Consequently, the land bearing khewat no.77 was ordered to be partitioned amongst the right holders of the village. Hence this petition.

In response to notice of motion, private respondents have put in appearance and filed reply. The petitioners filed replication to the written statement filed by the respondents.

After hearing learned counsel for the parties and perusing the record we are of the opinion that this petition deserves to be dismissed. Respondent Gram Panchayat challenged the order dated 3.6.1996 by filing a writ petition in this court being CWP No.9162 of 1996 which was dismissed in limine by order dated 3.7.1996. Special Leave Petition against the order of a Division Bench of this court passed in CWP No.9162 of 1996 was dismissed by the apex court by order dated 2.9.1996. Not only this Ram Lal and others the tenants on a part of the land in dispute filed another writ petition challenging the order dated 3.6.1996 being CWP No.10113 of 1996. Special Leave Petition at the instance of Ram Lal and others against the order of this court was dismissed by the apex court by order dated 7.5.1997. The petitioners as already noticed are some of other tenants on a part of the land in dispute. They have challenged the order dated 3.6.1996 now again on the same grounds on which same was challenged in CWP No.10113 of 1996. Thus in view of the dismissal of the above two writ petitions being CWP

No.9162 of 1996 and 10113 of 1996 filed on two different occasions challenging the same order which has been challenged now in this writ petition also, we see no ground to interfere especially having regard to the fact that special leave petitions preferred on each of the two occasions against the dismissal of the writ petitions were dismissed by the Supreme Court. Challenge having already failed at least two occasions earlier, we are not now inclined to permit the petitioners to take up the issue/matter which has been settled upto the Supreme Court.

The writ petition is consequently dismissed.

Sd/- G.C.Garg

Sd/- N.K.Aggarwal

Judges"

10. The Special Leave Petition No.7593 of 1998 was dismissed on 22.02.1999.

11. The preceding narrative reveals that order dated 03.03.1996, passed by the Additional Director Consolidation, was affirmed by dismissal of the writ petition by use of the words "No merit", "dismissed" and the special leave petition was also dismissed. The writ petitions filed by tenants were dismissed on the ground that the writ petition and the special leave petition filed by the Gram Panchayat have been dismissed. The other writ petitions were dismissed on the ground that the prior writ petitions and special leave petitions have been dismissed.

12. The Gram Panchayat, thereafter, filed a petition under Section 11 of the Punjab Village Common Lands (Regulation) Act, 1961 (hereinafter referred to as 'the 1961 Act') praying for a declaration of its ownership. The Collector, dismissed the petition on the ground that the writ petition, filed by the Gram Panchayat has been dismissed. The Gram Panchayat filed an appeal, which was allowed by the Appellate Authority and the matter was remanded to the Collector, to decide the question of title, on merits.

13. The petitioners have filed Civil Writ Petition no.2318 of 2002, impugning this order, by pleading that as order dated 03.03.1996, passed by the Additional Director Consolidation of Holdings, holding that the land, in dispute, vests in proprietors, has been affirmed, by dismissal of three separate writ petition and two Special Leave Petitions, the Appellate Authority, exercising powers under Section 11(2) of the 1961 Act, has no jurisdiction to direct the Collector to decide whether the land vests or does not vest in the Gram Panchayat.

14. We have heard counsel for the parties, perused the provisions of the Consolidation Act, the Consolidation Rules, the Punjab Village Common Lands (Regulation) Act, 1953, the Pepsu Village Common Lands (Regulation) Act, 1954, the Punjab Village Common Lands (Regulation) Act, 1961 (hereinafter referred to as 'the 1961 Act'), the Punjab Land Revenue Act, 1887 and judgments referred to by counsel for the parties.

15. An answer to the questions posed renders imperative that we set out, in brief, the types of common land, the evolution of possessory and proprietary rights in common land, the statutes that govern the vesting and divesting of title in common land, the management and control of such land, powers conferred

upon authorities under various relevant enactments, jurisdiction exercised by various authorities, the nature of their orders and prohibitions contained in these statutes.

16. The State of Punjab is an agrarian State, dependent upon agriculture, for its economic and social well being. Land, particularly agrarian land, is its most valuable but much neglected natural asset/resource of the State of Punjab.

17. Rights in land both possessory and proprietary were crystalised through a process called settlement of land holdings that commenced in the 1840s and eventually lead to enactment of the Punjab Land Revenue Act, 1887. The said enactment provides for demarcation of each village or a contiguous group of villages into a separate revenue estate. A revenue estate comprises of private agricultural land, besides common lands, called "Shamilat Deh" and land called "Abadi Deh". The private agricultural land obviously vests in individual proprietors. The common land was kept apart for common use and was called "Shamilat Deh". The proprietary and possessory rights in "Shamilat Deh", vested, in absolute terms, in proprietors. The purpose for which a particular parcel of "Shamilat Deh" could be used, the rights of proprietors and non-proprietors therein were set out, in the "Sharat Wazib-ul-arz" (a document that records the bye-laws of a revenue estate) also called a village administration paper. A proprietor was absolute owner of his share in "Shamilat Deh", held in common with other proprietors and could, depending upon rights recorded in the "Sharat Wazib-ul-arz", cultivate, sell, mortgage, lease and even partition the common land. The proprietors had a right to exclude non-proprietors from user of this land. The share holding of a proprietor was calculated as per his proprietary land holdings or the land revenue paid or the numbers of "ploughs" etc. and was represented by expression like "Hasab Rasad Paimana Malkiat", "Hasab Rasad Raqba Khewat", "Hissa Sola (16), Hasaab Rasad Malguzari etc. that generally followed the words "Shamilat Deh". The cultivated land in "Shamilat Deh" was cultivated by proprietors in accordance with their share holdings. Large tracts of land were left for pastures called "Charagah" or "Charand". The "Shamilat Deh" of a revenue estate was used for common purposes like pasture (Charand), Johar (pond) or Chappar, streets paths, cremation grounds, school, chaupals etc., but more often than not its user was confined to proprietors. The non-proprietors, though, an integral part of agrarian societies, were excluded from ownership and in many villages from the user of common land.

18. Another variety of common land is called "Shamilat Taraf, Shamilat Patti, Pana or Thola", which vests in members of the "Taraf, Patti, Pana or Thola" and not in the entire proprietary body of a village.

19. At this stage, it would be necessary to clarify that, though, agricultural land of a revenue estate, was demarcated into khewats, khataunis and khasra numbers, the land that fell within the "Lal Lakir" and was called "Abadi Deh" (the residential area of a revenue estate) was, a "no mans land", for a revenue officer. A revenue officer did not venture into the "Abadi Deh" situated within the "Lal Lakir", or demarcate khewats, khatonies or khasra numbers. A single khewat, khatoni and khasra number was allotted to the "Abadi Deh". The normal rule of ownership of land within "Abadi Deh" was and is even today that ownership, follows possession. However, paths, ponds, cremation grounds,

graveyards, streets, chaupals, etc., used for common purposes by residents whether located within or outside the "Abadi Deh" were assigned separate numbers and as they were used for common purposes and were treated as "Shamilat Deh".

20. The Consolidation Act was enacted in 1948, to consolidate and prevent fragmentation of land holdings. The said enactment brought into existence, a new variety of common land, distinct and separate from "Shamilat Deh", called "Jumla Mushtarka Malkan wa Digar Haqdarana Arazi Hasab Rasad Raqba" (for short "Jumla Mushtarka Malkan"), to be created after applying a pro-rata cut on the holdings of proprietors. Section 2(b)(b) of the Consolidation Act, for the first time provided a statutory definition of "common purposes". The Consolidation Act, amongst other matters provided for extension of village *abadi*, reservation of land for the village panchayat and other common purposes like village path, drains, village wells, ponds, tanks, schools, play grounds, dispensary, hospitals etc. Section 18 of the Consolidation Act placed a statutory obligation upon the Consolidation Officer to reserve land for common purposes, if common land in an estate was insufficient. Section 23-A of the Consolidation Act provides that as soon as a scheme comes into force, "the management and control" of all lands assigned or reserved for common purposes of the village shall vest in the State Government relating to common purposes specified in sub-clause (iv) of clause (bb) of Section 2 and in case of any other common purpose, in the panchayat of the village.

21. Rule 16(ii) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Rules, 1949 (hereinafter referred to as the "Consolidation Rules") further clarifies that this new type of common land, created after applying a pro-rata cut on the holdings of proprietors, for the village panchayat and other common purposes shall be called "Jumla Mushtarka Malkan" and shall vest in a Gram Panchayat for management and control but its ownership would continue to vest in proprietors. At this stage, we would sound a note of caution by recording that "Shamilat Deh" and "Jumla Mushtarka Malkan" are two distinct varieties of common land, the former was in existence before consolidation whereas the latter was created during consolidation. Sections 2(b)(b), 18, 23-A of the Consolidation Acts and Rule 16(ii) of the Consolidation Rules read as follows:-

Section 2. Interpretation.-- In this Act, unless there is anything repugnant in the subject or context-

- (a) XX XX XX XX
- (b) XX XX XX XX
- (bb) "Common purpose" means any purpose in relation to any common need, convenience or benefit of the village and includes the following purposes:-
 - (i) extension of the village abadi;
 - (ii) providing income for the Panchayat of the village concerned for the benefit of the village community.
 - (iii) village roads and paths; village drains, village wells, ponds or tanks; village watercourses or water-channels; village

- bus stands and waiting places; manure pits; hada rori; public latrines; cremation and burial grounds; Panchayat Ghar, Janj Ghar, grazing grounds; tanning places; mela grounds; public places of religious or charitable nature; and
- (iv) schools and playgrounds, dispensaries, hospitals, and institutions of like nature, water-works or tube wells whether such schools, playgrounds, dispensaries, hospitals, institutions, water-works or tube-wells may be managed and controlled by the State Government or not.

(c) XX XX XX XX"

Section 18. Lands reserved for common purposes:-

- (a) that any land specifically assigned for any common purpose shall cease to be so assigned and to assign any other land in its place;
- (b) that any land under the bed of a stream or torrent flowing through or from the Siwalik mountain range within the State shall be assigned for any common purpose;
- (c) that if any area under consolidation no land is reserved for any common purpose including extension of the village abadi, or if the land so reserved is inadequate, to assign other land for such purpose

Section 23-A. As soon as a scheme comes into force, the management and control of all lands assigned or reserved for common purposes of the village under section 18, —

- (a) in the case of common purposes specified in sub-clause (iv) of clause (bb) of section 2 in respect of which the management and control are to be exercised by the State Government, shall vest in the State Government; and
- (b) in the case of any other common purpose, shall vest in the panchayat of that village;

and the State Government or the Panchayat, as the case may be, shall be entitled to appropriate the income accruing therefrom for the benefit of the village community, and the rights and interests of the owners of such lands shall stand modified and extinguished accordingly:

Provided that in case of land assigned or reserved for the extension of village abadi or manure pits for the proprietors and nonproprietors of the village, such land shall vest in the proprietors and non-proprietors to whom it is given under the scheme of consolidation.

Rule 16 of Consolidation Rules:

Rule 16(i) XX XX XX

16(ii) In an estate or estates where during Consolidation proceedings there is no Shamlat Deh land or such land is considered inadequate, "land shall be reserved for the village Panchayat and for other common purposes", under section 18 (c) of the

Act, out of the common pool of the village 3[at the scale given in the schedule to these rules]. Proprietary rights in respect of land so reserved (except the area reserved for the extension of abadi of the proprietors and non-proprietors) shall vest in the proprietary body of estate or estates concerned and it shall be entered in the column of ownership of records rights as (Jumla Malkan wa Digar Haqdarana Arazi Hasab Rasad Raqba). The management of such land shall be done by the Panchayat of the estate or estates concerned on behalf of the village proprietary body and the Panchayat shall have the right to utilize the income derived from the land so reserved for the common needs and benefit of the estate or estates concerned.].

22. The vires of the Consolidation Act and Rules, particularly the provisions requiring Consolidation authorities to apply a pro-rata cut on the holdings of proprietors for creating "Jumla Mushtarka Malkan" lead to a furore amongst agricultural communities and lead to multiple challenges to their constitutionality. The validity of these provisions was eventually affirmed by the Hon'ble Supreme Court in **Ranjit Singh and others v. State of Punjab and others**, AIR 1965 (SC), 632, by holding that as land created under consolidation continues to vest in proprietors and the Consolidation Act is a measure of agrarian reforms it is protected by Article 31-A of the Constitution of India. The Hon'ble Supreme Court also held that as land is to be used for benefit of the village community as a whole, there is no question of any person being divested of ownership.

23. Apart from creating a new variety of "common land", the Consolidation Act and the Rules set out a detailed procedure for:- updating revenue record, preparing a scheme, inviting objections, procedure for valuation of land, consideration of objections/replies and, thereafter, allotment of land and change of possession in accordance with the area so determined. In order to perform these functions, Section 22 of the Consolidation Act provides that a Consolidation officer shall exercise power of a revenue officer as conferred under Chapter (IV) of the Punjab Land Revenue Act, 1887. Section 22 of the Consolidation Act reads as follows:-

"22. Preparation of record of rights. - (1) *The Consolidation Officer shall cause to be prepared a new record of rights in accordance with the provision contained in Chapter IV of the Punjab Land Revenue Act, 1887 (XVII of 1887), in so far as these provisions may be applicable for the area under consolidation giving effect to the repartition 2 [and order in respect thereof made] under the preceding section.*"

24. A Consolidation officer is, therefore, empowered, during consolidation proceedings to decide all such disputes and pass all such orders that fall to the jurisdiction of a revenue officer, as may be necessary for preparing revenue records and may even partition the land amongst co-sharers. Section 16-A of the Consolidation Act, which confers power upon a Consolidation Officer to partition land holdings provides that provisions of Chapter (IX) of the Punjab Land Revenue Act, 1887 (the chapter pertaining to partition of land), except Section 117, i.e., the power of a revenue officer to decide a question of title or refer parties to a civil Court, shall apply to consolidation proceedings. The question whether Consolidation authorities are empowered by Section 16-A of

the Consolidation Act to decide a disputed question of title came up for consideration before a Full Bench of this Court in **Ajit Singh v. Smt. Subaghan and others, AIR 1970, Punjab and Haryana, 93**. After considering the provisions of Sections 16-A, and 22 of the Consolidation Act and Section 117 of the 1887 Act, it was held that Consolidation authorities are not empowered to decide a disputed question of title.

