CALCUTTA HIGH COURT

Krishnalal Sadhu

Vs

State of West Bengal

(H Bose, C.J. B Mitra , J.)

27.01.1965

JUDGMENT

Bose, C.J.

1. This is an appeal from an Order of G.K. Mitter, J. dated the 27th August 1959 discharging a Rule issued under Article 226 of the Constitution.

2. The appellant No. 1 Krishnalal Sadhu (since deceased) and the appellants Nos. 2, 3 and 4 were the owners of C. S. plots Nos. 5246, 5248, 5249 and 5250 of mouza Chinsurah in the district of Hooghly measuring more or less 13 eottahs or Order 271 acres of land. On the 9th June 1946 a notification was issued under Section 4 of the Land Acquisition Act for acquisition of the said plots. In the said notification it was stated that the said plots were likely to be required to be taken by Government partly at the public expense and partly at the expense ot Chinsurah Balika Bani Mandir H.E. School for a public purpose, namely, for a playground and hostel for students and teachers of the said Institution. After the issue of the said notification objections were invited under Section 5-A of the Land Acquisition Act. The appellant Krishnalal Sadhu preferred objections. The Laud Acquisition Officer held an enquiry and after certain proceedings and correspondence a declaration under Section 6 of the Land Acquisition Act was published on the 13th July 1950. On the 1st June 1951 the appellants moved this Court under Article 226 of the Constitution and a Rule was issued being Civil Rule No. 1209 of 1951. On the 24th July 1953 this Rule came up for hearing before me sitting singly and the only ground that was argued at the time was that the acquisition was not a bona fide one. This Rule was discharged by me and against this Order an appeal was preferred being Appeal from Original Order No. 144 of 1954. This appeal came up for hearing before a Division Bench of this Court presided over by Chakravortti, C. J. and A.K. Sarkar, J. on the 9th February 1956 but the said appeal was dismissed. On the 21st June 1957 two notices were issued by P. Dutta, Magistrate, Second Class, Chinsurah, intimating that possession of the land and homestead in plot Nos. 5246, 5248, 5249

and 5250 in mouza Chinsurah which had been acquired by the Government in L. A. Case No. V-II of 50-51 will be taken on the 26th June 1957. One of such notices was addressed to the appellant No. 1 Krishnalal Sadhu and the other notice was addressed to the appellants Nos. 2, 3 and 4 and they were directed to deliver vacant possession on the date fixed in the notice. In the notice addressed to respondents Nos. 2, 3 and 4 respondent No. 2 was described as insane and respondents Nos. 3 and 4 as minors represented by guardian Sri Krishnalal Sadhu. It is alleged in the petition that since dismissal of the appeal on the 9th February 1956 up to the issuing of the notice dated the 21st June 1957, no steps had been taken by the Government and the appellants continued in possession of the plots in question but on the 26th June 1957 the respondents came with Police Force to take possession, but they were not successful in taking possession. Thereafter the appellants again moved this Court under Article 226 of the Constitution challenging the legality of the two notices dated 21st June 1957 on several grounds and besides the original petition affirmed on the 28th June 1957 the appellants also filed a supplementary petition affirmed on the 5th July 1957 in support of the application under Article 226 of the Constitution. On the 8th July 1957 Sinha, J. issued a Rule Nisi limited to grounds Nos. I and III as set out in paragraph 37 of the original petition. The said grounds are as follows :-

> "I. For that notices marked as annexure "C" and "G" to this petition purporting to take delivery of possession contravene the provisions of the Section 3(c) of the Land Acquisition Act, inasmuch as they have been issued by a Second Class Magistrate who is not attached to the Land Acquisition Department and he is not an officer specially appointed by the appropriate Government to perform the functions of the Collector Milder the Act.
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> III. For that the institution Balika Bani Vidyalaya, Chinsurah, is not a Company within the meaning of the Act and as such the notification under Section 4 and declaration under Section 6 of the Act are illegal and without jurisdiction."

