

(1977) 01 CAL CK 0006
In the Calcutta High Court

Chaturbhuj Misra

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 31-01-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 2, 2(2), 2(20)
West Bengal Estates Acquisition Act, 1953 — Section 39(1), 57(B), 57B, 6

Citation : 82 CWN 589

Hon'ble Judges : N.C. Mukherji, J;B.C. Roy, J

Bench : Division Bench

Advocate : Swadesh Ranjan Bhunia, for the Appellant; P.K. Sen Gupta,
Government Pleader for the Opp. Parties, for the Respondent

Final Decision : Allowed

Judgement

B.C. Ray, J.—This is an application on u/s 115 of the CPC and it is directed against the judgment and order dated May 17, 1974 passed by the Subordinate Judge, Third Court, Mindnapore in Title Appeal No. 208 of 1973 setting aside the judgment and decree dated the March 24, 1973 passed by the Second Court of Munsif at Contai in Title Suit No. 376 of 1969 holding that the suit abated u/s 57(b) of the West Bengal Estates Acquisition Act.

2. The Petitioner Sudhabodh Misra instituted a suit being Title Suit No. 376 of 1969 in the Second Court of Munsif at Contai stating inter alia that lands measuring 6. 67 acres described in schedule "A" to the plaint had been possessed by him exclusive on the basis of an amicable partition with the Defendant Nos. 2 since 1358 B.S. that the said property along with other properties were ancestral properties and they were governed by the Mitakshara School of Hindu Law in as much as their predecessors, who originally were residents of Orissa migrated to Midnapore where they are now residing. On 24th of Magh 1362 B.S., corresponding to 7th of February, 1956 a formal partition deed was executed and registered by them specifically recording the allotments in the shares of each of the parties. The Petitioner as Plaintiff prayed for a

declaration of his exclusive title to schedule "A" property and for a declaration that the same could not vest in the state. The Plaintiff also prayed for a permanent injunction restraining the state of West Bengal from interfering with the possession of the Plaintiff in respect of the said lands. The Defendant No. 1, the State of West Bengal, filed a written statement contending inter alia that the Plaintiff was not governed by the Mitakshara School of Hindu Law and there was no partition and the land in possession of the Plaintiff being above the ceiling had not been retained by the Plaintiff and as such the same had vested in the State. On March 24, 1973 the Munsif Second Court, Contai, decreed the said suit holding inter alia that the Plaintiff was governed by the "Mitakshara school of Hindu Law" and that this question was finally and conclusively decided in an earlier suit to which the state of West Bengal, the Defendant No. 1, was a party. This will be evident from the exhibits 4 and 4(a)... the Judgments of the Trial Court as well as of the appellate court. It was further held that in the said suit it was also decided that there had been a partition of the ancestral properties between the Plaintiff and the Defendant Nos. 2 to 4 in 1360 B.S. and the State of West Bengal being a party to that suit was not competent to challenge the deed of partition as a void or collusive document. The learned Munsif further held that the total lands in possession of the Plaintiff being less than the ceiling no question of retention could arise as the Plaintiff was not a "Big Raiyat" and as such the submission of "B" Form was not at all necessary.

3. Against this judgment and decree the Defendant No. 1, the State of West Bengal, preferred an appeal which was registered as Title Appeal No. 20B of 1973. During the pendency of this appeal the West Bengal Estate Acquisition (Second Amendment) Act 1973 by which Section 57B was inserted in the said Act was enforced. A preliminary objection was taken on behalf of the Appellant that the suit has abated under the provisions of Section 57B of the West Bengal Estates Acquisition Act. On May 17, 1974 the subordinate Judge, Third Court, Midnapore, held that the suit had abated u/s 57B of the said Act and set aside the judgment and decree passed by the Trial Court.

4. It is against this judgment and decree the instant application had been moved and the Rule was obtained.

5. Mr. Swadesh Ranjan Bhunia learned Advocate for the Petitioner has submitted that the suit being one for declaration of title and for a permanent injunction does not come within that mischief of Section 57B of the West Bengal Estates Acquisition Act, 1953 and as such the impugned order of abatement of the suit passed by the Court of appeal below is wholly illegal, unwarranted and without jurisdiction.