25. The final stage of consolidation arrives under Section 21, of the Consolidation Act, with repartition, whereby new revenue numbers are assigned and possessions are exchanged. A person aggrieved, by a proposed order, may file written objections within 15 days and thereafter file appeals before the Consolidation Officer and then onwards to the Settlement Officer, the Assistant Director Consolidation and if still dissatisfied, may approach the State Government, under Section 42 of the Consolidation Act. Section 22 provides for preparation of a new record of rights and Section 23 enjoins upon the Consolidation Officer, where all owners and tenants agree, to call upon them to exchange possession but if owners and tenants do not agree to enter possession and to fix a date upon which owners and tenants shall be obliged to enter possession of their land holdings as determined in the new record of rights.

26. During this process of repartition, preparation of record of rights and delivery of possession, consolidation authorities also assess the value of "Shamilat Land" delimit "Shamilat Deh" and establish the "Shamilat Khewat (as distinguished from "Jumla Mushtarka Malkan") as the ownership of the Gram Panchayat. The possession of "Shamilat land" is accordingly delivered to the Gram Panchayat. In cases, where consolidation was completed before "Shamilat Deh", came to statutorily vest in a Gram Panchayat, the shamilat land continued to be recorded as ownership of proprietors.

27. By the time of re-partition, Consolidation Authorities had already applied a pro-rata cut on the holdings of proprietors and created "Jumla Mushtarka Malkan" (as distinct from "Shamilat Deh") for the panchayat and for other common purposes and an entry to that effect is incorporated in the new record of rights, referred to as the "Missal Haqiat", i.e., the first jamabandi prepared after consolidation. As soon as a scheme is complete, the management and control of all land created assigned or reserved for common purposes of the village as "Jumla Mushtarka Malkan", under Section 18 and 23-A of the Consolidation Act and vests in the Panchayat of that village for the purpose of management and control, as clarified by Rule 16(ii) of the Consolidation Rules.

28. We would, thus notice that during the process of consolidation, a Consolidation officer exercises powers of a revenue officer, as conferred by Punjab Land Revenue Act, 1887, but is not empowered by any provision of the Consolidation Act or the 1887 Act, to decide a disputed question of title. It would be necessary to once again reiterate that the Consolidation Act, does not contain any provision conferring power upon consolidation authorities to decide a question of title whether between private individuals or between a Gram Panchayat and a private individual and with respect to common lands only empowers Consolidation authorities, to delimit the "Shamilat Khewat" and create "Jumla Mushtarka Malkan".

29. The years 1953 and 1954, saw the enactment of two significant

statutes, namely, the Pepsu Village Common Lands (Regulation) Act, 1954 (hereinafter referred to as 'the 1954 Act') and the Punjab Village Common Lands (Regulation) Act, 1953 (hereinafter referred to as 'the 1953 Act'). The 1953 and 1954 Acts, jointly referred to as the "Shamilat Law", declared by Section 3 of these statutes that land described as "Shamilat Deh" shall vest in a Gram Panchayat, bringing about a paradigm shift in the ownership of and rights in "Shamilat Deh". The 1953 and 1954 Acts, extinguished, by a statutory declaration, proprietary and possessory rights of proprietors and non-proprietors in "Shamilat Deh" and provided that that "Shamilat Deh" of a village shall henceforth vest in a Gram Panchayat and would be used for common purposes of the entire village community, under the aegis of the Gram Panchayat. This statutory vesting of proprietary rights in "Shamilat Deh" in a Gram Panchayat, was apparently too expansive and lead to repeal of the 1953 and 1954 Acts and the enactment of the 1961 Act.

30. The 1961 Act, by way of Section 2(g) of the 1961 Act, assigns a comprehensive definition of "Shamilat Deh". Section 2(g) (1) to 2(g)(5) provide the circumstances in which land shall be included in "Shamilat Deh", whereas Section 2(g)(i) to 2(g)(ix) provide the circumstances in which land, though, described as "Shamilat Deh" shall be excluded from "Shamilat Deh". Section 2(g) (as applicable to the State of Punjab) reads as follows:-

2. Definitions.—

(g) "Shamilat deh" includes—

- (1) *Lands described in the revenue records as Shamilat deh excluding abadi deh*
- (2) shamilat tikkas;
- (3) lands described in the revenue records as shamilat, Tarafs, Pattis, Pannas and Tholas and used according to revenue records for the benefit of the village community or a part thereof or for common purposes of the village;
- (4) lands used or reserved for the benefit of the village community including streets, lanes, playgrounds, school, drinking wells, or ponds within abadi deh or gorah deh; and
- (5) lands in any village described as banjar qadim and used for common purposes of the village, according to revenue records;

but does not includes-

- (i) [.....]
- (ii) has been allotted on quasi-permanent basis to a displaced person;
- (ii-a) was shamilat deh, but , has been allotted on quasi-permanent basis to a displaced person, or, has been otherwise transferred to any person by sale or by any other manner whatsoever after the commencement of this Act, but on or before the 9th day of July, 1985.]
- (iii) has been partitioned and brought under cultivation by individual landholders before the 26th January, 1950."

- (iv) having been acquired before the 26th January, 1950, by a person by purchase or in exchange for proprietary land from a co-sharer in the shamilat deh and is so recorded in the jamabandi or is supported by a valid deed; [and is not in excess of the share of the co-sharer in the shamilat deh].
- (v) is described in the revenue records as Shamilat, Taraf, Pattis, Pannas, and Thola and not used; according to revenue records for the benefit of the village community or a part thereof or for common purposes of the village.
- (vi) lies outside the abadi deh and was being used as gitwar, bara, manure pit, house or for cottage industry, immediately before the commencement of this Act];
- (vii) [.....]
- (viii) was *Shamilat Deh* was assessed to land revenue and has been in the individual cultivating possession of co-sharers not being in excess of their respective shares in such shamilat deh on or before the 26th January, 1950.
- (ix) was being used as a place of worship or for purposes, subservient thereto, immediately before the commencement of this Act"

31. Section 3 of the 1961 Act provides that the "Shamilat Law" (i.e. the 1954 and 1953 Act) shall be deemed always to have applied to all lands, which are "Shamilat Deh" except to the extent they are excluded from "Shamilat Deh" by Section 2(g) of the 1961 Act. Section 3, to put in simply declares that land that has vested in a Gram Panchayat under the "Shamilat Law" (1953 and 1954 Acts) shall continue to so vest, extinguishing all rights, title, or interest held by any person before the enactment of "Shamilat Law" except to the extent it is excluded from such vesting, by Section 2(g) of the 1961 Act. Section 4 of the 1961 Act also provides for certain situations in which "Shamilat Deh" shall or shall not vest in a Gram Panchayat.

32. The 1961 Act was, however, silent as to the manner in which or the forum which would decide disputes relating to right, title or interest in "Shamilat Deh". The disputes regarding vesting of "Shamilat Deh" in a Gram Panchayat were, therefore, decided by Civil Courts. The 1961 Act was amended by introducing Section 11, which provides that "any person" raising a plea with respect to any right, title or interest in "Shamilat Deh", shall file a petition before the Collector. Section 13 of the 1961 Act prohibits a Civil Court from entertaining any dispute with respect to matters provided for under the 1961 Act. Section 13-B, provides that the provisions of the 1961 Act shall have effect, notwithstanding anything to the contrary in any law or agreement, instrument, custom, or usage or any decree or order on any court or other authority.

33. At this stage, it would be necessary to point out that, though, the generic term used for common land is "Shamilat Deh" but revenue authorities tend to use the expression "Panchayat Deh" and "Gram Panchayat Deh" etc.,

while describing "Shamilat Deh".

34. The common land of village can be divided into three separate and distinct categories, namely, "Shamilat Deh" i.e. land that existed prior to the Consolidation, prior to enactment of the 1953, 1954 and 1961 Acts and came to vest in a Gram Panchayat, under the 1953, 1954 and 1961 Acts, "Shamilat Patti, Pana, Thola & Taraf etc.", which vest in a Gram Panchayat only if this land is used for common purposes of the village, as per the revenue record and land described as "Jumla Mushtarka Malkan", which was created, under the Consolidation Act and came to vest in a Gram Panchayat or the State Government, for management and control, alone.

35. "Shamilat Deh" is the exclusive ownership of a Gram Panchayat, "Shamilat Taraf, Patti, Panna" etc. vest in a Gram Panchayat only if used for common purposes as per the revenue record, whereas "Jumla Mushtarka Malkan", confers the right of management and control upon a Gram Panchayat and the Gram Panchayat is in possession of the land for common use in terms of Section 2(bb) of the Consolidation Act, a provision for which is to be made in the Consolidation Scheme prepared in terms of Rule 4 of the Consolidation Rules. We have tried to distinguish the different varieties of common land as revenue authorities have over a period of time begun treating these separate varieties of land as one.

36. The 1961 Act, however, does not enact any provision declaring land reserved as "Jumla Mushtarka Malkan" as "Shamilat Deh".

37. After having set out the nature of common land and the provisions of these statutes, we would proceed to answer the first question.

38. The first question posed before us is whether Consolidation authorities are empowered to decide a question of title. The question is raised in the context of proprietors filing a petition, under Section 42 of the Consolidation Act seeking a declaration that land which is "Shamilat Deh" or "Jumla Mushtarka Malkan" does not vest in the Gram Panchayat and requiring the Director Consolidation to partition "Shamilat Deh" amongst proprietors or return "Jumla Mushtarka Malkan" to proprietors. The question posed, in our considered opinion, is no longer res integra as it came up for consideration before a Full Bench of this Court, in **Ajit Singh v. Subhagan and others, A.I.R.1970 (Punjab), 93** and, though, answered in the context of a dispute regarding title between private parties answers the question posed. The Hon'ble Judges, comprising the Full Bench, examined provisions of the Consolidation Act, the rules framed thereunder, power exercised by a Consolidation Officer, as a revenue officer, provisions of the Punjab Land Revenue Act 1887 Act and held that, though, Consolidation authorities, exercise powers of a revenue officer, they are not empowered to decide a question of title.

39. The question that fell for consideration, before the learned Full Bench, was:-

"The question of whether one or more of joint owners of the holding of land have in some manner or other acquired rights which go beyond their rights as recorded in the revenue records is one which is constantly arising and the question is whether the Consolidation Officers should be deemed to have the powers of the revenue Court under Section 117 of the Land Revenue Act to determine such questions as if they were Civil

Courts or should in every case leave the parties to have their rights determined by competent civil Court, and there is also the question whether where once a decision of this kind has been made by a Consolidation Officer a party would have the right to establish his rights in civil Court in spite of the provisions of Section 16-A (2)? This is how these appeals come before this Bench"

40. After considering provisions of the Consolidation Act and the Punjab Land Revenue Act, 1887, it was held as follows:-

"5. The whole of Chapter IX of the Punjab Land Revenue Act, 1887 (Punjab Act 17 of 1887), is not to apply to any matter of partition during the consolidation of holdings after a notification under sub-section (1) of section 14 of East Punjab Act 50 of 1948, but to that the exception is section 117 of the first-mentioned Act, of which sub section (2) deals with the matter of procedure, and sub-section (1) provides - "when there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent Court, or he may himself proceed to determine the question as though he were such a Court." On a question of partition of land arising, it is the initial jurisdiction of the Revenue Officer under sub-section (1) of section 117 of Punjab Act 17 of 1887 to first decide whether 'a question as to title in any of the property of which partition is sought' is or is not involved. This is what he has to decide first. On his decision in this respect, further consequences arise. If he decides that no question of title arises, he proceeds to take proceedings for partition of the land, but if he decides that a question of title arises then one of the two courses is open to him either to refer the parties to an ordinary civil Court or to convert himself into a civil Court for the purpose of decision of such question of title. Section 16-A, sub-section 1 of East Punjab Act 50 of 1948, only excepts section 117 of Punjab Act 17 of 1887, taking away all other provisions relating to partition of land in Chapter IX of the Land Revenue Act from application to consolidation proceedings. There is no such officer in East Punjab Act 50 of 1948 as a 'revenue Officer.' The only officers who appear in this Act are the Consolidation Officer and the Settlement Officer, both expressions defined respectively in clauses (a) and (h) of section 2 of that Act. It may be that a revenue officer may be appointed to those offices, but East Punjab Act 50 of 1948, does not make that a necessity. Any other person properly qualified can be appointed to those offices to answer the definition of those expressions as in clauses (a) and (h) of section 2 of that Act. As there are no revenue officers under the provisions of East Punjab Act 50 of 1948, under sub-section (1) of section of 117 of Punjab Act 17 of 1887 a Consolidation Officer or a Settlement Officer cannot convert himself into a civil Court to try any question of title that he considers arises in relation to any partition of a holding or holdings that becomes necessary to be provided in the scheme of consolidation. So, the second alternative in subsection (1) of section 117 of that Act cannot become operative while applying section 16-A of East Punjab Act 50 of 1948 to a particular scheme of consolidation. The only possible course open in such a contingency, when a Consolidation Officer or a Settlement Officer on Appeal or the authority exercising powers under section 42 of East Punjab

Act 50 of 1948 reaches a decision that a question of title arises in a particular case, is to refer the parties to a civil Court to have such question decided according to sub-section (1) of section 117 of Punjab Act 17 of 1887. The second question of law in the reference order is thus answered in this manner that an officer under the provisions of East Punjab Act 50 of 1948, not being a revenue officer, cannot be deemed to be so and thus he has no power or jurisdiction to convert himself into a civil Court while deciding a question of title in the course of a dispute with regard to partition of land in consolidation of holdings.

