

(1987) 03 PAT CK 0033

In the Patna High Court

Case No : Civil Revision No's. 960 and 1003 of 1982

Pashupati Nath Singh and etc.

APPELLANT

Vs

Jairam Singh and Others etc.

RESPONDENT

Date of Decision : 21-03-1987

Acts Referred:

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 — Section 3, 4

Citation : AIR 1988 Patna 256

Hon'ble Judges : S.S. Sandhawalia, C.J.;Birendra Prasad Sinha, J

Bench : Division Bench

Advocate : Binod Kumar Roy, S.N. Tripathi and Manan Kumar Mishra, for the Appellant; H.N. Sahay and S. Bikash, for the Respondent

Judgement

Birendra Prasad Sinha, J.—These two civil revision applications on reference have been heard together and are being decided by a common judgment.

2. The question for consideration is as to whether an execution proceeding abates u/s 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 on the publication of a notification u/s 3 of the said Act. Section 4(c) of the Act reads as under : --

upon the publication of the notification under Sub-section (1) of Section 3 in the official gazette the consequences, as hereinafter set forth, shall subject to the provision of this Act, from the date specified in the notification till the close of the consolidation operations, ensue in the area to which the notification relates, namely (c) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regards to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated :"

3. This Act provides for the consolidation of holdings and prevention of fragmentation of land. The question regarding declaration of rights or interests of the parties in any land can be decided by the consolidation authorities in accordance with the Consolidation Act. On the other hand, an executing court cannot go behind the decree which has become final. It is well established that the executing court has to execute the decree as it is. It is also established that objections of the nature that may be determined in an execution proceeding cannot be adjudicated upon by the consolidation authorities. The scheme of consolidation has to be consistent with a decree which has become final. Section 4(c) of the Act only comes in at the stage when a decree has not become final. When the matter is sub judice either in suit or in appeal or in reference or revision, the court or authority before whom such a suit or proceeding is pending shall pass an order abating the suit or the proceeding. As stated earlier, when a decree has become final and the matter is pending before an executing court, there is nothing to be considered in respect of any declaration of right or interest or for the declaration or adjudication of any other right. Considering all these aspects a Division Bench of this Court in the case of *Bikarama Dubey. v. Hrishikesh Singh*, reported in 1979 BBCJ 726 held that provisions of Section 4(b) & (c) are not applicable to execution proceedings and the execution cases are not barred either before or after the issuance of a notification u/s 3(1) of the Act where the right or interest in land could not be adjudicated upon or dealt with under the Consolidation Act. The said view has been approved by a Full Bench of this Court in the case of *Hari Mohan Thakur v. Mahendra Narain Chand* in Civil Rev. No. 97 of 1980 decided on 11th Sept. 1986. The question before the Full Bench was whether in a suit for partition, the proceeding subsequent to the preliminary decree (which has achieved finality) in pursuance thereof for the preparation of the final decree would be hit and consequently abate u/s 4(c) of the Act. The answer was given in the negative.

4. Now I move on to consider the two civil revisions i.e. Civil Revision No. 960 of 1982 and Civil Revision No. 1003 of 1983, separately. Civil Revision No. 960 of 1982 :

5. This application is by a decree holder. The suit filed by the plaintiff-decree holder had been decreed. The judgment debtor filed an appeal which was also dismissed by the first appellate court. The judgment debtor then came in a second appeal before this Hon'ble Court. In the second appeal, an application was filed by the decree holder u/s 4(1)(c) of the Act stating, inter alia, that the appeal had abated. An order was passed to that effect by this Court, as a result of which the appeal stood abated. The decree was put under execution by the decree holder. The judgment debtor filed an application in the execution court saying that the execution proceeding had also abated u/s 4(1)(c) inasmuch as, when the appeal abated the suit also stood abated and, therefore, there was nothing to be executed in the execution proceeding and a prayer was made that an order should be passed to the effect that the execution proceeding also stood abated. The learned Munsif (the executing court) after considering all the

circumstances held that the execution proceeding also stood abated since on the abatement of an appeal, the judgment and decree of both the courts --the trial court and the appellate court are set aside. In the case of Bibi Rahmani Khatoon and Others Vs. Harkoo Gope and Others, , it was held that when the appeal abates, the judgment and decree of both the courts are set aside. If the decree becomes non-existent, there remains nothing to be executed by an executing court. That being so, the learned Munsif was right in not proceeding further with execution case. He is, however, not correct to say that the execution proceeding stands abated and such a proceeding shall come within the mischief of Section 4(1)(c) of the Act. In the case of Ramkrit Singh and Others Vs. The State of Bihar and Others, it was stated by a Full Bench that on the close of consolidation operation in a village or area the abated suit would revive and the revived suit shall have to be decided in conformity with the decisions arrived at in the consolidation proceeding in so far as the right or interest in any land covered by the consolidation proceedings is concerned. The word "abate" signifies that at some point or the other, the suit or the proceeding would revive and there can be no question of the revival of the execution proceeding. However, the execution case cannot proceed where a decree has become non-existent and, therefore, the execution case must be dismissed.

6. I do not find any reason to interfere with the impugned order in this civil revision application, which is dismissed but without cost.

Civi Revision No. 1003 of 1983 :

7. This civil revision application is also by the decree-holder. An ex parte decree was passed on 26-3-1970. A notification u/s 3 of the Consolidation Act had been published on 2nd of Feb. 1977. No appeal or revision was preferred by the judgment debtor against the ex parte decree. The petitioners filed an execution case in the court of Subordinate Judge (Execution Case No. 21 of 1978). Delivery of possession was given to the decree holder. The execution case remained pending for execution of the decree for cost of Rs. 1160-50 p. In execution of the decree, some land belonging to the judgment-debtor was attached and was auction sold on 14-11-1979. Later the judgment debtor filed an application before the executing court that the decree was without jurisdiction since the same had been passed after the publication of a notification u/s 3(1) of the Act so the execution could not proceed and the same must be held to have abated. The execution court after hearing the parties held that the decree passed by the court itself was without jurisdiction having been passed after the notification u/s 3(1) of the Act and, therefore, "the suit and in consequence the decree and judgment has abated."

8. It was rightly contended by the learned counsel for the petitioners that the executing court cannot go behind the decree and had no power to abate the suit and hold that the decree and judgment had abated. An executing court is vested only with the power to execute the decree as it is and cannot usurp the power of the trial or the appellate court. It is clear from the reading of Section 4(1)(c)

itself that the suit, appeal revision or reference shall abate on an order being passed by the court where the matter is pending at the relevant time. In the instant case, the matter was not pending before any court which could go into its merits as regards right or interest etc. The executing court obviously could not go into the question of right and interest of the parties. The impugned order has, therefore, to be set aside as being without jurisdiction.

9. This civil revision is, accordingly, allowed but without cost.

10. To sum up Civil Revision No. 960 of 1982 is dismissed and Civil Revision No. 1003 of 1983 is allowed. The parties shall bear their own costs.

S.S. Sandhawalia, C.J.

11. I agree.