

ALLAHABAD HIGH COURT

Rudra Pal Singh

Vs.

Ram Pal Singh

Civil Misc. Writ Petitions Nos.1869 and 1870 of 1969
(R.B. Misra, J.)

28.07.1971

ORDER

R.B. Misra, J.

1. These are two connected petitions under Article 226 of the Constitution. They arise out of a consolidation matter. As common questions of fact and law are involved in these writ petitions, it will be convenient to dispose them of by a common judgment.

2. The relationship of the parties will be clear from the following admitted pedigree:-

3. The dispute between the parties relates to holdings Nos.132, 133, 134 and 135. It appears that there have been earlier litigations between the parties regarding the Khatas in dispute, and one of such litigations was a suit for partition under Section 49, U.P. Tenancy Act, 1939. That suit was filed by Jagatpal, Dan Bahadur and Ram Bahadur, representing the branch of Sheonath Singh, against Raghuraj Singh, Rudrapal Singh, Rampal Singh and Anantpal Singh, representing the branch of Devidin Singh. Rudrapal Singh filed a written statement wherein he admitted the share of the plaintiffs to be one-half, and one-fourth was claimed as his own share. A preliminary decree was passed in that suit by the Assistant Collector on 18th January, 1950. An appeal against the preliminary decree was filed by Raghuraj Singh and others, which was partly allowed by the Addl. Commissioner on the 12th of June, 1950. He modified the decree of the trial Court in respect of the holdings of village Bishundasour and dismissed the suit in respect of those holdings on the ground that they exclusively belonged to the defendants.

On Second Appeal the Board of Revenue modified the decree of the Additional Commissioner, restored that of the trial Court, and decreed the suit in toto by their order dated 10th February, 1954. That decree became final, inasmuch as no further appeal to the Supreme Court was filed, nor was the judgment of the Board of Revenue challenged by a writ petition. Proceedings for the preparation of the final decree, however, continued, and, it appears that on account of the various objections filed by the judgment-debtors, the preparation of the final decree kept on hanging for a long time, and a second appeal arising out of the proceeding for the preparation of final decree

was pending when the village, where the Khatas in question, was brought under consolidation operations by a notification dated 18th August, 1958 under Section 4 of the U.P. Consolidation of Holdings Act.

4. Two sets of objections were filed before the Assistant Consolidation Officer by Rudrapal Singh one in respect of his share in Khata No.135, and the other in respect of Khatas Nos.132, 133 and 134, which were registered as Cases Nos.501 and 512 respectively. Anantpal Singh also filed a separate objection.

5. The Consolidation Officer, following the decision of the Board of Revenue D/d. 10-2-1954, allowed the objections of Rudrapal Singh and Anantpal Singh with respect to Khata No.135 but rejected the same with respect to the other Khatas by his order D/d. 9-12-1967. The Consolidation Officer treated the decision of the Board of Revenue dated 10-2-1954 as final and conclusive. Against this order of the Consolidation Officer three appeals were filed; two by Rampal Singh and the third by Rudrapal Singh. All these three appeals were disposed of by the Settlement Officer (Consolidation) by a common order dated 12th October, 1968. He allowed the appeals filed by Rampal Singh in toto and dismissed the appeal of Rudrapal Singh. Rudrapal Singh filed two Revisions (Nos. 954 and 955) and Jagatpal Singh, Ram Bahadur Singh and Dan Bahadur Singh also filed two Revisions (Nos.949 and 950) against the order of the Settlement Officer (Consolidation). All the four revisions were disposed of by the Deputy Director of Consolidation by his common order dated 28th May, 1969, dismissing all the four revisions. Aggrieved by the order of the Deputy Director of Consolidation, Rudrapal Singh has filed writ petition No.1869 of 1969, while Jagatpal Singh, Ram Bahadur Singh and Dan Bahadur Singh have filed writ Petition No.1870 of 1969.

6. Shri N.D. Ojha, appearing for the petitioners in both the writ petitions, contended that Deputy Director of Consolidation and the Settlement Officer (Consolidation) have committed an error apparent on the face of the record in holding contrary to the decision of the Board of Revenue dated 10th February, 1954. According to him, once the decision of the Board of Revenue, declaring the rights and interest of the parties in the disputed holdings, became final, it was not open to the Settlement Officer (Consolidation) or to the Deputy Director of Consolidation to hold to the contrary,

7. Shri S.C. Agrawal appearing for the contesting respondents, contended that there was no final adjudication of the rights of the parties by the Board of Revenue; a Second Appeal, arising out of the proceedings for the preparation of final decree, was still pending before the Board of Revenue when the village in question was brought under consolidation operation. He urged that according to Section 5 of the Act, as it was in force on the date of notification under Section 4 of the Act, the proceedings of the Second Appeal were to be stayed, and indeed they were so stayed. According to the amended Section 5 as it stands at present the proceedings of the appeal would abate and the rights of the parties will have to be gone into afresh by the consolidation

authorities.