41. Their Lordships, thereafter, examined Section 16-A of the Consolidation Act and Section 117 of the 1887 Act, in detail, and proceeded to hold that the right of a Consolidation Officer to partition land, is subject to any decision, on the question of title, by a civil Court, as prescribed by Section 117 of the 1887 Act. An extract from the judgment reads as follows:-

So the matter of partition in consolidation of holdings is subject to the provisions of section 117 of that Act; it follows that whatever is the consequence stated in sub-section (2) of section 16-A is subject also to the provisions of section 117 of Punjab Act 17 of 1887. No doubt according to sub-section (2) of section 16-A of East Punjab Act 50 of 1948, notwithstanding anything to the contrary contained in any law for the time being in force, when land has been partitioned pursuant to a scheme confirmed under section 20 of that Act, it is to be held by each owner or tenant, to whom it has been allotted, in full right of ownership or tenancy, as the case may be, and the rights of other jointowners or joint-tenants in the land are deemed to be extinguished. When this sub-section says that its provisions are to prevail 'notwithstanding anything to the contrary contained in any law for the time being in force,' these words do not exclude subsection (1) of the very section of which sub-section (2) is a part, that is to say, sub-section (1) of section 16-A of East Punjab Act 50 of 1948. So the provisions of both sub-section (1) and sub-section (2) of section 16-A of that Act are subject to a decision of the question of title by a civil Court under section 117 of Punjab Act 17 of 1887.

42. The Hon'ble Judges of the Full Bench, thereafter, concluded as follows:-

*7. It has been held in **Jit Singh v. State of Punjab, (a) CW 538 of 1962, decided on 11th November, 1962.** (P.C. Pandit, J.); **Ram Gopal v. The State of Punjab (Grover and Jindra Lal, JJ.), Beg Raj v. The Additional Director, Consolidation of Holdings 1966 Curr. LJ (Pb.) 134.** (Shamsher Bahadur, J.), and **Bhajan Lal v. The Punjab State, CW 439 of 1965, decided on 19th May, 1966.** (P.C. Pandit, J.), that when a question of title arises at the time of making provision for partition of joint holdings in a scheme of consolidation, then such a provision is not to be made until the question of title is disposed of by a civil Court according to section 117 Punjab Act 17 of 1887.....The result then is that if a right-holder endeavours to raise what he considers is a question of title at the time of the framing of the scheme of consolidation and objects to a provision in that scheme for partition so far as his holding is concerned, then, if the officers under East Punjab Act 50 of 1948 reach a conclusion that a question of title is involved, they must stay their hands and leave*

the question of title to be decided in a civil Court, but if, on the contrary, they come to the conclusion that a question of title does not arise before them for the matter of framing the scheme of consolidation, then an aggrieved right-holder has one of the two courses open, (a), to go immediately to a civil Court and obtain a decision on the question of title claimed by him, or, (b) if he does not pursue the first course, to go before a civil Court after the completion of the partition and obtain a decision on the question of title as claimed by him. He would be doing so under section 117 of Punjab Act 17 of 1887, which is an exception kept alive by section 16-A of East Punjab 50 of 1948, and in either of the two cases, as above, the operation of sub-section (2) of section 16-A of East Punjab Act 50 of 1948 will be subject to the decision of the civil Court."

43. A perusal of this judgment reveals that Consolidation authorities exercise powers of revenue authorities but as Section 16-A of the Consolidation Act excludes Section 117-A of the Punjab Land Revenue Act, from power conferred, a Consolidation Officer, is not empowered to decide a question of title. The consistent view of this Court, for the last more than four decades, has been that Consolidation authorities, are not empowered to deliberate upon, much less decide a question to title. A few relevant judgments, holding as above, are ***Beant Singh and others v. State of Punjab and others, 1966 P.L.R., 221(DB)***, ***Karam Singh v. Harpal Bahadur Singh and others, 1970 P.L.J., 99***.

44. The matter, however, does not rest here. A dispute relating to the power of Director Consolidation, to decide whether land vests or does not vest in the Gram Panchayat came up for consideration before the Hon'ble Supreme Court in ***Gram Panchayat, Village Sidh v. Additional Director, Consolidation of Holdings, Punjab, (SC), 1997 (3) R.C.R.(Civil) 491*** and ***Gram Panchayat, Nurpur v. State of Punjab, (SC), 1997(2) P.L.R., 694***. The facts of these cases were that the Director Consolidation had partitioned "Shamilat Deh" amongst proprietors, while exercising power under Section 42 of the Consolidation Act, by holding that the land does not vest in the Gram Panchayat. After considering provisions of the Consolidation Act and the 1961 Act, the Hon'ble Supreme Court held that a Director Consolidation, exercising power under Section 42 of the Consolidation Act, is not empowered to decide whether land vests or does not vest in a Gram Panchayat as the only authority empowered to decide such a dispute is the Collector, exercising power under Section 11 of the 1961 Act. A relevant extract from the judgment in Gram Panchayat, Nurpur (supra) reads as follows:-

"The question before the Additional Director, Consolidation of Holdings, Punjab was whether the land in dispute was shamilat deh land and as such owned by the Gram Panchayat or it was owned by the proprietors of the village. The Additional Director came to the conclusion that the respondents were the owners and proprietors of the land. The Gram Panchayat challenged the order of the Additional Director by way of a writ petition before the High Court. The petition was dismissed in limine.

2. Sections 11 and 13 of the Punjab Village Common Lands (Regulation) Act, 1961 (the Regulation Act) are as under:

"Section 11. Decision of claims of right, title or interest in shamilat deh.- (1) Any person claiming right, title or interest

in any land, vested or deemed to have been vested in a panchayat under this Act or claiming that any land has not so vested in a Panchayat, may submit to the Collector, within such time, as may be prescribed, a statement of his claim in writing and signed and verified in the prescribed manner and the Collector shall have jurisdiction to decide such claim in such manner as may be prescribed.

(2) Any person or a Panchayat aggrieved by an order of the Collector made under sub- section (1) may, within sixty days from the date of the order, prefer an appeal to the Commissioner in such form as manner as may be prescribed and the Commissioner may after hearing the appeal, confirm, vary or reverse the order appealed from and may pass such as he deems fit.

Section 13. Bar of Jurisdiction of Civil Courts:- *No civil court shall have jurisdiction:-*

- (a) to entertain or adjudicate upon any question, whether any property or any right to or interest in any property is or is not Shamilat deh vested or deemed to have been vested in a Panchayat under this Act ; or*
 - (b) to question the legality of any action taken by the Commissioner or the Collector or the Panchayat, under this Act, or*
 - (c) in respect of any matter which the Commissioner or the Collector is empowered by or under this Act to determine."*
3. *It is not disputed that the jamabandi entries for the year 1944-45 prior to the Consolidation Act read as "Shamilat Deh Hasab Rasad Khewat" and in the cultivation column entry is "Maqbooza Malkan"*
 4. *The Additional Director interpreted the entires to mean that the respondents were in continuous possession of the land in dispute from 1944-45 onwards and on that assumption, he came to the conclusion that despite the entry in the column of assumption, he came to the conclusion that despite the entry in the column of ownership, the land was not shamilat deh land and as such did not vest in the Gram Panchayat. The High Court upheld the finding by dismissing the writ petition in limine.*
 5. *We are of the view that the Additional Director Consolidation, had no authority to go into the question whether the land in dispute was shamilat deh or not. This is a question which could only be decided by the authorities under the Regulation Act. We, therefore, allow the appeal, set aside the impugned order of the Additional Director Consolidation and also the order of the High Court and send the matter before the Collector, Kapurthala for decision in accordance with law under the Regulation Act. We make it clear that the Collector shall decide the matter afresh in*

accordance with law irrespective of the orders passed by the Consolidation Authorities in this respect. We direct the Collector to decide the matter within 2 months of the receipt of this order."

45. We, therefore, have no hesitation in recording that it is beyond debate that, if a question arises, before an officer exercising power under the Consolidation Act, regarding any right, title or interest in "Shamilat Deh" "vested" or deemed to have vested in a Gram Panchayat, a Consolidation Officer, the State or its delegate exercising plenary power under Section 42 of the Act, are not empowered, while examining the correctness of any scheme prepared during consolidation or order passed thereunder to record a finding on such a question of title or to hold that land is or is not "Shamilat Deh" and as a consequence whether any right, title or interest vests or does not vest in the Gram Panchayat. The only authority empowered to answer such a question is the Collector, exercising power under Section 11 of the 1961 Act. As a necessary corollary an order passed under Section 42 of the Consolidation Act, holding that the land vests or does not vest in a Gram Panchayat would be illegal and nonest for assumption of jurisdiction where there is none, as opposed to a mere erroneous exercise of jurisdiction or may, at best be construed to be an order passed by a tribunal of limited jurisdiction, in the exercise of its limited powers to correct errors in the scheme or orders passed during consolidation and nothing more. The latter conclusion would require a degree of explanation.

46. The 1961 Act, is a special statute enacted to vest "Shamilat Deh" in a Gram Panchayat. The Consolidation Act, on the other hand, is a special statute enacted to consolidate land holdings. Section 11 of the 1961 Act, provides a special tribunal and a procedure for determining whether land or any right, title and interest therein vests or does not so vest in a Gram Panchayat. The Hon'ble Supreme Court as well as the Full Bench of this Court and various Division Benches have held that Consolidation authorities are not competent to determine questions of title including whether "Shamilat Deh" vests or does not vest in a Gram Panchayat. The only power available to Consolidation authorities is to calculate the value of land delimit the land, and allot land in a consolidated parcel be it to the Gram Panchayat as the "Shamilat Khewat" or to owners of private land. A finding on a question of title, recorded by a tribunal of limited jurisdiction is not binding on a tribunal or Court specifically constituted to decide a question of title, in this case the Collector exercising power under Section 11 of the 1961 Act.

47. The arguments addressed by counsel for the parties, appear to suggest a broad agreement that the Director Consolidation, has no power whether under Section 42 of the Consolidation Act or under any other provision to decide a question of title relating to "Shamilat Deh" but as counsel for the petitioners has raised a plea that in case there is an error in consolidation proceeding and the error is likely to affect ownership of a proprietor or the Gram Panchayat in "Shamilat Deh", the Director Consolidation would be entitled, in the exercise of power under Section 42 of the Consolidation Act, to order such a correction, even if it adversely affects the ownership of a Gram Panchayat, the plea requires a degree of consideration. Counsel for the petitioners also contends that as "Jumla Mushtarka Malkan" is not included in "Shamilat Deh" by Section 2(g) of the 1961 Act, Consolidation authorities, who

have created "Jumla Mushtarka Malkan" in the exercise of powers under Section 18, 23-A of the Consolidation Act and Rule 16(ii) of the Consolidation Rules would necessarily be empowered to decide whether the land is or is not "Jumla Mushtarka Malkan", i.e., whether it was created by applying an excessive pro-rata cut on the holdings of proprietors and whether land described as "Jumla Mushtarka Malkan" was actually earmarked or reserved for a common purpose and as a consequence whether the land vests in the State Government or the Gram Panchayat, for the purpose of management and control.

48. Section 42 of the Consolidation Act reads as follows:-

"42. Power of State Government to call for proceedings:-*The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed, scheme prepared or confirmed or repartition made by any officer under Act, call for and examine the record of any case pending before or disposed of by such officer and may pass order in reference thereto as it thinks fit;*

Provided that no order or scheme or repartition shall be varied or reserved without giving the parties interested notice to appear and opportunity to be heard except in cases where the State Government is satisfied that the proceedings have been vitiated by unlawful consideration."

49. Accepting for a moment that power conferred by Section 42 of the Consolidation Act empowers the State or its delegate, the Director Consolidation/ Director Land Records to order correction of any error committed, while establishing the "Shamilat Khewat" or creating "Jumla Mushtarka Malkan" and while doing so to adversely affect the proprietary or possessory rights of a Gram Panchayat or the State, such an order, in our considered opinion, cannot be held to be a binding or a final adjudication on a question of title. Section 42 of the Consolidation Act merely empowers the State, to satisfy itself as to the legality or propriety of any order, passed or scheme prepared during consolidation and to correct any errors committed during consolidation but does not empower the authority to decide a disputed question of title. Thus, if a party raises a question of title, under Section 42 of the Consolidation Act or pleads that land has been wrongly allotted to the Gram Panchayat as it is not "Shamilat Deh" or there is an error in allotment of "Jumla Mushtarka Malkan" land, the Director Consolidation, should generally desist from passing an order touching upon a question of title and should direct parties to file a petition under Section 11 of the 1961 Act, where the land is "Shamilat Deh" and before an appropriate forum where the land is "Jumla Mushtarka Malkan". If, however, the authority does not adopt such a course and passes an order holding that the land does not vest in the Gram Panchayat or that the land is not "Jumla Mushtarka Malkan", the order so passed would at best be an order passed by a Tribunal of limited jurisdiction and, therefore, not conclusive as to the proprietary and possessory rights of a Gram Panchayat or a private individual, so as to estopp the Gram Panchayat or a private individual from approaching the adjudicatory authority i.e. the Collector exercising power under Section 11 of the 1961 Act or an appropriate forum to determine whether land vests or does not vest in a Gram Panchayat. As referred to in the preceding paragraphs, Consolidation authorities, including

the authority exercising plenary jurisdiction, under Section 42 of the Consolidation Act, exercise powers of a revenue officer under the 1887 Act. A revenue officer is not competent to decide disputed questions of title as held by a Full Bench in **Ajit Singh's case (supra)** and the Hon'ble Supreme Court in **Gram Panchayat, Nurpur (supra)**. Thus, even if we were to hold that Consolidation authorities are empowered, under the Consolidation Act, to correct errors, touching upon a question of title, such an exercise of power cannot be held to a final or a binding opinion on a question of title.

50. Consolidation authorities are tribunals of limited jurisdiction, conferred with power to consolidate land holding. A finding on a question of title by a tribunal of limited jurisdiction is binding or final as to the correction so ordered but cannot, be held to be final on a matter that does not fall to its jurisdiction. Such an order would be subject, necessarily to any adjudication on the question of title, by the jurisdictional forum, in case the land is "Shamilat Deh" by the Collector, exercising powers under Section 11 of the 1961 Act, in case the land is "Jumla Mushtarka Malkan" by an appropriate forum. We will deal with the forum that may be called upon to decide a dispute whether the land is "Jumla Mushtarka Malkan" at a later stage. At this stage, we would like to once again clarify that though counsel for the petitioner has canvassed that inherent in the exercise of a power to order correction, is the passing of an order holding that the land is or is not "Shamilat Deh" or "Jumla Mushtarka Malkan", such an order would not be binding on a question of title, whether it pertains to a Gram Panchayat or private individuals, or the Government.