3. The respondents to this petition were State of West Bengal (No. 1) Collector of Hooghly (No. 2), Land Acquisition Collector, Hooghly (No. 3), Acting Head Mistress and Secretary, Chinsurah Balika Mandir (No. 4) and Second Class Magistrate, Chinsurah (No. 5).

4. On behalf of the respondents Nos. 1, 2, 8 and five one Parimal Chandra Banerjee who describes himself as a Land Acquisition Officer of the Hooghly Collectorate affirmed the affidavit-in-opposition on the 3rd November 1967. In this affidavit it is stated inter alia that after the disposal of the appeal No. 144 of 1954 cm the 9th February 1956 the Land Acquisition Office by a letter dated 20th February 1956 asked the appellant Krishnalal Sadhu to give delivery of possession by 29th February 1956. Upon receipt of the said notice Krishnalal Sadhu made a

representation in writing praying for time as he intended to file an appeal to the Supreme Court against the decision of the Appeal Court. Time was allowed till 12th March 1956 but on the 6th March 1956 Krishnalal Sadhu asked for further time and such time was granted. Thereafter he applied for further extension of time on the 7th April 1956 and such time was allowed till 8th May 1956. It appears that thereafter the appellant Krishnalal Sadhu obtained further extension of time on several occasions for the purpose of making representations and thereafter some attempt was made to obtain delivery of possession but without any success. On the 27th May 1957 one Sri N. Ray describing himself as Land Acquisition Officer, Hooghly, wrote a letter to the Sub-Divisional Magistrate, Chinsurah Sadar. The relevant portion of this letter may be set out hereunder :Government of West Bengal, Office of the Collector of Hooghly Land Acquisition Department.

From: The Collector of Hooghly.Memo No. 1478 L. A. dated Chinsurah, the 27 May, 1957.

To : Sub-Divisional Magistrate Chinsurah
Sadar, (S. D. O.)
Sub : Possession in respect of lands and construction in C. S. Plot Nos.

Further attempt to take over possession of the said property was made this day by this Department and Sri N. K. Sen this office Kgo. was deputed for the purpose. His attempts to take over failed as will appear from his report hereto enclosed. Only course is now open to us is to request you to enforce and cause delivery of possession which when obtained may be made over to this Department as provided in Section 47 of L- A. Act I of 1894. The matter will kindly be treated as urgent and this office may be intimated when an authorized officer will be directed to take over the property from him.

Sd/- A. Ray,

Land Acquisition Officer.

Hooghly."

5. On the 18th June 1957 S. C. Sen, the Sub-Divisional Officer Sadar, Hooghly wrote a letter to Sri P. C. Dutta, Sub-Deputy Magistrate, Second Class, Chinsurah, Hooghly. The material portion of the letter is set out below :

> "Subject : Possession under Section 47 Act I of 1894 of Land acquired for Chinsurah Balika Bani Mandir. The Special Land Acquisition Officer, Hooghly has applied under Section 47 of the L. A. Act I of 1894 to enforce possession of the land as description given below, which has been acquired in L. A. Case No. V-II of 1950-51 for Balika Bani Mandir, Chinsurah. As the Land Acquisition staff has been impeded in taking the possession, so you are requested and hereby authorised to take possession as a Magistrate on my behalf. The Superintendent of Police, Hooghly has been requested to give necessary Police help for your protection and to maintain peace. You are therefore requested to fix up a convenient date for the purpose very early and the S. P. may be informed accordingly. The Land Acquisition Kgo. may also be informed in time so that he may be present for identifying the lands. Schedule or lands acquired. C. S. Plots Nos. 5246, 5248, 5249 and 5250."

6. It appears that after the said letter dated 18th June 1957 was written authorising P. C. Dutta, Magistrate, Second Class to enforce surrender of the disputed property under Section 47 of the Act, the two notices dated 21st June 1957 as already stated were issued by Mr. P. C. Dutta and on the 26th June 1957 the said Magistrate along with the deponent Parimal Chandra Banerjee and a Kanungo went to take possession of the land on the 26th June 1957 but possession could not be obtained on account of resistance offered to such taking of possession.