8. In view of the contentions of the parties the only question to be determined in these two petitions is whether the decision of the Board of Revenue declaring the rights of the parties by passing the preliminary decree had or had not become final. If it had become final, certainly it was not open to the consolidation authorities to reopen the matter and come to a different conclusion. On the other hand, if, the rights of the parties had not been finally determined on account of the pendency of the appeal arising out of the proceedings for the preparation of final decree, the consolidation authorities undoubtedly could determine the rights of the parties afresh on the basis of the, material before them.

9. Section 97 of the Code of Civil Procedure provides that:-

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

It would be recalled that the Second Appeal pending before the Board of Revenue was not against the preliminary decree. It was against the final decree. Obviously no appeal against the preliminary decree declaring the rights of the parties in the property in dispute was pending before the Board of Revenue. So the preliminary decree was no more in jeopardy. Now the pertinent question is whether the pendency of the Second Appeal against the final decree will take away the finality of the preliminary decree.

10. The contention of Shri Agrawal is that unless a final decree is prepared in a case, the case does not come to an end and would be deemed to be pending. According to him, the case terminates only by the passing of the final decree. In support of his contention he relied upon a Full Bench decision of this Court reported in (*Mahabir Singh v. Narain Tewari*¹) wherein it was held thus:-

"A suit continues till the final decree is passed and it can abate till that contingency happens. It can abate after the passing of a preliminary decree."

The learned counsel further relied upon (*Jadunath Roy v. Parameswar Mullick*²) wherein it was held by the Privy Council that:-

"A partition suit in which a preliminary decree has been passed is still a pending suit, and the rights of the parties who are added after the preliminary decree have to be adjusted at the time of final decree."

Reliance was also placed on (*Anmol Singh v. Hari Shankar Lal*³), which held thus:-

"Under the Civil Procedure Code, now in force, suit does not terminate by the passing of the preliminary decree, but continues till it is finally and completely disposed of by the passing of the final decree. Consequently where one out of the several defendants dies after the preliminary decree but before the final decree and his legal representative is not brought on record within the time allowed by law, the suit abates as regards that defendant."

On the strength of these authorities it is sought to be argued on behalf of the respondents that a suit remains pending unless a final decree is passed in it, and as an appeal arising out of the proceedings for the preparation of final decree was still pending in this case when the village was brought under consolidation operation, there was no final

¹ AIR 1931 All 490 ³ AIR 1930 All 779

² AIR 1940 PC 11

adjudication in spite of the fact that no appeal had been filed against the preliminary decree.

11. Shri N.D. Ojha on the other hand, referred to Order 22, Rule 12 of the Code of Civil Procedure, which provides:-

"Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

The Allahabad High Court has made certain amendments in the Rule, and the amended Rule 12 of Order 22, Civil Procedure Code reads thus:-

"Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

In view of this amendment there is no question of abatement either of the execution proceeding or of the preparation of final decree in case of the death of a party. The amendment made by the Allahabad High Court certainly has got no retrospective effect, as was held by this Court in (*Sewa Ram v. Gian Singh*⁴).

12. In view of the amendment of Order 22 Rule 12, C.P.C. made by the Allahabad High Court, the Full Bench decision in, AIR 1931 Allahabad 490 (FB) (supra), relied upon by the counsel for the respondents, has lost its force, and under the provisions of Section 97. C.P.C. a preliminary decree, unless it is appealed against, finally adjudicates the rights, and title of the parties.

13. In the Privy Council case of AIR 1940 PC 11 (supra), where an appeal had been filed against the proceedings for the preparation of final decree, there could be a readjustment of the share as declared in the preliminary decree in view of a situation that had made it necessary to readjust the share. This can be made more clear by an example. If there was a dispute between three persons, and the preliminary decree had declared the rights of each of them to be one-third and during the proceedings for the preparation of final decree one of the three joint owners died, then in such a

situation the rights and the shares of the parties would certainly have to be re-adjusted, and the same can be done, if an appeal against the final decree was pending although no appeal against the preliminary decree had been filed. The Privy Council case cited above only contemplates a case of this nature. But in the present case no new contingency has arisen necessitating the readjustment of the shares of the parties. In this case it has been definitely found by the Revenue Court, which was competent to do so, that the Khatas in dispute were joint Khatas in which Sheonath Singh and Devidin Singh had half share each. No appeal having been filed against that preliminary decree, the rights of the parties cannot be challenged in an appeal against the final decree.