51. We, therefore, hold that:- (a) Consolidation authorities, are tribunals of limited jurisdiction; (b) Consolidation authorities exercise powers of revenue officers, under the 1887 Act, a power to record and update fiscal entries and prepare record of rights; (c) but are not empowered to decide a question of title or vest/divest a party of its title; (d) the only authority empowered to determine a question, whether the land is "Shamilat Deh", between a Gram Panchayat and a private individual was the Civil Court but after enactment of Sections 11, 13 and 13-A of the 1961 Act, the Collector and; (e) if the land is "Jumla Mushtarka Malkan", an appropriate forum.

52. As a necessary consequence an order passed by the Director Consolidation, under Section 42 of the Consolidation Act holding that the land in dispute vests or does not vest in a Gram Panchayat is an order passed on an illegal assumption or appropriation of jurisdiction rendering the exercise of powers by the Director Consolidation null and void in its inception and in its operation and at best an order passed by a tribunal of limited jurisdiction that is not binding on the proprietary or possessory rights of the Gram Panchayat or a private individual before a Court or a Tribunal statutorily empowered to decide such a dispute.

53. The question that would necessarily require an answer is the forum an aggrieved person would be entitled to approach for redressal of his grievance, that the land is not "Jumla Mushtarka malkan" or that possessory title has wrongly vested in a Gram Panchayat or that a wrong pro rata cut has been applied while creating "Jumla Mushtarka Malkan".

54. While considering the nature of common land, we have already noticed that there are three distinct types of common land, namely, "Shamilat Deh", "Shamilat Taraf, Patti, Thola" etc. and "Jumla Mushtarka Malkan", with

the former two vesting or not in the Gram Panchayat in terms of the 1953, 1954 and 1961 Acts and the latter vesting in the Gram Panchayat, only for the purpose of management and control, under the Consolidation Act. The types of common land, though, different in their origin, creation and the nature of rights are more often than not dealt with in the same manner by revenue authorities and over a period of time this significant distinction has blurred.

55. The 1961 Act, was enacted to vest rights in "Shamilat Deh" and continues to apply to "Shamilat Deh" alone. The preamble to the 1961 Act, declares legislative intent, in the following terms:-

"An Act to consolidate and amend the law regulating the rights in shamilat deh and abadi deh.

56. The 1961 Act was enacted, so as to consolidate, amend the law regulating rights in "Shamilat Deh" and "Abadi Deh". The 1961 Act is confined to rights in "Shamilat Deh" and "Abadi Deh". Section 2(g) of the 1961 Act defines "Shamilat Deh" by including land described in Section 2(g)(1 to 5) and excluding land described in Section 2(g)(i) to (ix) in "Shamilat Deh". Section 2(g) of the 1961 Act (reproduced in the earlier part of the judgment) does not declare that land reserved for common purposes, during consolidation by a Consolidation Officer, after applying a pro-rata cut, i.e., "Jumla Mushtarka Malkan" shall also be included in "Shamilat Deh"

57. Section 3 of the 1961 Act sets out the land to which the 1961 Act applies but does not include "Jumla Mushtarka Malkan". Section 4 pertains to the vesting of rights in Panchayat and nonproprietors in land, which is included in "Shamilat Deh" of any village, and also does not refer to "Jumla Mushtarka Malkan". Section 5 of the Act provides for regulation of use and occupation etc. of land vested or deemed to have vested in panchayats, under the 1961 Act. Section 7 of the Act confers the power to put a panchayat in possession of "Shamilat Deh", but does not refer to "Jumla Mushtarka Malkan" land. Section 7-A, confers the power of appeal upon the Commissioner. Section 8 provides for saving of existing cultivating possession in "Shamilat Deh". Section 9 provides for utilisation of income.

58. Section 11 bears the title "Decision of claims of right, title or interest in "Shamilat Deh" and empowers the Collector to adjudicate any claim, right, title or interest in "Shamilat Deh". Section 11 does not refer to much less confer power upon the Collector to decide disputes with respect to any right, title, or interest in land reserved during consolidation by applying a pro-rata cut i.e. "Jumla Mushtarka Malkan".

59. Thus, an appraisal of provision of the 1961 Act makes it absolutely clear that "Jumla Mushtarka Malkan" land is not included in "Shamilat Deh" and, therefore, provisions of the 1961 Act including provisions of Section 11 that empower the Collector to decide a dispute regarding title shall not apply if the land is "Jumla Mushtarka Malkan".

60. A reference would necessarily have to be made, to Section 2(g)(6), introduced by the State of Haryana, declaring that land reserved for common purposes, during consolidation, i.e., "Jumla Mushtarka Malkan" shall be included in "Shamilat Deh". The State of Punjab has not enacted any such provision. We, therefore, have no hesitation in holding that land described as "Jumla Mushtarka Malkan" is not "Shamilat Deh", vests in the Gram Panchayat

for management and control alone and any dispute with respect to any right, title or interest in this land, cannot be decided under any adjudicatory provisions of the 1961 Act, much less by the Collector, exercising power under Section 11 of the 1961 Act.

61. We draw support for our conclusions from provisions of the Punjab Gram Panchayat (Common Purposes Land Eviction and Rent Recovery) Act, 1976 (hereinafter referred to as 'the 1976 Act'). The State of Punjab was conscious of the fact that "Jumla Mushtarka Malkan" is not "Shamilat Deh", and proceedings whether for eviction or for declaration of title cannot be initiated under the 1961 Act. The State of Punjab enacted the 1976 Act, providing for eviction from land created during consolidation. Section 2 and 3 of the 1976 Act, when read together provide for eviction from land reserved for common purposes of a village under Section 18 and 23-A of the Gram Panchayat Act. Section 3 of the 1976 Act provides that the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1973, shall apply to such land. The State of Punjab, while enacting the 1976 Act apparently, lost sight of the fact that the Collector exercising power under Section 11 of the 1961 Act exercises power to determine dispute relating to any right, title or interest in "Shamilat Deh" and not "Jumla Mushtarka Malkan" and, therefore, failed to provide a forum for deciding such a dispute.

62. The question that now remains is to identify the forum, a person who raises a plea that the land is not "Jumla Mushtarka Malkan" or that it was created by applying an illegal pro rata cut or that the land was not reserved for common purposes during consolidation, would be required to approach. After due consideration of the entire matter, we find no provision in the 1961 Act, the 1976 Act or the Consolidation Act that provides a forum to a person who raises such a plea and, therefore, in the absence of any fora for deciding such a dispute a person may have to approach a Civil Court but Section 44 of the Consolidation Act prohibits a Civil Court from entertaining any matter which the State Government or any officers are empowered by the Consolidation Act to determine or dispose of. Section 44, however, cannot be read to prohibit Civil Courts from deciding a question of title relating to "Jumla Mushtarka Malkan" as what is prohibited by Section 44 is matters that fall to the jurisdiction of State Government or to any officer duly empowered by the Consolidation Act to decide. The Consolidation Act does not confer power whether on the State Government or the officers empowered thereunder to decide a question of title. The jurisdiction of a Civil Court to entertain a dispute regarding "Jumla Mushtarka Malkan" is, therefore, not barred by Section 44 of the Consolidation Act. The only forum available to a person, who raises a dispute regarding title in "Jumla Mushtarka Malkan" is the principal Court of civil jurisdiction having jurisdiction in the matter, as provided by Section 9 of the Code of Civil Procedure, i.e., a Civil Court.

63. Thus, where a party seeks to raise a plea that the land is not "Jumla Mushtarka Malkan" etc., he shall be obliged to approach a Civil Court, exercising jurisdiction in accordance with Section 9 of the Code of Civil Procedure till such time as the State does not provide an appropriate forum. The first question is answered accordingly.

64. The second and third questions posed in the reference are as follows:-

(2) If answer to the first question is in the negative, then whether an

order passed by a Director Consolidation, determining ownership of a Gram Panchayat, affirmed by the High Court and the Supreme Court operates as res-judicata in a subsequent petition, filed under Section 11 of the Act?

- (3) Whether Section 13-B of the Act empowers the Collector, exercising jurisdiction under Section 11 of the Act, to disregard an order passed by the Director Consolidation, that has been affirmed by the High Court and the Hon'ble Supreme Court."

65. Counsel for the petitioners contend that where an order passed by Consolidation authorities, holding that the land does not vest in a Gram Panchayat has been affirmed by dismissal of a writ petition and a Special Leave Petition, such an order even if it was without jurisdiction or passed by a Tribunal of limited jurisdiction shall be deemed to have merged in the order passed by the High Court and the Hon'ble Supreme Court and, therefore, cannot be reopened and the mere fact that the writ petition and Special Leave Petition were dismissed in limine, without passing a speaking order would make no difference, as the Gram Panchayat's plea that order passed by Consolidation authorities was without jurisdiction, shall be deemed to have been considered and rejected. It is further argued that whether order passed by consolidation authorities is illegal or erroneous, its affirmation, by dismissal of the writ petition and the Special Leave Petition, would necessarily operate as resjudicata and estop the Gram Panchayat from filing a petition, under Section 11 of the 1961 Act. A petition, filed under Section 11 of the 1961 Act seeking adjudicating of a question of title, would, in essence, call upon the Collector to ignore orders passed by the High Court and the Hon'ble Supreme Court or to even hold that these orders are incorrect. Conferring such a power on the Collector would be contrary to the scheme of judicial precedence, provided in the Constitution, namely, the High Court, at the pinnacle of judicial adjudication in a State and the Supreme Court at the apex of all adjudicatory courts and Tribunals for the entire country. The principle of resjudicata, applies to the present case as the Gram Panchayat while filing the writ petition as well as the Special Leave Petition, pleaded that order passed by the Director Consolidation is without jurisdiction. The principles of resjudicata, the doctrines of rule estoppel and merger would, therefore, restrain the Gram Panchayat from approaching the Collector. The petitioners rely upon **Daryao and others v. State of U.P and others, AIR 1961 SC, 1457**, to contend that the Hon'ble Supreme court has held that if the High Court or the Supreme Court examines the merits and affirms an order, which is without jurisdiction, such an order would operate as resjudicata. The petitioners also rely upon **Ramesh and another v. Seth Gendalal Motilal Patni and another, AIR 1966 SC, 1445**, to contend that if a Tribunal passes an order that is prima-facie without jurisdiction but a writ petition raising a plea that the order is without jurisdiction is dismissed, the order would be final on the question of jurisdiction, as the question whether an order is right or wrong is irrelevant while deciding a plea of jurisdiction. The petitioners also rely upon **Dayawanti v. Yadvindra Public School, 1996(1) RRR, 111, Gurdev Kaur v. Gram Panchayat Balad Kalan and others 2009(1) RCR (Civil), 550 (DB), L. Chandra Kumar vs. Union of India and others, 1997(3) SCC 261, Sivathanu Pillai v. Lakshmi Rajamma, AIR 1981 Kerala, 214, Bindeswari Charan Singh v. Bageshwari Charan Singh, Privy Council, AIR 1936 PC 46, Isher Singh v. Sarwan Singh, AIR**

1965 SC, 948 and **1966 SC, 1145**, to contend that if a question of jurisdiction is raised and decided by the High Court or the Supreme Court, then parties cannot re-agitate the question of jurisdiction in any other proceedings.

66. Counsel for the respondents, on the other hand, contend that the doctrines of estoppel, merger and or resjudicata cannot be invoked to confer jurisdiction upon a forum, that has no jurisdiction. The mere fact that a judgment, which is without jurisdiction has been affirmed by the appellante forum would not operate as resjudicata. The doctrine of resjudicata requires that before a judgment is said to operate as resjudicata the judgment should have been passed by a forum that was competent i.e. had jurisdiction to pass such an order. The Director Consolidation has no jurisdiction to decide a question of title much less between the Gram Panchayat and a proprietor. The order passed by the Director Consolidation has to be tested for jurisdictional validity on the provisions of the Consolidation Act. The provisions of the Consolidation Act, do not empower Consolidation authorities to decide questions of title, decide whether land is "Shamilat Deh" or not, decide whether land has rightly allotted in the Gram Panchayat, or to decide whether the Gram Panchayat has any right, title or interest in the land, in dispute. The order passed in writ petition or in special leave petition, is at best as an order affirming an order passed by a tribunal of limited jurisdiction, conferred with power to order corrections. The power to order corrections, as conferred by Section 42 of the Consolidation Act, cannot be construed as a power to decide a question of title. The question of resjudicata, estoppel and merger would only arise if the Director Consolidation had jurisdiction to decide a question of title. The principles of resjudicata, estoppel and merger would not apply, despite dismissal of the writ petition and the special leave petition, for the simple reason that the Director Consolidation had no jurisdiction to decide a question of title and his order would be deemed to have been upheld only insofar as his power to order corrections. It is further submitted that the doctrine of merger does not apply as the writ petitions and the special leave petitions were dismissed without assigning any reason.

67. It is further argued that the case in hand does not deal with rights in private properties but rights in public property, vested in a Gram Panchayat, as a trustee. Accepting for a moment that the Director Consolidation has powers to order correction and to hold that the land, in dispute does not vest in the Gram Panchayat and may be returned to proprietors but such an order can not be deemed to oust the jurisdiction of the Collector to determine, de hors finding recorded by the Director Consolidation, whether the land vests or does not vest in the Gram Panchayat. The mere fact that the writ petition and the special leave petition may have been dismissed, would not prohibit the Collector from exercising jurisdiction particularly where orders passed by the High court and the Supreme Court do not disclose an adjudication on merits.

68. We have considered the arguments with a great degree of care, perused statutory provisions, precedents cited before us and have already held, while answering question number one that Consolidation authorities or the authority exercising power under Section 42 of the Consolidation Act are not empowered, under any provision of the Consolidation Act, to decide a question of title or to decide whether land vests or does not vest in a Gram Panchayat. It has also been held that if Consolidation authorities, decide that

land vests or does not vest in a Gram Panchayat, such an order being an order of a tribunal of limited jurisdiction is not be binding, before the forum conferred with jurisdiction to decide a question of title.