7. In sub-paragraphs (g) and (i) of paragraph 3 of this affidavit-in-opposition the deponent Parimal Chandra Banerjee has described the two letters issued on the 21st June 1957 as notices which were issued by Sri Dutta to the appellants.

8. On behalf of the respondent No. 4 one Miss Krishna Dutta has affirmed the affidavit-in-opposition and this affidavit is more or less on the same lines as the affidavit affirmed by Sri Parimal Chandra Banerjee.

9. In the affidavit-in-reply which was affirmed on the 3rd February 1958 by the appellant No. 3 Govindalal Sadhu it is inter alia stated in paragraph 8 thereof that the authorisation by the Sub-Divisional Officer, Hooghly to the Magistrate, Second Class for the purpose of exercising powers under Section 47 of the Act is not according to law and it is alleged that the obstruction to the Settlement Kanungo was not obstruction to the Collector in taking possession and as such recourse could not be had to the provisions of Section 41 of the Land Acquisition Act. It is further stated that the two notices issued on the 21-6-1957 were not signed or issued by an

Officer specially appointed by the State Government of West Bengal to perform the functions of the Collector and Land Acquisition Officer, Hooghly and so the notices were without jurisdiction and no possession could be taken on the basis of the said two notices.

10. The Rule Nisi issued on the 8th July 1957 came up for hearing before G. K. Mitter, J. who by his judgment delivered on the 27th August 1959 discharged the said Rule. It is against this order that the present appeal has been preferred.

11. Pending disposal of the appeal the appellant No. 1 Krishnalal Sadhu died. An application was made thereafter for adding the heirs and legal representative of Krishnalal Sadhu as parties to the appeal. Objection was taken on behalf of the respondents that as the appeal had abated by reason of the heirs and legal representative of Krishnalal Sadhu not being substituted within the time prescribed by law, the application for addition of the heirs and legal representatives is not maintainable without setting aside the abatement. At the hearing of the appeal the learned Advocate appearing for the appellants Mr. Arun Kumar Dutta has stated that he does not want to press this application for addition of parties inasmuch as the appeal is maintainable and can continue without bringing the heirs and legal representative of Krishnalal Sadhu on record and there is no question of abatement of the appeal so far as appellants Nos. 2, 3, and 4 are concerned, even though the appeal is assumed to have abated so far as the appellant No. 1 Krishnalal Sadhu is concerned by reason of his heirs not having been brought on record within the time allowed by law. In the circumstances, the Court made an Order dismissing the application for addition of parties and proceeded to hear the appeal.

12. Preliminary objection has thereupon been taken on behalf of the respondents as to the maintainability of the appeal and it has been argued that without the heirs and legal representative of Krishnalal Sadhu being brought on record within the time allowed by law, the appeal has abated as a whole and it is not there Fore maintainable and should be dismissed.

13. In support of the proposition that the entire appeal has abated, reliance was placed on certain decisions of the Supreme Court. The first decision referred to is State of Punjab v. Nathu Ram. Inthis case certain lands belonging to two brothers Labhu Ram and Nathu Ram jointly, were acquired for military purposes under the Defence of India Act, 1939. But as the two brothers refused to accept the compensation offered by the Collector, the State Government referred the matter for enquiry to an Arbitrator under Rule 10 of the Punjab Land Acquisition (Defence of India) Rules, 1943. The Arbitrator passed a joint Award granting a higher compensation and also ordered payment of certain amount on account of income-tax which would be paid on the compensation received. The State Government appealed against the Award to the High Court of Punjab. During the pendency of the appeal Labhu Ram, one of the respondents, died. The High