6. Mr. Bhunia has next submitted that the partition of the ancestral properties including the suit land had been effected mutually in 1360 B.S. and since then the Petitioner has been in exclusive possession of the suit properties. On 7th February, 1956, corresponding to 24th Magh 1362 B.S. a formal document of partition was executed and registered by the Petitioner embodying the particulars

of the allotment that fell to the shares of each of the co-perceners. The said partition has been held to be valid and to have been acted upon by the parties in an earlier suit between the parties and the question of validity of the partition deed and exclusive possession of the allotments by the parties cannot be reagitated. He has further submitted that the suit lands in possession of the Plaintiff being much below the ceiling there is no necessity of submission of any return in form "B" for retention of the said lands and no question of vesting of the suit lands arises.

7. Mr. Bhunia has lastly contended that the impugned order is not a decree as no right of the parties relating to the subject matter of the suit has been conclusively determined and as such no appeal lies against the impugned order. The revisional application is therefore competent. The decision in 1976(1) C. L. J. 246 has been referred to in this connection.

Mr. Prabhat Kumar Sen Gupta, learned Government Pleader appearing on behalf of the Respondent No. 1 has contended that the order appealed against is a decree as it dismissed the appeal which determines the rights of the Petitioner. It is in substance, a decree against which an appeal lies. In support of his submission he referred to the decisions reported in 18 C.W.N. 205 and 1976(2) C.L.J. 470. The revisional application is not maintainable in law and it is liable to be set aside.

8. Mr. Sen Gupta has also contended that the suit is in fact one for alteration of entry in the record of rights and the order of the court of appeal below is quite legal and valid and the same could not be interfered with in this revisional Jurisdiction.

9. With regard to the first submission made on behalf of the Respondent No. 1 that the application for revision is not maintainable as the impugned order is a decree and hence appealable it is necessary to consider this preliminary objection. Sub-Section 2 of Section 2 of the CPC defines "Decree" as the formal expression of an adjudication which, so far as regards the courts expressing it, conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit. Thus an order in order to be a decree within the meaning of Section 2(2) of CPC must satisfy the following tests..viz. (a) the order must be an order passed in a suit and not in a proceeding, (b) the order must decide or adjudicate upon the rights of the parties to the suit relating to the matters in controversy in the suit and (c) the decision or determination shall be conclusive and final as far as the court determining the same is concerned. Any determination or adjudication which is appealable as an appeal from an order is not a decree. The rights as mentioned in the said section refer to substantive rights in regard to the subject matter of the suit and not merely a processual right. In ILR 45 Bom 627, Dattatraya Purshottam Parnekar and Anr. v. Radhabai it has been observed by Macleod C.J. as follows:

10. "Issue of law of which a case may be disposed of most often raise the

question of jurisdiction or of limitation. But a finding that the court has jurisdiction or that the Plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties regard to all or any of matters in controversy in the suit. It merely enables the court to proceed to enquire into those rights. So, too, an issue of res judicate found in the Plaintiffs' favour enables the court to deal with the merits of the case."

11. The same observation has been made in ILR 39 Bom, 339 (F.B.) *Chanmalswami Guru Rudraswami Rudraximat v. Gangadharappa alias Sugappa and others*. In AIR 1943 140 (Lahore) it has been held that when the effect of an order is to conclusively determine the rights of the parties with respect to a matter material to the due execution of the decree, the question would be u/s 47 and a decree within Section 2(2) from which an appeal would lie. An order rejecting an application to raise a new plea or to amend or alter the pleas already filed can by no stretch of imagination be said to be a determination of the rights of the parties and the same cannot be regarded as a decree. An interlocutory order in the course of execution proceedings which decides a point of law arising interlocutory and otherwise is not a decree within the meaning of Section 2(2) of the code of Civil procedure. Thus interlocutory orders such as others of injunction receiver, etc. which do not finally dispose of any dispute or claim in the suit itself are not decrees.