69. A large number of orders have been, passed by Directors, Additional Directors of Consolidation and the Director of Land Records, holding that "Shamilat Deh" or "Jumla Mushtarka Malkan" does not vest in the Gram Panchayat and, thereafter directing its redistribution or partition amongst proprietors. The reasons assigned in these orders may differ but in essence, authorities under the Consolidation Act have recorded findings that the land does not vest in the Gram Panchayat and have ordered its return to proprietors. In cases, where orders passed by Consolidation authorities have not been challenged in writ petitions or special leave petitions, there may not be any difficulty as such orders would not be binding upon the Collector, in view of Section 13-B of the 1961 Act, but a degree of difficulty does arise where these orders have been unsuccessfully challenged, by the Gram Panchayat or by private individuals and writ petitions and special leave petitions have been dismissed.

70. The question, therefore, that requires an answer is whether the Collector, who exercises powers of the jurisdictional forum under Section 11 of the 1961 Act to decide a question of title relating to "Shamilat Deh" or a Civil Court to determine whether land vests or does not vest in the Gram Panchayat, is prohibited, by dismissal of writ petitions and special leave petitions against an order passed by Consolidation authorities, from entertaining and deciding a question of title.

71. As referred to earlier, the petitioners' urge that as writ petitions and the special leave petitions have been dismissed, the doctrine of merger, the principles of resjudicata, the doctrine of rule estoppel and the precedence assigned to orders passed by the High Court and the Supreme Court, prohibit a Gram Panchayat from filing a petition under Section 11 of the 1961 Act and the Collector from ignoring these orders and entertaining such a petition.

72. Before we answer these questions, it would be necessary to refer to Sections 11, 12, 13 and 13-B of the 1961 Act. Section 11 need not be reproduced as it has been reproduced while reproducing an extract from judgment of the Hon'ble Supreme court in **Gram Panchayat, Village Sidh(supra)**. Sections 12, 13 and 13-B of the 1961 Act, read as follows:-

12. Finality of orders.-

Save , as otherwise, expressly provided in this Act, every order made by the Collector or the Commissioner shall be final and shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceedings.

13. Bar of Jurisdiction in Civil Courts:-

No civil court shall have jurisdiction:-

- (a) *to entertain or adjudicate upon any question, whether any property or any right to or interest in any property is or is not Shamilat deh vested or deemed to have been vested in a Panchayat under this Act ; or*
- (b) *to question the legality of any action taken by the*

Commissioner or the Collector or the Panchayat, under this Act, or

- (c) *in respect of any matter which the Commissioner or the Collector is empowered by or under this Act to determine].*

13B. Provisions of this Act to be overriding:-

The provisions of this Act shall have effect, notwithstanding to the contrary in any law or any agreement, instrument, custom, or usage or any decree or order on any court or other authority].

73. Section 11, confers exclusive jurisdiction, upon a Collector, duly appointed by State Government, to decide whether or any right, title or interest in "Shamilat Deh" vests or does not vest in a Gram Panchayat,. Section 11, was introduced, in the 1961 Act, by way of an amendment in 1976. Before this amendment, the power to decide such a dispute vested in a Civil Court. The power of a Civil Courts to entertain such a dispute was statutorily barred, after introduction of Section 13 in the 1961 Act. The only authority competent to decide a dispute regarding title, between a Gram Panchayat and a private individual or vice versa, relating to any right, title or interest in "Shamilat Deh" is the Collector, exercising power under Section 11 of the 1961 Act. Section 12 of the 1961 Act accords finality to orders passed by the Collector and the Appellate Authority. Section 13-B of the 1961 Act enacts a non-obstante clause that postulates that all judgments, decrees and orders passed by any authority shall be ignored if they are not in accordance with provisions of the 1961 Act.

74. Section 13-B, cannot possibly apply to orders passed by a High Court or the Supreme Court but at the same, we cannot ignore legislative intent to ensure that authorities like Consolidation Officers or revenue officers do not proceed to decide matters relating to title etc. or any matters that fall to the jurisdiction of the Collector under the 1961 Act.

75. Now reverting to the dispute in hand. A perusal of the order passed under Section 42 of the Consolidation Act reveals that the Additional Director Consolidation, while ordering correction, in orders passed during consolidation, has held that as the land belongs to proprietors it shall be redistributed amongst proprietors. It would be appropriate to reiterate that authorities, exercising power under Section 42 of the Consolidation Act, may have the power to order correction of errors in the scheme or orders passed during consolidation but are not empowered or competent to decide a question of title, much less that land vests or does not vest in a Gram Panchayat. The order passed by a Director or Additional Director of Consolidation, in the exercise of power under Section 42 of the Consolidation Act, is simpliciter an order, passed, to correct errors in, Consolidation proceedings and nothing more. Consolidation officers and other authorities are tribunals of limited jurisdiction, conferred with power to order corrections but are not conferred with power to decide disputed questions of title. The affirmation of their orders by dismissal of writ petitions or special leave petitions is an affirmation of their power to order corrections and not an affirmation of a power to decide a question of title or a binding adjudication on a question of title. Even otherwise, an order passed by a tribunal of limited jurisdiction, particularly on a question of title, cannot operate as resjudicata.

76. Let us for a moment accept the argument that in view of dismissal of

the writ petition and the special leave petition, the order passed by the Director has merged in the order passed by the High Court or the Supreme Court and, therefore, prohibits the Gram Panchayat from filing a petition under Section 11 of the 1961 Act or operates as resjudicata. The Director Consolidation, is a tribunal of limited jurisdiction, empowered to correct errors and if while correcting an error, has to decide whether land vests or does not vest in a Gram Panchayat, all that would be affirmed and, therefore, merged in the order passed by the High Court or the Supreme Court, would be his power to order corrections, in the scheme or orders passed during Consolidation. By no stretch of imagination, can an order, passed by the High Court or the Supreme Court, dismissing challenge to an order passed by the Director Consolidation, be construed as an order affirming the power of Director Consolidation, to decide a question of title or conferring legitimacy on his order. A tribunal of limited jurisdiction can only decide matters that fall to its limited jurisdiction, in this case the jurisdiction to correct an order and, therefore, cannot possibly operate as resjudicata before the forum assigned with jurisdiction to decide disputed questions of title.

77. The principle of resjudicata, applies where the former order, in this case, an order passed by Consolidation authorities was passed by a Court of competent jurisdiction, i.e., a Court competent to decide a question of title. The adjudication by Consolidation authorities would at best be an adjudication by a revenue officer, who is not competent to decide a question of title and is, therefore, neither binding nor final as to a question of title. The order, even if it has recorded a finding on title would not be construed to be a final and binding adjudication on the question of title as the question of title would necessarily have to be left to the jurisdictional forum i.e., the Collector, if the land is "Shamilat Deh" and the Civil Courts if the land is "Jumla Mushtarka Malkan".

78. A reference is necessarily called for to judgments of the Supreme Court on the question of resjudicata. In **Daryao and others v. State of U.P. and others**, AIR 1961 Sc 1457, their Lordships of the Supreme Court while considering a plea of resjudicata, in the context of Article 227 of the Constitution of India vis-à-vis Article 32 of the Constitution of India explained the doctrine of resjudicata and held that the doctrine of resjudicata applies only if the former order was passed by a Court of competent jurisdiction. A relevant extract from the judgment in **Daryao and others (supra)**, reads as follows:-

"10. In considering the essential elements of resjudicata one inevitably harks back to the judgment of sir William B. Hale in the leading *Duchess of Kingston* case. Said Sir William B. Hale "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, "the doctrine of resjudicata is not a technical doctrine

applicable only to records; ' it is a fundamental doctrine of all courts that there must be an end of litigation. "Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause". "Resjudicata", it is observed in Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation interest republicae ut sit finis litium; the other; the hardship on the individual that he should be vexed twice for the same cause- nemo debet bis vexari pro eadem causa". In this sense the recognised basis of the rule of resjudicata is different from that of technical estoppel. "Estoppel rests on equitable principles and resjudicata rests on maxims which are taken from the Roman Law". Therefore, the argument that resjudicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted.

11. This rule is subject to the limitation that the judgment in the former action must have been rendered by a court or tribunal of competent jurisdiction.

XX XX XX XX"

79. It would also be necessary to refer to a judgment of the Hon'ble Supreme Court in **Sushil Kumar Mehta v. Gobind Ram Bohra, 1990(1) Supreme Court Cases, 193**. The question before the Hon'ble Supreme Court was whether a decree passed by a Court, which was jurisdictionally incompetent to pass such a decree is a nullity and whether the plea can be raised in execution and whether the decree operates as resjudicata. A relevant extract from the judgment reads as follows:-

12. This Court has held that it is a well established principle that a decree passed by a court without jurisdiction is a nullity and the plea can be set up whenever and wherever the decree is sought to be enforced or relied upon, and even at the stage of execution or in collateral proceedings.

XX XX XX XX

15. In *Chandrika Misir & Anr. v. Bhaiya Lal*, [1973] 2 SCC 474 Palekar J. speaking for a Bench of two Judges held that the decree passed by the Civil Court in relation to matters governed by U.P. Zamindari Abolition and Land Reforms Rules, 1952 for possession was a nullity and in the appeal it was for the first time permitted to be raised in this Court and the decree was declared to be a nullity.
16. In *Ledgard v. Bull*, [1886] Law Report, 13 AC, 134 the Privy Council laid down that where the original Court in a suit was inherently lacking jurisdiction, and was incompetent to try the same, on its transfer by consent of parties, to a Court with

jurisdiction such consent did not operate as a waiver of the plea of want of jurisdiction.

XX XX XX XX

20. In Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B.Jeejeebhey, [1970] 3 SCR 830 the Bench consisting of Shah, C.J., Hegde and Grover, JJ. was called upon to consider whether a decree passed without jurisdiction operates *resjudicata*. The facts therein were that the respondent leased out the land for construction of a building to the appellant, which was duly constructed. The tenant applied for fixation of the standard rent. The Civil Court rejected the prayer holding that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 does not apply to the open land let out for construction. But later the High Court reversed that view in another decision and held that the Act applied to the open land leased out. Relying upon that judgment, an application was again filed for fixation of the standard rent of the premises. Objection was raised that the earlier rejection operated as *res judicata*. In that context, in negating the contention, this Court held that the doctrine of *res judicata* belongs to the domain of procedure. It cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be *resjudicata* in other proceedings between the same parties. The matter in issue may be an issue of fact. The fact decided by a competent Court is final determination between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is *res judicata*. The reasons for the decision are not *resjudicata*. A matter in issue between the parties is the right claimed by one party and denied by the other. The claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is *res judicata*, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transactions which is the source of the right is *res judicata*. A previous decision on a matter in issue is a composite decision; the decision of law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be *res judicata* in a subsequent proceeding if it be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority,

nor when the decision relates to the jurisdiction of the Court to try the earlier suit nor when the earlier decision declares valid a transaction which is prohibited by law:

"A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C.J., observed in Tarini Charan Bhattacharjee's case:--

"The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory or precluding the parties from reopening or recontesting that which has been finally decided."

"A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise."

26. Thus it is settled law that normally a decree passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a Court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a coram non iudice. A decree passed by such a Court is a nullity and is non est. Its validity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the Court to pass a decree which cannot be cured by consent or waiver of the party.

XX	XX	XX	XX
XX	XX	XX	XX

Thus the decision of a competent Court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a Court unrelated to questions of fact or law or mixed questions does not

operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of a law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata. Thus a question of jurisdiction of a Court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a Court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a Court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the Court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the Court inherently lacks jurisdiction.

80. It would also be appropriate to refer to the judgment of Hon'ble Supreme Court in **Isabella Johnson (Smt.) v. M.A.Susai (Dead) by Lrs.-**

“5. Learned counsel..... The Civil Court took the view that it had no jurisdiction to try the suit in question and directed the return of the plaint for representation to the appropriate Revenue Court. When the claim was filed in the Revenue Court, the court took the view that it had no jurisdiction to try the claim. Thereupon, a suit was again instituted in the Civil Court for the same relief. This suit failed throughout on the ground of resjudicata. The High Court affirmed the dismissal and the Division Bench of this Court took the view that the High Court was right in taking the view that the principles of resjudicata were applicable to the issue of jurisdiction. In our opinion, the contention of learned counsel for the appellant cannot be upheld. We find that in *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy* a bench comprising three learned Judges of this Court has taken the view that a decision on the question of jurisdiction of the Court or a pure question of law unrelated to the right of the parties to a previous suit, is not resjudicata in the subsequent suit. The court observed:-

“It is true that in determining the application of the rule of resjudicata the court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be

resjudicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure means the right litigated between the parties, i.e., the facts on which the rights id claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of resjudicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of resjudicata, for a rule of procedure cannot supersede the law of the land."

6. The same view has been reiterated by a Bench comprising three learned Judges of this Court in *Sushil Kumar Mehta v. Gobind Ram Bohra (dead)* through his Lrs.

We find that the decision of three learned Judges of this Court in *Mathurn Prasad Bajoo Jaiswal and Others v. Dossibai N.S. Jeejeebhoy*, has not been noticed at all by the Division Bench comprising two learned Judges of this Court which delivered the judgment in *Avtar Singh and Others v. Jagjit Singh and Another*, and hence, to the extent, that the judgment in *Avtar Singh's* case takes the view that the principle of *res judicata* is applicable to an erroneous decision on jurisdiction, it cannot be regarded as good law. In our opinion a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of *res judicata*. It is well settled that there can be no estoppel against law or on a pure question of law and in this case the question of jurisdiction is a pure question of law.