14. The matter can be looked at from yet another aspect. Supposing the Consolidation of Holdings Act had not seen the light of the day and an appeal against the final decree was

⁴ AIR 1935 All 180

pending and no appeal against the preliminary decree had been filed, then it was not possible for any party to get the preliminary decree set aside or modified in view of the provisions of Section 97, Civil Procedure Code. What could not have been done directly, cannot be obtained indirectly, is a well established principle. In my judgment, therefore, it was not open to the consolidation authorities to reopen the matter as it had become final by the passing of the preliminary decree.

15. It is not possible to accept the contention of Shri Agrawal that Section 5 of the U.P. Consolidation of Holdings Act contemplates for the abatement of the entire suit and it does not contemplate the abatement of a part of the suit. The amended Section 5, as it stands now, in so far as is material for the purposes of this case, reads thus:

"5. (2) Upon the said publication of the notification under sub-section (2) of Section 4 of the following further consequences shall ensue to the area to which the notification relates, namely-

(a) every proceeding for the correction of record 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 regard 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 the order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending, stand abated."

It is true that the section contemplates for the abatement of a proceeding or a suit. But a suit can be in different stages. In the first stage of the suit the rights of the parties were declared; in the second stage, according to the shares declared in the preliminary decree, lots were to be prepared. It is not impossible to conceive of a part of the suit having become final while the remaining part of the suit was still to go on. In the instant case the first part declaring the rights of the parties, had become final because no appeal had been filed against that preliminary decree. In the case of *"Venkata Reddy v. Pethi Reddy"* reported in⁵ the Supreme Court laid down the following

principle on this aspect of the matter:-

"A decision is said to be final when, so far as the Court rendering it is concerned," it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal modification or amendment. Similarly, a final decision would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees - a preliminary decree and a final decree-the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages, and though the suits in such cases can be regarded as fully and completely decided only after a final decree is

⁵ AIR 1963 SC 992

made, the decision of the Court arrived at the earlier stage also has a finality attached to it. Section 97, Code of Civil Procedure clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree."

16. Shri Agrawal, however, placed reliance on (*Kamta Singh v. Ganesh Prasad Dube*⁶) to support his contention that the whole suit shall abate and not only a part of it. But the question in that case was slightly different from the one now before me. In that case an appeal against the decree was pending and the question was whether only appeal should abate or the suit itself, and the learned Single Judge of this court took the view that the suit together with the appeal would abate; to hold otherwise would create an anomalous position.

17. In (*Smt. Lall v. Smt. Ranjhari*⁷), it was held that it is permissible to abate the suit and the appeal partially under Section 5 of the Consolidation of Holdings Act. This case is more in consonance with the facts of the present case than the one relied upon by Shri Agrawal. In view of the Supreme Court decision referred to above, (AIR 1963 Supreme Court 992), although a case did not terminate unless a final decree was passed in it, yet there may be finality of the various stages of that case. In this view of the matter the contention of Shri Agrawal cannot be accepted.

18. As a second limb of this argument, it was contended that the judgment in the earlier suit could stand in the way of the consolidation authorities only if the earlier judgment had the force of *res judicata*. Since an appeal against the final decree was pending, there was no final adjudication and thus the judgment of the Board of Revenue declaring the rights of the parties cannot operate as *res judicata*. But this contention of Shri Agrawal also cannot be accepted

because it has already been held that there was a final adjudication of the rights and title of the parties by the passing of the preliminary decree which could not have been challenged by an appeal against the final decree even if the U.P. Consolidation of Holdings Act had not come into force.

19. The learned counsel for the respondents next contended that the parties in this case were not litigating under the same title but under a different title, inasmuch as after the date of vesting the old rights of the parties had come to an end and there was a fresh settlement by virtue of the provisions under the U.P. Zamindari Abolition and Land Reforms Act and a new right had come into existence with the result that the consolidation authorities could adjudicate upon that new right.

20. The settlement, as contemplated by the provisions of the U.P. Zamindari Abolition and Land Reforms Act, can be only with a person who had an interest in the property. The question, whether one or both the parties had interest in the property in question, had already been determined by a competent revenue Court, and when both the parties were held to have a share in the property in question, the settlement will be deemed to be with both the parties. The new right that accrued by virtue of the settlement under the provisions of the U.P. Zamindari Abolition and Land Reforms Act is, therefore, dependent upon the old right. As both the parties had a share in the tenancy holdings, they

⁶1967 RD 261

⁷1968 All LJ 693

would both be entitled to have a share in the Sirdari holdings.

21. For the reasons given above, the writ petition must succeed. Both the Writ Petitions (Nos.1869 of 1969 and 1870 of 1969) are accordingly allowed and the orders of the Deputy Director of Consolidation dated 28th May, 1969 and of the Settlement Officer (Consolidation) dated 12th October, 1968 are quashed. There will, however, be no order as to costs.

Writ petition allowed.