12. Section 57B which has been inserted in the Estate Acquisition Act by the West Bengal Estates Acquisition (Second Amendment) Act 1973 expressly bars the jurisdiction of Civil Court to entertain certain classes of suits specified in Sub-Section 1 as well as in clauses a, b, c, of Sub-Section 2 of Section 57B of the said Act. It also provides that all such suits if they are pending immediately before the commencement of the said amendment Act 1973 shall abate. The question is whether the impugned order holding that the suit has abated u/s 57B of the said Act is in substance a decree and an appeal lies against it. In 80 C.W.N. 205, *Amritamay Ghosh v. State of West Bengal* it has been held by R. Bhattacharya, J. that an order recording abatement of the suit u/s 57B of the West Bengal Estates Acquisition Act amounts to a final determination of the rights of the parties and as such it is a decree which is appealable. No, revisional application lies against such an order. In another bench decision of this Court in 1976 (I) C.L.J. 470 *Sidheswar Biswas v. State of West Bengal*, Chittotosh Mukherji, J. had differed from the said decision & the learned Judge has observed that an order holding that the suit abated u/s 57B of the said Act did not amount to a decree and as such the same was not appealable nor it was an appealable order as it did not come within the purview of order 43 Rule 1 of the Code of Civil Procedure. In a later decision reported in 1976 (2) C.L.J. 231 *Kassem Ali Tarafdar v. State of West Bengal and others*, R. Bhattacharya J. has noticed the aforesaid decision and referring to his earlier decision mentioned before has held that in case of conflicting decision the earlier will prevail until it set aside by a larger Bench. In making this observation reliance has been placed upon the decision in 21 C.W.N. 375. The learned Judge has therefore, upheld his previous decision that an order

of abatement passed u/s 57B of the West Bengal Estates Acquisition Act is a decree as it finally determines the suit and so an appeal lies against such order.

13. In 32, C.W.N. 299 Naimuddin Biswas and Ors. v. Maniruddin Laskar and others the facts, in brief, are that the tenants of a holding brought an action against their landlords for correction of any entry of rent in the record of rights u/s 106 of Bengal Tenancy Act. The suit was dismissed and an appeal against the said judgment was allowed. Against the said judgment and decree a second appeal was filed by the landlords. During the pendency of the appeal one of the Appellants died and his heirs were not brought on record. It was held relying on the decision in ILR 10 Bom 220 and ILR 18 Mad 496 that the appeal had abated in respect of the deceased Appellant after partial abatement the appeal was no longer properly constituted and had become incompetent as the right to it was in the remaining Appellants. It was held that an order of abatement was virtually a decree as it disposed of the Plaintiffs' claim as completely as if the suit was dismissed. In I.L. R. 18, Mad 496 Subayya v. Samindyyar the Plaintiff brought a partition suit against his brother who was impleaded as Defendant. The Plaintiff died during the pendency of the suit and an application was made on behalf of a boy alleged to have been adopted by the widow of the deceased under his authority stating that his name may be brought on the record as Plaintiff. This application was made within the due time. The Trial court rejected the application and dismissed the suit on the ground that it had abated. It has been held that an appeal lay against the rejection of the above application and also against the dismissal of the suit. In Sabitribai Debi Vs. Jugal Kishore Das and Others, it was observed that where the legal representatives of a deceased proforma Respondent is not brought on record the appeal does not abate into and the order that the appeal abates not only against the Respondents who died but also against the Respondents present is appealable. The proforma Defendant did not appear in the Trial court and no relief was claimed against him. As such omission to bring on record the legal representatives of the Defendant does not cause the suit to abate. So the order that the appeal had abated into because of non-substitution of the heirs of the deceased Defendant was appealable. The decision in ILR 10 Bom 220, and ILR 18 Mad 496 were considered in another bench decision of the Lahore High Court reported in AIR 1961 Lah, 245 (F.B.) Niranjan Nath v. Afzal Hussain and it has been held that when a court passes purely a formal order recognizing the abatement which is a *fait accompli*, of the suit, does not adjudicate upon any rights and cannot be treated as a decree.

14. In 59 C.W.N. 1056 Subodh Gopal v. Nilabia Barani Devi and others it has been observed that an order of abatement of suit made u/s 7 of the West Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950 cannot be said to be a decree as it did not contain any adjudication determining the rights of the parties with regard to any matter in controversy in the suit itself. It merely records a misadventure, which has befallen the suit by the operation of a new law. In making these observations the decision in Naimuddin Biswas v. Maniruddin Laskar in 32 C.W. N. 299 was considered and it was observed that in that case

the appeal abated against one of the Appellants as his legal representatives were not brought on the record and the entire appeal had been held to be incompetent as the right to prosecute appeal did not survive in the remaining Appellants. It was in that context the learned Judges observed that an order of abatement was virtually a decree. The learned judges did not say that such an order was technically a decree. What they meant was that the order of abatement terminated the rights of the deceased Appellant in the same manner as a decree. Similar question cropped up in the case in 60 C.W.N. 1075 Subodh Gopal Bose v. Burmah Shell Oil Storage and distributing Co. India Ltd. and it was held following the decision in 59 C.W.N. 1056 that an order of abatement of suit did not amount to a decree and so appeal lay against such an order. Both the decisions are pronounced by Division Bench of this Court.