81. A relevant extract from the Judgment in **Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar and anothers, 2008(9) Supreme Court Cases 54**, reads as follows:-

30. The principle of *res judicata* is undoubtedly a salutary principle. Even a wrong decision would attract the principle of *res judicata*. The said principle, however, amongst others, has some exceptions, e.g., when a judgment is passed without jurisdiction, when the matter involves a pure question of law or when the judgment has been obtained by committing fraud on the court.
31. In *Williams v. Lourdusamy and Anr.*, this Court stated the law, thus:
- "11. The principles of *res-judicata* although provide for a salutary principle that no person shall be harassed again and again, have its own limitations. In O.S. No. 402 of 1987, the respondent No. 2 was not impleaded as a party. In his absence therefore, the issue as to whether respondent No. 2 had entered into an oral agreement of sale or not could not have been adjudicated upon. The said

Court had no jurisdiction in that behalf. If that was decided in the said suit, the findings would have been nullities."

34. A Three - Judge Bench of this Court in *Ashok Leyland Ltd. v. State of Tamil Nadu and Anr.* held:

"118. The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or res judicata."

82. A perusal of these judgment and due consideration of the principles of resjudicata leads to a singular conclusion that for an order passed, in former proceedings, to operate as resjudicata in latter proceedings, it should have been passed by a Court of competent jurisdiction. The Director Consolidation, as held, hereinbefore, is a tribunal of limited jurisdiction not competent to decide a question of title and, therefore, any finding recorded in an order passed by Consolidation authorities or by the Director Consolidation under Section 42 of the Consolidation Act on a question of title, even if writ petitions and special leave petitions have been dismissed, would not operate as resjudicata, on a question of title, raised before the jurisdictional forum.

83. We would now examine whether order passed by the Director Consolidation has merged in orders passed by the High Court and the Hon'ble Supreme Court and prohibits the filing of a petition under Section 11 of the 1961 Act, or where the land is "Jumla Mushtarka Malkan", the filing of a civil suit.

84. A perusal of the orders passed by this Court, while dismissing the writ petitions, reveals that no reasons were recorded whether on the first or on the second occasion. On the third occasion, though the order runs into more than 1½ pages it relies upon earlier orders, dismissing the writ petition filed by the Gram Panchayat and another private persons. The orders dismissing the Special Leave Petitions also do not set forth any reason.

85. The doctrine of merger postulates that an order passed by a Court or a Tribunal shall merge into the order passed by a superior forum whatever be the nature of the order, passed by the superior forum. The doctrine of merger is not universal in its application and admits to certain significant exceptions particularly in cases where the writ petitions or the special leave petitions were dismissed without assigning any reason or on the ground of laches or alternative remedy etc. The doctrine of merger would apply only where the High Court or the Supreme Court have examined the matter on merits and while so doing have held that the impugned order is within jurisdiction but where no such adjudication is discernible, an order passed by a lower court or Tribunal, which is without jurisdiction cannot be said to have merged in an order passed by the High Court or the Hon'ble Supreme Court, so as to prohibit the jurisdictional forum entertaining a dispute on a question of title. The doctrine of merger, cannot cure a nullity or a lack of jurisdiction, nor can, in our considered opinion, the law of precedence in the hierarchy of courts, cure an order that is void in its inception and nonest in its operation.

86. The doctrines of resjudicata and merger are doctrines of public policy

coined to confer finality to legal proceedings and cannot be invoked to confer legitimacy on orders that are limited in their jurisdictional ambit to prohibit the jurisdictional forum deciding a question of title. If, however, the writ petitions or the special leave petitions are dismissed after examining the merits or after considering the provisions of the Punjab Village Common Lands (Regulation) Act, etc. or after holding that the Director Consolidation had jurisdiction to decide the dispute, the order passed by the Director Consolidation shall be deemed to have merged in orders passed by the High Court or the Supreme Court, thereby prohibiting the Collector or the appropriate forum, from considering or deciding an application on a question of title. We, therefore, have no hesitation in holding that the doctrine of merger would only apply where the writ petitions and the special leave petitions have been dismissed by assigning reasons for dismissal of the writ petition and the special leave petition.

87. In order to place our conclusions in their correct perspective, it would be appropriate to refer to a few judgments of the Hon'ble Supreme Court setting out the nature of jurisdiction under Article 226 of the Constitution of India, the jurisdiction to entertain a special leave petition and the circumstances in which the doctrine of merger and resjudicata operate with respect to orders passed under Article 226 and Article 136 of the Constitution of India.

88. Before we refer to other judgments, it would be necessary to refer to an extract from the judgment in **Ramesh and another v. Seth Gendalal Motilal Patni and another, AIR 1966 SC, 1445 (supra)**, so as to set out the jurisdiction under Article 226 of the Constitution of India:-

“16. We are concerned here with the exercise of extraordinary original civil jurisdiction under Art. 226. Under that jurisdiction, the High Court does not hear an appeal or revision. The High Court is moved to intervene and to bring before itself, the record of a case decided by or pending before a court or tribunal or any authority within the High Court's jurisdiction. A petition to the High Court invoking this jurisdiction is a proceeding quite independent of the original controversy. The controversy in the High Court, in proceedings arising under Art. 226 ordinarily is whether a decision of or a proceeding before, a court or tribunal or authority, should be allowed to stand or should be quashed, for want of jurisdiction or on account of errors of law apparent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so, is a final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. But it is not to be taken that any order will be a final order. There are orders and orders. The question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either

upholds it or does not, In either case the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of jurisdiction of the court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not."

89. The above opinion was recorded in the context of certificate of leave to appeal under Article 133 of the Constitution of India.

90. In **Shankar Ramchandra Abhyankar v. Krishanji Dattatreya Bapat**, AIR 1970, page 1, the Hon'ble Supreme Court considered the nature of the doctrine of merger, its jurisdiction under Article 136 of the Constitution of India and held as follows:-

- (i) *Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*
- (ii) *The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.*
- (iii) *Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it., Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.*
- (iv) *An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*
- (v) *If the order refusing leave to appeal is a speaking order, i.e.*

gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunals or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But this does not amount to saying that the order of the Court, tribunals or authority below has stood merged in the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

- (vi) *Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger, the order may be of reversal, modification or merely affirmation.*
- (vii) *On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."*

91. A relevant extract from the judgment in *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust and another, 1978(3) SCC, 119*

- 10. *In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this, Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the special leave petition cannot be reopened. But the technical rule*

of *res judicata*, although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate have been decided. It is not safe to, extend the principle of *res judicata* to such an extent so as to found it on mere, guess work. To illustrate our view point, we) may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of Certiorari to challenge some order or decision on several 'grounds. If the Writ Petition is dismissed after contest by a speaking order obviously it will operate as *res judicata* in any other proceeding, such as, of suit, Article 32 or Article 136 directed from the same order or decision. If the Writ Petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of *res judicata*. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly even if one writ petition is dismissed in limine by a non- speaking one word order 'dismissed', another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case' is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter, then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principle of *res judicata*.

11. There are several decisions of this Court dealing with the doctrine and principles of *res judicata*. We may refer to only a few. In *Daryao and others v. The State of U.P. and others*(1) Gajendragadkar J., delivering the judgment of this Court elaborately discussed the rule of *res judicata* and ultimately held that where the High Court dismisses a writ petition after hearing the matter on the merits on the ground that no fundamental right was proved or contravened a subsequent petition to the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same party would be barred by the general principles of *res judicata*. At page 591 says the learned Judge :-

" In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect."

This passage lends support to the principles of *res judicata* enunciated by us above. In *Daryao's* case '(supra) the

conclusions are stated at page 592. Two situations, namely, (1) disposal of the writ application on merits and (2) its dismissal not on merits but on the ground of Laches of the party or the availability of an alternative remedy, enabled us to state what we have said above. The, dismissal of a writ petition in limine with a reasoned order may or may not constitute a bar. It will depend upon the nature of the order. "If the petition is dismissed in limine", says the learned Judge, "without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32." We have thought it proper to elucidate this aspect of the matter a bit further to indicate that dismissal of a writ petition in limine by a non speaking order could certainly create a bar in the entertainment of another writ petition filed by the same party on the same cause of action".

92. A reference may also be made to **Kunhayammed and others v. State of Kerala and another, 2000(6) SCC, 359**. After referring to the nature of doctrine of merger, it was held that if the writ petition or special leave petition is dismissed by passing a nonspeaking order, the doctrine of merger would not apply. A relevant extract from the judgment in **Kunhayammed and others v. State of Kerala and another(supra)**, reads as follows:-

“44. To sum up our conclusions are :-

- (i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
- ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.
- (iii) Doctrine of merger is not a doctrine of universal or unlimit application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136

of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

- iv) An order refusing special leave to appeal may be a non speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.
- v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.
- (vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.
- (vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.”

93. In **Chandi Prasad and others v. Jagdish Prashad and others** **2004(8) SCC, 724**, the Hon'ble Supreme Court once again dealt with the nature of the doctrine of merger and the effect of dismissal of a special leave petition and held as follows:-

- 23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there

cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does.
25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed and Others Vs. State of Kerala and Another [(2000) 6 SCC 359] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating:
 - "41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.
 42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality.
 43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special

leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

94. A relevant extract from the judgment in **Daryao and others v. State of U.P. And others, AIR 196 SC, 1457**, would also be appropriate.

"If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which are already indicated. If the petition is dismissed in limine without passing a speaking order than such dismissal cannot be treated as creating a bar of resjudicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of resjudicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32 because in such a case there has been no decision on the merits by the Court".

95. In view of the nature of the doctrine of merger and the precedents referred to by us, we have no hesitation in holding that where a tribunal/Court of limited jurisdiction, adjudicates upon a matter that does not fall to its jurisdictional competence, such an order, even if affirmed by dismissal of the writ petition or a special leave petition, shall not operate as resjudicata or prohibit the jurisdictional forum from deciding questions that fall to the latter's jurisdictional competence. This apart, if an order is affirmed, by dismissal of a writ petition and the special leave petition but neither the order passed in writ jurisdiction nor in leave to appeal, assigns any reasons, such the order shall not be deemed to have merged in the order passed by the High Court or the Supreme Court, so as to prohibit the jurisdictional forum from entertaining a petition on a question of title and the said forum would not be prohibited from deciding the matter on merits.

96. We, therefore, answer the second and third questions, in the following terms:-

- (1) The State or its delegate, exercising power under Section 42 and authorities under the Consolidation Act are tribunals of limited jurisdiction.
- (2) Consolidation authorities have no power to decide disputed questions of title in respect of lands, or any right, title or interest therein.

- (3) The State or its delegate, may in the exercise of power under Section 42 of the Consolidation Act order correction of errors, in accordance with law;
- (4) While exercising powers under Section 42 of the Consolidation Act, if it is held that the land, in dispute, vests or does not vest in a Gram Panchayat such an order would be construed to be an opinion recorded by a Tribunal of limited jurisdiction and an order so passed would not operate as *resjudictaa* to be binding upon parties or the Collector, exercising power under Section 11 of the 1961 Act, or the jurisdictional forum, constituted for deciding a question of title.
- (5) If a writ petition or special leave petition filed to challenge an order passed under Section 42 of the Consolidation Act is dismissed without assigning any reason, by use of the words "dismissed", "no merits, dismissed" or such like similar expressions, the order passed under Section 42 of the Consolidation Act shall not merge in the order passed by the High Court or the Hon'ble Supreme Court, so as to operate as *resjudicata* or prohibit the Gram Panchayat from approaching the jurisdictional forum, or.
- (6) If an order passed under Section 42 of the Consolidation Act has not been challenged in a writ petition or before the Hon'ble Supreme Court, such order shall be ignored, by the Collector exercising power under Section 11 of the 1961 Act, as Section 13-B clearly postulates that notwithstanding anything to the contrary in any law or any agreement, instruments, custom or usage or any decree or order of any court or other authority, the provisions of the 1961 Act shall prevail.
- (7) If, however, the order passed by the Director Consolidation has been affirmed, by the High Court or in a special leave petition or an appeal before the Hon'ble Supreme Court on merits, the order passed by the Director Consolidation shall be deemed to have merged in orders passed under Articles 226 and 136 of the Constitution of India and would, therefore, on the basis of the doctrine of rule estoppel, merger and the order of precedence among courts, prohibit the Gram Panchayat from filing a petition under Section 11 of the 1961 Act, the Collector from entertaining such a petition, or where the land is "Jumla Mushtarka Malkan" the Civil Court.

97. We are now left with answer to the fourth question, which reads as follows:-

"Whether a plea that the order passed by the Director Consolidation was obtained by fraud can be raised after the order has been affirmed by the High Court and the Hon'ble Supreme Court?

98. The answer to this question lies in the nature of an act of fraud, namely, that fraud vitiates every act particularly fraud played upon a Court. A fraud is a species of conduct, so abhorrent to the rule of law that such an order cannot be pressed into service and would not operate as *resjudicata*, even

where it has been affirmed by a superior forum. An order obtained by fraud may, therefore, be challenged and provided fraud is proved, be ignored by the forum where the order is pressed into service in opposition to the rights of parties. A reference in this regard may be made to a judgment of the Hon'ble Supreme Court in **Gram Panchayat of Village Naulakha v. Ujagar Singh, 2000(4) RCR, (Civil) 749**. The Hon'ble Supreme Court was considering the nature of an order obtained by fraud and collusion and held that if it is alleged that an order has been obtained by collusion or fraud, the Gram Panchayat or any person aggrieved may file a petition under Section 11 of the Act and would not be required to seek adjudication by an independent suit, before a Civil Court. A relevant extract from the judgment reads as follows:-

- “7. The law in England also appears to be the same, that no independent suit is necessary. In *Spencer-Bower and Turner on Res Judicata*, it is stated that there are exceptions to the principle of *res judicata*. If the party setting up *res judicata* as an estoppel has alleged all the elements of an estoppel (i.e. ingredients of *res judicata*), it is still open to the latter (the opposite party) to defeat the estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes- fraud, cross-estoppel, contract and public policy. The author clearly says that no active proceedings for 'rescission' of the earlier judgment are necessary. They stated as follows:

“The avoidance of a judicial act on the ground of fraud or collusion is effected not only by active proceedings for rescission.....but also by setting up the fraud as a defence to an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible.”

Thus, the law is well settled that no independent suit as a condition precedent is necessary.