15. Mr. Sengupta, learned Government pleader has referred to us the decision reported in Major S.S. Khanna Vs. Brig. F.J. Dillon, to substantiate his contention that the impugned order determines some rights of the parties, and as such an appeal lay against the said order. In this case it was held by His Lordship Shah, J. that the revisional Jurisdiction conferred upon the High Court u/s 115 of the CPC was not limited to those cases only where no appeal was obtained from the final order passed in this suit or proceeding. This judgment, therefore, does not decide the question involved in the present case.

16. So on a consideration of the above decisions it is quite apparent that a formal order of abatement passed by the court without adjudicating upon the rights of the parties is not a decree. The observation in ILR 10 Bom 222 to the effect that an order of abatement was virtually a decree cannot be taken to mean that such an order of abatement terminates the whole appeal just like a decree. So from this observation it cannot be inferred that the court held that the formal order of abatement will tantamount to a decree. On the other hand, it is quite apparent from the provisions of Section 2(20) of the CPC that an order in order to be a decree must satisfy the tests laid down in that section. Section 57B merely ousts the jurisdiction of the civil court to entertain certain classes of suits but it does not debar civil court to entertain suits relating to matters not specified in Sub-Section 1 as well as in clauses a, b, c, of Sub-Section 2 of Section 57B of the said Act. It also provides that if any suit involving these questions are pending before a civil court at the commencement of the West Bengal Estates Acquisition (Second Amendment) Act 1973 such suit shall abate only with regard to the matters aforesaid. Thus the order of abatement made u/s 57B of the said Act does not purport to adjudicate upon or determine any of the rights in controversy between the parties with regard to the matters in the suit and as such an order cannot be treated as a decree within the meaning of Section 2(2) of the Code of Civil Procedure, Moreover, no decree has been prepared by the Court. We, therefore cannot agree with the observation made by our learned brother Bhattacharyya, J. in 80 C.W.N. 205 that an order of abatement passed u/s 57B of the West Bengal Estates Acquisition Act is a decree and is appealable. On the other hand we respectively agree with the view

expressed by our learned brother Chittatosh Mukherji, J. in 1976(1) C.L.J. 470 and we held that an order of abatement made u/s 57B of the Act is not a decree and as such no appeal lies against such an order. The present application for revision against the impugned order of abatement passed by the subordinate judgment passed by the subordinate judge is therefore maintainable in law. The preliminary objection as to the maintainability of the application for revision, therefore overruled.

17. It has been contended by Mr. Bhunia, learned Advocate for the Petitioner that if it is held that no appeal lies against the impugned order of abatement the revision petition may be treated as an appeal as the court fee to be paid on the memorandum of appeal will not exceed the court fee paid already. In *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, it has been observed by their Lordships of the Supreme Court that revisional jurisdiction is a part and parcel of the appellate jurisdiction of the High Court. Basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. In a later decision of the Supreme Court reported in *The Reliable Water Supply Service of India Vs. Union of India (UOI) and Others*, it has been held High Court can convert an appeal into a revision. There is no necessity of consenting this revision petition into an appeal as we have already held that the impugned order is not a decree determining the rights of the parties in the suit and as such revision lies against the same.