8. Collusion, say *Spencer-Bower and Turner*, is essentially play-acting by two or more persons for one common purpose- a concerted performance of a *fabula* disguised as a *judicium*-an unreal and fictitious presence of a contest by confederates whose game is the same. As stated by Lord Selborne L/C in **Boswell v. Coaks, 1894 (6) Rep. 167**, there is no Judge; but a person divested with the ensigns of a judicial office, i misemployed in listening to a fictitious cause proposed to him, there is no party litigating.....no real interest brought into question and to use the words of a very sensible civilian on this point, *fabula non judicium, hoc est; in scena, non in foro, res agitur*. That, in our view, is the true meaning of the word 'collusion' as applied to a judicial proceeding.
9. Further property of a public institution cannot be allowed to be jeopardised by persons, who at an earlier point of time, might have represented it and who were expected to effectively defend public interest and community property. Persons representing

public bodies are expected to discharge their functions faithfully and in keeping with the trust reposed in them.”

99. The question that would still have to be answered is whether an order passed by the Director Consolidation founded on fraud or collusion would merge in an order passed by the High Court and the Supreme court, if the writ petitions and the special leave petitions have been dismissed.

100. The doctrine of merger is based on principles of judicial propriety, the need to prevent perpetual uncertainty and maintain a binding judicial hierarchy. The doctrine of merger is not absolute and admits to a large number of exceptions, some of which we have already noticed. A significant exception is where the order is alleged to have been obtained by collusion and fraud. Fraud and collusion are a species of conduct so abhorrent to the administration of justice that they vitiate all acts performed or orders passed and no person much less a successful litigant may press into service the doctrine of merger or resjudicata in defence. To affirm a fraudulent order on the anvil of doctrine of merger would, in our considered opinion, be a traversity of justice. The dismissal of a writ petition or a special leave petition would not prohibit the filing of a petition under Section 11 of the 1961 Act, where the land is allegedly “Shamilat Deh” and before a Civil Court where the land is “Jumla Mushtarka Malkan” to prove the plea of fraud or collusion. A reference may be made to a judgment of the Hon'ble Supreme Court in **S.P.Changalvaraya Naidu (dead) by LRs v. Jagannath (dead) by LRs(supra)**. A relevant extract from this judgment reads as follows:-

“1. Fraud-avoids all judicial acts, ecclesiastical or temporal” observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decre- by the first court or by the highest court- has to be treated as a nullity by ever court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

“7.....”The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient level to retain the, illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of litigation.”

101. The judgment in **S.P.Changalvaraya Naidu (dead) by LRs v. Jagannath (dead) by LRs(supra)** was followed in **A.V.Papayya Sastry and others v. Government of Andhra Pradesh and others**. A relevant extract whereof read as follows:-

“31. The above principle, however, is subject to exception of fraud.

Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior."

102. The principle that fraud vitiates an order, judgment or decree, was reiterated by the Hon'ble Supreme Court in **Union of India and others v. Ramesh Gandhi, 2012 (1) Supreme Court Cases, 476** and it was held that if a judgment obtained by fraud is a nullity and it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the Court, is impermissible. A reference was made to fraud regarding public law jurisprudence. A relevant extract from the judgment reads as follows:-

"27. If a judgment obtained by playing fraud on the Court is a nullity and is to be treated as non est by every Court superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the Court by not disclosing the necessary facts relevant for the adjudication of the controversy before the Court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest".

103. The clear and unambiguous enunciation of law, on the question of fraud and collusion leaves no doubt that an order obtained by fraud cannot be said to have merged into an order passed by the High Court or the Supreme Court and an aggrieved party may validly raise a plea of fraud and collusion before the Collector, exercising power under Section 11 of the Act. If, however, the aggrieved party fails to prove its plea of fraud or collusion, such an order shall be deemed to have merged in orders passed by the High Court or the Hon'ble Supreme Court.

104. We answer the reference in terms recorded above. The writ petitions be placed before an appropriate Bench.

Sd/- (RAJIVE BHALLA) JUDGE

Sd/- (S.S.SARON) JUDGE

Sd/- (S.P.BANGARH) JUDGE

S.S. SARON, J. --

105. I have had the advantage of going through the judgment prepared by brother Rajive Bhalla, J. with which I concur and endorse. However, the question of Shamlat land and Jumla Mushtarkha Malkan land has in the recent years been a subject of considerable debate and also misuse. Therefore, to further elaborate the position with respect to the said two kinds of lands as these are at times intermixed the following is being added.

106. Punjab being an agricultural State its economy is dependent on its agriculture. Prices of agriculture land have risen manifold in the recent past. There has been an endeavour to encroach upon the Shamlat lands and Jumla Mushtarka Malkan lands by various persons. At times the intending purchasers are unaware of the nature of such lands or are allured by the land dealers to purchase such lands little knowing the consequences and the effect of the transactions that they are entering into. Nature of the disputes that arise from such transactions and the legal position that may arise are not known. Therefore, to clarify this position, a distinction between the two kinds and nature of lands, which has been duly considered and elaborately dealt with in the preceding judgment prepared by my brother, is being elaborated.

107. The Shamlat lands owe their origin primarily to the regular land settlements that were carried out in Punjab initially under the old Land Revenue Act (XXIII of 1871) known as 'Bandobasts'. Certain lands were carved out for common purposes in some revenue estates; mostly from out of the shares of the proprietors; besides, the proprietary body of a village also left out certain lands for common purposes which were to be used by the proprietors of land. The proprietors of land in an estate had a share in the land to the extent of their holdings in the revenue estate which is recorded in the revenue record by entries such as 'Hasab Rasad Zare Khewat' or to the extent of land revenue being paid by the proprietors, such as 'Hasab Rasad Mal Guzari', 'Hasab Rasad Paimana Malkiat' and 'Hasab Rasad Raqba Khewat'. The said terms were only indicative of the extent of the share of the proprietors in the common lands of the village known as 'Shamlat deh.' The nature of 'Shamlat deh' lands or village common lands has been considered by a five judges bench of the Hon'ble Supreme Court in **Gram Panchayat, Jamalapur v. Malwinder Singh AIR 1985 SC 1394**. A reference was made to Rattigan's Digest of Customary Law in the Punjab and it was observed that in the introduction to Chapter X (Village Common Land) it is noted that within the territorial limits of every village some portion of the uncultivated waste lands are reserved 'for purposes of common pasture, for assemblies of people, for the tethering of the village cattle, and the possible extension of the village dwellings' and that lands so reserved are jealously guarded as the common property of the original body of settlers who founded the village or their descendants, and occasionally also those who assisted the settlers in clearing the waste and bringing it under cultivation are recognized as having a share in these reserved plots. It was further noticed "even in villages which have adopted separate ownership as to the cultivated area, some such plots are usually reserved as village common, and in 'pattidar' villages, it is not unusual to find certain portions of the waste reserved for the common use of the proprietors of each 'patti', and other portions for common village purposes. The former is designated as 'Shamlat-patti' and the latter 'Shamlat-deh'. It was said "as a general rule, only proprietors of the village (malikan-deh) as distinguished from proprietors of their own holdings (malikan makbuza khud) are entitled to share in the Shamlat-deh." Prior to the partition of India on August 15, 1947 the Shamlat-deh lands in Punjab were owned by the proprietors of the other lands in the village, "Hasab Rasad Khewat", that is to say, in the same proportion in which they owned the other lands. Therefore, a person who did not own any other land in the village could have no proprietary right or interest in the Shamlat-deh lands. But, though the interest of the proprietors of the other

lands, in Shamlat-deh lands, was incidental to their proprietary interest in those other lands, such interest in the Shamlat was not a mere appendage to their interest in the other lands. Therefore, Shamlat lands were for the common use by the villagers and the proprietors had a share in the said lands mostly to the extent of their holdings which were reflected in the revenue records or Jamabandi as Hasab Rasad Zare Khewat. The nature of such lands known as Shamlat-deh are reflected in the revenue records (Jamabandi). The enactment of the Punjab Land Revenue Act, 1887 resulted in maintaining a record of land holdings. These were primarily meant for fiscal purposes for collection of land revenue. However, an entry in the Jamabandi (record of rights) prepared in accordance with Chapter IV reflects the right and title of its proprietor. These documents are considered for determining the ownership and tenancy rights etc., if any; besides, the nature of land and the source of its irrigation. The presumption that these raise are though rebuttable.

108. A need was felt for consolidation of agriculture land holdings and to prevent its fragmentation for better management, utilization and productivity for the development of the estate. This need became more and an impetus was given after independence of the country. With this avowed object in view, the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 ('1948 Consolidation Act' - for short) was enacted. The legislative intent was to develop agricultural land and optimize agriculture produce from such land by consolidating the holdings of a proprietor of land in the village and prevent its fragmentation. In case a proprietor had various chunks of land, then for its better management, cultivation and irrigation, a need was felt to consolidate his land holdings which would augment his agriculture produce. Therefore, the object was to provide a compact area of land instead of having scattered chunks of land; besides, avoid fragmentation. In the consolidation process, it was also felt that certain lands need to be kept for common purposes in every village which land was to be given to the village Panchayats or the Gram Panchayats for its management and control only. This land for common purposes was/is independent of the 'Shamlat deh' lands, which the proprietors had carved out or the settlements had provided for. In the 1948 Act; 'common purpose' (before its amendment) was defined under Section 2 (bb) to mean "any purpose in relation to any common need, convenience or benefit of the village". In Section 14 (1) of the 1948 Act it was provided that the Government may of its own accord, or an application, declare its intention to make scheme of consolidation of holdings "for the purpose of better cultivation of lands therein." Section 18 of the 1948 Act inter alia provided that notwithstanding anything contained in any law for the time being in force, it shall be lawful for the Consolidation Officer to direct (a) that any land specifically assigned for the any common purpose shall cease to be so assigned and to assign any other land in its place, besides, (c) that if in any area under consolidation no land is reserved for any common purpose including extension of the village abadi or if the land so reserved is inadequate, to assign other land for such purpose. Section 18 of the 1948 Act relates to "lands reserved for common purposes." The said section reads as under:-

"18. Lands reserved for common purposes:-

Notwithstanding anything contained in any law for the time being in force, it shall be lawful for the Consolidation officer to direct-

- (a) that any land specifically assigned for any common purpose shall cease to be so assigned and to assign any other land in its place;
- (b) that any land under the bed of a stream or torrent flowing through or from the Shiwalik mountain range within the [State]* shall be assigned for any common purpose;
- (c) that if any area under consolidation no land is reserved for any common purpose including extension of the village abadi, or if the land so reserved is inadequate, to assign other land for such purpose."

* [Substituted for the word "Province" by Adaption of Laws Order, 1950.]

109. The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Rules 1949 ("1949 Rules" – for short) were framed. Rule 16 (ii) reads as under:-

"In an estate or estates where during consolidation proceedings there is no shamlat deh land or such land is considered inadequate, land shall be reserved for the village Panchayat and for other common purposes, under Section 18 (c) of the Act, out of the common pool of the village at the scale given in the Schedule to these rules. Proprietary rights in respect of land so reserved (except the area reserved for the extension of abadi of proprietors and non-proprietors) shall vest in the proprietary body of the estate or estates concerned and it shall be entered in the column of ownership of record of rights as '**Jumla Malkan Wa Digar Haqdaran Arazi Hasab Rasad Raqba**'. The management of such land shall be done by the Panchayat of the estate or estates concerned on behalf of the village proprietary body and the Panchayat shall have the right to utilize the income derived from the land so reserved for the common needs and benefits of the estate or estates concerned". (Emphasis added)

110. Therefore, in terms of the 1948 Act and the 1949 Rules, the title and ownership in the land reserved for 'common purposes' vests in the proprietary body of the estate or estates concerned and in the column of ownership of record of rights (Jamabandi) it is to be entered as "Jumla Malkan Wa Digar Haqdaran Arazi Hasab Rasad Raqba"; however, the management and control of such land is to be done by the Panchayat on behalf of the village proprietary body. This aspect is also evident and quite clear from the provisions of Section 23-A of the 1948 Act (as substituted by Punjab Act 39 of 1963), which reads as under:-

"23 A. Management and control of lands for common purposes to vest in Panchayats or State Government. – As soon as a scheme comes into force, the management and control of all lands assigned or reserved for common purposes of the village under Section 18, -

- (a) in the case of common purposes specified in subclause (iv) of clause (bb) of section 2 in respect of which the management and control are to be exercised by the State Government, shall vest in the State Government; and

- (b) in the case of any other common purpose, shall vest in the Panchayat of that village;

and the State Government or the Panchayat, as the case may be, shall be entitled to appropriate the income accruing therefrom for the benefit of the village community, and the rights and interests of the owners of such lands shall stand modified and extinguished accordingly;

Provided that in the case of land assigned or reserved for the extension of village abadi or manure pits for the proprietors and non-proprietors of the village, such land shall vest in the proprietors and non-proprietors to whom it is given under the scheme of consolidation."

111. The said provision, therefore, only provides for "management and control of lands for common purposes to vest in Panchayats or State Government." It does not provide for vesting of ownership or title.