18. The suit of which this revisional application arises has been instituted for declaration of the Plaintiff's title to the lands described in "Schedule" "A" to the plaint on the basis of amicable partition between him and his co-parceners the co-Defendants Nos. 2 to 4 in 1960 B.S. and separate possession from that time and subsequent execution and registration of formal deed of partition by them on 24th Magh. 1362 B.S. Corresponding to 7th February 1956 and for permanent injunction restraining the Defendant No. 1. The State of West Bengal from interfering with the possession of the Plaintiff in respect of the lands in suit. It has been pleaded in the plaint that the predecessors of the Plaintiff migrated from Orissa to their present place of residence at Midnapore and they are governed by "Mitakshara School of Hindu Law. It appears that previously title suit No. 276 of 1963 was filed by Defendant No. 2 against the Plaintiff and the State of West Bengal for declaration of title to the lands allotted to his share by the said deed of partition Ext. 1. The said suit was decreed and it was also held that the family of the Plaintiff was governed by "Mitakshara School of Hindu Law". An appeal was filed against the said judgment and decree by the State of West Bengal and the same was dismissed and the judgment and decree of the court below were affirmed. It is also evident from Exts. A/1 and B, the records of Big Raiyat case No. A/2354 of 1959 and copies of the return in form B that said deed of partition was accepted. The trial court on a consideration of the said documents as well as the oral evidences on record held that the family of the Plaintiff was governed by "Mitakshara law" and the ancestral properties had been partitioned in 1360 B.S. and the Plaintiff had been in exclusive possession of the

suit lands and other lands in his share as described in schedule "A" to the plaint. It was also held that the said lands being much below the ceiling no big raiyat case could be started nor the Plaintiff was required to file a "B" form for retaining the lands. Against the said judgment and decree the Defendant No. 1 preferred an appeal. In the appeal objection was taken that the suit had abated u/s 57B of the said Act. The Court of appeal below passed the impugned order recording that the suit had abated without at all entering into the merits of the appeal and without considering scope and extent of applicability of the provisions of Section 57B of the said Act to this case. Section 57B of the said Act does not bar the jurisdiction of the Civil Court completely. It merely creates an embargo upon the civil court to entertain suits for determination of rent or the determination of the status of the tenant or the incidents of tenancy. It also debars the Civil Court from entertaining any suit for alteration of any entry in the finally published revisional record of rights or for decision of any dispute involving determination of the question of retention of land by a raiyat or intermediary either expressly or by implication when an order for preparation or revision of record of rights has been made u/s 39(1) of the said Act. The present Suit is simply a suit for declaration of title and permanent injunction and it does not in any way involve the determination of any of the matters specified in Sub-section (1) as well as in clauses a, b, and c of Sub-Section 2 of Section 57B of the said Act. The suit is, therefore, not hit by the provisions of the said section and as such the impugned order holding that the suit abated u/s 57B of the said Act is perverse without jurisdiction and hence the same is liable to be set aside. It is pertinent to refer in this connection the decision reported in 1975 (1) C.L.J. 154 Ram Krishna Mullick and Ors. v. State of West Bengal and others where P.K. Banerjee J. has held that the suit will not be barred and the suit will not abate if the question of title is involved in the suit. It has been also held that the suit will not be barred and suit will not abate if it involves the question of partition between the co-sharers who are intermediaries. In another Bench decision of this Court reported in 1975 (2) C.L.J. 2305 Ayubali Sardar and Anr. v. Derajuddin Mullick and others to which I was a party it has been observed that in order to come within the purview of mischief of Section 57(B)(1) or 57(B) the dispute or the question must be one which comes within the purview of determination in the preparation of the record of rights. A question or dispute which does not at all for determination in the process of preparation or revision of the record of rights would not come within the purview of either of those provisions and consequently the entertainment of a civil suit for determination of such a dispute or question is not barred under the provision of the said section nor it was so intended.

19. Considering the above decisions the conclusion is irresistible that the present suit has not abated under the provisions of Section 57B of the said Act.

20. It is also to be noted that the total area of lands in schedule "A" to the plaint is much below the ceiling provision in Section 6 of the West Bengal Estates Acquisition Act. Moreover, the Petitioner is a raiyat and even if, for arguments sake, the date of partition of ancestral property is taken to be the date of

execution and registration of the partition Deed, Ext. 1 which is dated 24th Magh, 1362 B.S. the partition has been effected prior to the date of vesting of Raiyati lands, the date of vesting of Raiyati lands, the date of vesting being last of Baisakh 1363 B.S.

21. In the premises aforesaid all the contentions raised on behalf of the Petitioner succeed, the rule is, therefore, made absolute. The impugned order passed by the court of appeal below is hereby set aside. The case is sent back to the court of appeal below for a fresh decision in accordance with law. In the circumstances of the case there will be no order as to costs.

N.C. Mukherji, J.

22. I agree.