112. A Five Judges Bench of the Supreme Court in **Ajit Singh v. State of Punjab AIR 1967 SC 856** noticed that Article 31-A (1) (a) of the Constitution mentioned four categories i.e. (i) acquisition by the State of an estate; (ii) acquisition by the State of rights in an estate; (iii) the extinguishment of rights in an estate and (iv) the modification of rights in an estate. These four categories are mentioned separately and are different. In the first two categories, it was held that the State 'acquires' either an estate or rights in an estate. In other words, there is a transference of an estate or the rights in an estate to the State. When there is a transference of an estate to the State, it could be said that all the rights of the holder of the estate have been extinguished. But if the result in the case of the extinguishment is the transference of all the rights in an estate to the State, it would properly fall within the expression 'acquisition by the State of an estate'. Similarly, in the case of an acquisition by the State of a right in an estate it could also be said that the rights of the owner have been modified since one of the rights of the owner has been acquired. It was further held that there is this essential difference between 'acquisition by the State' on the one hand and 'modification or extinguishment of rights,' on the other that in the first case the beneficiary is the State while in the latter case the beneficiary of the modification or the extinguishment is not the State. It was considered whether taking of the property for the common purposes in terms of Rule 16 (ii) of the 1949 Rules amounted to acquisition by the State of any land and who is the real beneficiary and whether it is the Panchayat. It was held that it is clear that the title remains in the proprietary body and in the revenue records the land would be shown as belonging to "all the owners and other right holders in proportion to their areas" (emphasis added). The Panchayat would manage it on behalf of the proprietors and use it for common purposes; it cannot use it for any other purpose. The proprietors enjoy the benefits derived from the use of land for common purposes. It was true that the non-proprietors also derive benefit but their satisfaction and advancement enures in the end to the advantage of the proprietors in the form of a more efficient agricultural community. The Panchayat as such does not enjoy any benefit. On the facts of the said case it seemed to their Lordships that the beneficiary of the modification of rights is not the State, and therefore there is no acquisition by the State within the second proviso to Article 31-A (1) of the Constitution. Therefore, it is to be noticed that the Hon'ble Supreme Court in its majority judgment in **Ajit Singh's**

case (supra) specifically held that in respect of 'Jumla Mushtarka' land which is carved out in consolidation proceedings, the proprietary body of the village remains its owner and in the revenue records it is to be recorded as belonging to all the owners and other right holders in proportion to their areas though it is to be used for common benefits of all. Therefore, 'Jumla Mushtarka' land can be utilized only for "common purposes" as defined in Section 2 (bb) of the 1948 Act. On the day the judgment in **Ajit Singh's case (supra)** was pronounced by the Supreme Court, another judgment of the same Five Judges Bench was pronounced in the case of **Bhagat Ram and others v. State of Punjab and others AIR 1967 SC 927**. In the said case the question that was considered was whether the consolidation scheme insofar as it makes reservation of land for income of the Panchayat is hit by second proviso to Article 31-A. As already noticed Section 2 (bb) of the 1948 Act defines common purpose which includes "providing income for panchayat of the village concerned for the benefit of the village community". It was held that the income can only be used for the benefit of the village community. But so is the other income of the Panchayat of a village to be used. The income is the income of the Panchayat and it would defeat the whole object of the second proviso if any other construction is to be given. The Consolidation Officer, it was held, could easily defeat the object of the second proviso to Article 31-A by reserving for the income of the Panchayat a major portion of the land belonging to person holding land within the ceiling limit. Therefore, the reservation of 100 kanals 2 marlas of land for the income of the Panchayat in the scheme it was held was contrary to the second proviso and the scheme must be modified by the competent authority accordingly. The majority, therefore, in **Bhagat Ram's case (supra)** held that providing for income of the Panchayat was not a common purpose. This evidently shows that the land which is earmarked for common purposes can be utilized only for 'common purposes' as defined in Section 2 (bb) of the 1948 Act.

113. In **Johri Mal v. Director Consolidation, AIR 1967 SC 1568**, the consolidation scheme in respect of the village under consolidation was confirmed which amongst other provided that the owners of permanent 'ghers' or enclosure would be permitted to retain them in their possession. One of the proprietor namely Johrimal had made a 'gher' or an enclosure in khasra No.3942. In terms of the scheme, this was to remain with him. In the consolidation scheme which was finalized under Section 20 of the 1948 Act, it was provided that the existing and permanent enclosure shall be kept in ownership and possession of these proprietors who were owners in possession prior to the consolidation and in addition if these persons so desire, they shall be entitled to be given additional area upto one bigha for extension of the abadi. In the case of such persons of right holders who had constructed houses or enclosure etc. within the Shamlat area, they would keep them in their possession but adjustment would be made out of their khewat land. Later on the Director Consolidation to whom all powers of State Government had been delegated under Section 42 of the 1948 Act reconsidered the matter and ordered that this particular piece of land i.e. Khasra No.3942, should be reserved for extension of the abadi for nonproprietors. The Director Consolidation accordingly ordered that instead of being reserved for Johrimal, the plot should be kept for non-proprietors and the consolidation records should be changed to that extent. The said order of the Director Consolidation

was assailed in this Court and the writ petition of the petitioner was allowed. It was held by a Single Bench of this Court that the Director Consolidation had no authority to make an order contrary to the scheme without amending the scheme itself, and all amendment of the scheme could be made only under Section 36 and not under Section 42 of the 1948 Act. Letters Patent Appeal against the said order was heard by a Full Bench of this Court in **Director of Consolidation v. Johri Mal (AIR 1961 Punjab 208)**, it was allowed and the order of the learned Single Judge was reversed. It was held by the majority of the Judges that the impugned order amounted to alteration of the consolidation scheme for which the State Government had power under Section 42 of the 1948 Act as amended by the East Punjab Holdings (Consolidation and Prevention of Fragmentation) (Second Amendment and Validation) Act (Punjab Act 27 of 1960), to make any change in the consolidation scheme subject to the requirements of that Section. The petitioner Johrimal assailed the order of the Full Bench before the Supreme Court. The Supreme Court in **Johri Mal v. The Director of Consolidation of Holdings, Punjab and another AIR 1967 SC 1568** held that Section 42 of the 1948 Act as amended by Act No.27 of 1960 authorized the State Government to interfere with the scheme of Consolidation or repartition made under the said Act. The amending Act had substituted the words 'any order passed by any officer under this Act', the words 'any order passed, scheme, prepared or confirmed or repatriation made by any officer under this Act'. Section 36 on the other hand authorises the authority confirming a scheme to alter or revoke it in that case the new scheme must be published, objections heard and decided and the scheme has to be confirmed once again in accordance with the procedure under Sections 19 and 20 of the Consolidation Act. The power conferred in the State Government, it was held, is a separate power independent of Section 36 which deals with the power of the authority confirming the scheme. No force was found in the contention that the scheme of consolidation cannot be varied by the State Government under Section 42 except in accordance with Section 36 of the Consolidation Act. It was also contended that Section 18 (c) of the 1948 Act requires that before a Consolidation Officer, directs reservations of any land for the village abadi, no land should have been reserved for a common purposes in the area under consolidation or the lands so reserved should have been inadequate. It was held that Section 18 (c) confers a power on the Consolidation Officer to reserve the land of the proprietors for any common purpose including the extension of the village abadi and there was no express limitation in the language of the Section to the effect that the land to be taken from the proprietors and other right holders should be according to rateable share. But the language of Section 18 (c) it was held should be interpreted in a reasonable manner. The legislature could not have intended that the land should be taken from one proprietor only for common purpose. The intention must be that all proprietor should contribute rateably for such purposes. The said intention must be that all proprietors should contribute rateably for such purposes. This intention is brought out by Rule 16 (ii) and this is what Section 18 (c) must be held to mean. Reference was made to **Ajit Singh v. State of Punjab (supra)** wherein it has been held that Section 18 (c) must be construed reasonably and that only a fraction of each proprietor's land was taken and formed into a common pool, so that the whole may be used for the common needs and benefits of the village. It was pointed out that title will vest in the

proprietary body and the management of the land was done by the Panchayat of the estate on behalf of the proprietary body and the land was used for common needs and the benefits of the estate concerned. It was, therefore, held that Rule 16 (ii) only provides for adjustment of the rights of persons holding land so reserved in the interest of village economy and there was no 'acquisition of land' within the meaning of the second proviso to Article 31-A (1) of the Constitution of India and there was no question of paying compensation in cash to the proprietors for such adjustment of right. Therefore, it is quite apparent that lands of the proprietors is deducted by applying a pro rata cut for common purposes in accordance with the consolidation scheme that is prepared. The land kept for common purposes is recorded in the revenue record as; "Jumla Malkan Wa Digar Haqdaran Arazi Hasab Rasad Raqba" (all the owners and other right holders in proportion to their areas). The land which is kept for common purposes in a consolidation scheme is for used by the villagers for common needs as envisaged by Section 2 (bb) of the 1948 Act. The common purposes for which such land can be used is to be confined to those as defined in Section 2 (bb) of the 1948 Act and not other, unless these are incorporated therein. This is the intent of the judgment of the Five Judges Bench Judgment of the Supreme Court in Bhagat Ram's case wherein land reserved for "providing income from the Panchayat of the village concerned for the benefit of the village community" was held would defeat the object of second proviso to Article 31-A by reserving for the income of the Panchayat a major portion of the land belong to a person holding land within the ceiling limit. Besides, it is to be noted that the management and control only vests in the Panchayat in respect of lands earmarked for common purposes in a consolidation scheme. The proprietary rights and ownership vest in the proprietary body of the village.

114. During the process consolidation of holdings, consolidation proceedings were carried out. The proprietors of land in a village had a share in Shamlat land which was kept for common purposes of the village. In some villages during consolidation proceedings, this land was, partitioned amongst the co-sharers according to the scheme that was prepared in terms of the 1948 Act for a particular village. It is during consolidation operations that the Punjab Village Common Lands (Regulations) Act, 1953 and the PEPSU Village Common Lands (Regulations) Act, 1954 came to be passed. The Punjab Village Common Lands (Regulation) Act, 1953 was in respect of areas which immediately before 01.11.1956 comprised in the State of Punjab while the PEPSU Village Common Lands (Regulation) Act, 1954 in relation to the territory which immediately before 01.11.1956 was comprised in the State of Patiala and East Punjab Estate Union (PEPSU). After the passing of the State Reorganization Act, 1956 on 01.11.1956, the PEPSU State merged with Punjab. Then a new Act namely the Punjab Village Common Lands (Regulations) Act, 1961 (1961 Act-for short) was enacted, which is now in operation. Section 2 (g) of the 1961 Act defines "shamlat deh" lands as follows:-

"Section 2 (g) "Shamlat deh" includes :-

- (1) lands described in the revenue records as Shamlat deh excluding abadi deh;
- (2) shamlat tikkas;

(3) lands described in the revenue records as shamlat, tarafs, pattis, pannas and tholas and used according to revenue records for the benefit of the village community or a part thereof or for common purposes of the village;

(4) lands used or reserved for the benefit of village community including streets, lanes, playgrounds, schools, drinking wells, or ponds within abadi deh or gorah deh; and

(5) lands in any village described as banjar qadim and used for common purposes of the village according to revenue records;

but does not include land which ---

(i) ----

(ii) has been allotted on quasi-permanent basis to a displaced person;

(ii-a) was shamlat deh, but, has been allotted on quasi-permanent basis to a displaced person, or, has been otherwise transferred to any person by sale or by any other manner whatsoever after the commencement of this Act, but on or before the 9th day of July, 1985.

(iii) has been partitioned and brought under cultivation by individual landholders before the 26th January, 1950;

(iv) having been acquired before the 26th January, 1950, by a person by purchase or in exchange for proprietary land from a co-sharer in the shamlat deh and is so recorded in the jamabandi or is supported by a valid deed; [and is not in excess of the share of the co-sharer in the shamlat deh].

(v) is described in the revenue records as shamlat taraf, pattis, pannas, and thola and not used according to revenue records for the benefit of the village community or a part thereof or for common purposes of the village;

(vi) lies outside the abadi deh and was being used as gitwar, bara, manure pit, a house or for cottage industry immediately before the commencement of this Act;

(vii) ----

(viii) was shamlat deh, was assessed to land revenue and has been in the individual cultivating possession of co-sharers not being in excess of their respective shares in such shamlat deh on or before the 26th January 1950; or,

(ix) was being used as a place of worship or for purposes subservient thereto immediately before the commencement of this Act.

115. Section 2 (g) of 1961 Act which defines 'Shamlat deh' is in two parts clauses (1) to (5) provides for such lands which are inclusive of 'Shamlat deh' while clauses (i) to clause (ix) relate to those lands that are excluded from 'Shamlat deh'. The general principle is that the lands which are included in 'Shamlat deh' are to vest in Panchayat and those that are not included and are shown to be excluded from 'Shamlat deh' in terms of Clause (i) to (ix) of

Section 2 (g) of the 1961 Act are to vest with the proprietors. Section 4 of the 1961 Act provides for vesting of rights in Panchayat and non-proprietor. It is envisaged therein that notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interest whatever in the land which is included in the 'Shamlat deh' of any village and which has not vested in a Panchayat under the Shamlat law shall at the commencement of this Act i.e. 1961 Act vest in a Panchayat constituted for such village, and where no such Panchayat has been constituted for such village, vest in the Panchayat on such date as a Panchayat having jurisdiction over that village is constituted. The important aspect to be noticed in Section 4 is that all rights, title and interest whatever in the land which is included in the 'Shamlat deh' of any village is to vest in a Panchayat constituted for such village. As against this land which is reserved for common purpose under the 1948 Act in terms of Section 18 (c) of the said Act, the proprietary rights in respect of land, so reserved (except the area reserved for the extension of abadi of proprietors and nonproprietors) is to vest in the proprietary body of the estate or estates concerned, and is to be entered in the column of ownership of record of rights (Jamabandi) as 'Jumla Malkan Wa Digar Haqdarar Arazi Hasab Rasad Raqba'. The management of such land is to be done by the Panchayat of the estate or estates concerned on behalf of the village proprietary body in terms of Rule 16 (ii) of the 1949 Rules.

116. From the above it follows that 'Shamlat Land' vests completely in the Panchayat with all rights of ownership in accordance with Section 4 of the 1961 Regulation Act. The ownership and management vests in the Panchayat and it can utilize the land in accordance with the provisions of 1961 Act and the Rules framed thereunder.

117. In respect of the land which is earmarked for common purposes by a Consolidation Scheme by applying a pro rata cut on the land of a proprietor is to be entered in the revenue record as 'Jumla Malkan Wa Digar Haqdarar Arazi' in accordance with Rule 16 (ii) of the 1949 Rules. The ownership of title of this land does not vest in the Panchayat. It is only the management and control that vests in the Panchayat in terms of Section 23A of 1948 Act. This is also evident from the Five Judges Bench decision of the Hon'ble Supreme Court in **Ajit Singh's case (supra)** and also from the Five Judges Bench decision in **Bhagat Ram's case (supra)** which is reiterated by the Hon'ble Supreme Court in **Johri Mal's case (supra)**.

Order accordingly.

PUNJAB & HARYANA HIGH COURT

Before: K. Kannan, J.

Regular Second Appeal No.606 of 1986 (O&M)

Decided on: 08.01.2014

Darbara Singh

Appellant

Versus

Jaswant Kaur and others

Respondents