Court of Punjab held that the appeal abated against Labhu Ram and that its effect was that the appeal against Nathu Ram also abated and accordingly the High Court dismissed the appeal and also certain cross-objections which had been preferred. The State Government thereupon came up before the Supreme Court on appeal on a certificate granted by the High Court. It was held by the Supreme Court so far as the question of the abatement of the appeal was concerned that the appeal against Nathu Ram alone could not proceed, inasmuch as to get rid of the joint decree it was essential for the appellant State to implead both the joint decree-holders and in the absence of one the appeal was not properly constituted. The subject matter for which the compensation had been awarded was one and the same land and the assessment of compensation so far as Labhu Ram was concerned having become final, there could not be different assessment or compensation for the same parcel of land. It has further been pointed out by the Supreme Court that inasmuch as Order 22 Rule 4 of the Code of Civil Procedure does not provide for the abatement of the appeals against the correspondents of the deceased respondents, there can be no question of abatement of the appeals against them. The only question is whether the appeal can proceed against them. Then after referring to the provisions of Order 1 Rule 9 of the Code of Civil Procedure and explaining such provisions the Supreme Court pointed out that the test of determining whether the appeal was properly constituted and whether all the necessary parties for the decision of the controversy were before the Court or not had been laid down in diverse forms. It has further been pointed out that the Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the Court; and (c) when the decree against the surviving respondents, if the appeal succeeds will be ineffective, that is to say it could not be successfully executed.

14. Then after laying stress on the fact that the decree passed in favour of Labhu Ram and Nathu Ram was a joint decree, the Supreme Court observed as follows :--

> "Different views exist in the case of joint decrees in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases the abatement of the appeal against the deceased respondents will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the Appellate Court. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the

capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final but also as a necessary corollary that the Appellate Court cannot in any way modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent the Appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

15. The next case referred to was that Ram Sarup v. Munshi. In this case an appeal from a pre-emption decree was preferred by the vendees and the appellants were five in number. They fell in two groups constituted respectively by the first and second appellants who were brothers and by appellants Nos. 3, 4 and 5. While the appeal was pending in the Supreme Court the first appellant died. No application was however made to bring on record the legal representatives of the deceased appellant. The sale of the property was not a sale of any separate item of property in favour of the deceased appellant but of one entire set of properties to be enjoyed by two sets of vendees in equal shares. It was held by the Supreme Court that as the decree was a joint one and a part of the decree had become final, by reason of abatement, the entire appeal must be held to have abated.

16. The other case of the Supreme Court which was referred to is that Rameswar Prasad v. Sham Behari Lal. In this case it is pointed out by the Supreme Court that the principle behind the provisions of Rule 4 of Order 41 of the Code of Civil Procedure seems to be that any one of the plaintiffs or the defendants in filing an appeal as contemplated by the Rule represents all the other non-appealing plaintiffs or defendants, as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. But where a number of persons have filed an appeal and pending the appeal one of the appellants dies, the surviving appellants cannot be said to have filed the appeal as representing the deceased appellant. So if in respect of the deceased appellant the appeal has abated and the decree in favour of the respondents has become final against his legal representatives, they not having been brought on record in time, it will be against the scheme of the Code to hold that Order 41 Rule 4 empowers the Court to pass a decree in favour of the legal representatives of the deceased appellant on hearing an appeal by the surviving appellants even though the decree has become final. After dealing with the scope of the provisions of Order 41 Rule 4 and Order 22 Rule 9 of the Code of Civil Procedure the Supreme Court observed at p. 1904 as follows :--

> "We do not consider it necessary to discuss the cases referred to at the hearing. Suffice it to say that the majority of the High Courts have taken the correct view viz, that the appellate Court has no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants tinder Order 41 Rule 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned under Order 22 Rule 3, See ILR 19 Pat 870: AIR 1940 Pat 346 (FB); Amin *Chand v. Baldeo Sahai Ganga Sahai*[1]*, Nanak v. Ahmad Ali2, Pyarelal v. Sikharchand, ; Reghu Sutar v. Nrusingha Nath, ; Venkata Ram Rao v. Narayana, (FB); Sonahar Ali v. Mukbal Ali*[3]*, The Bombay, Calcutta and Madras High Courts have taken a different view: See Shripad Balwant v. Nagu Kushaba*[4]*, Satulal Bhattacharjee v. Asireddi Sheikh ; Soma Sundaram Chettiar v. Vaithilinga Mudaliar*[5]*"*

17. The attention of this Court was also drawn to a decision of the Full Bench of this Court Santosh Kumar Mondal v. Nandalal Chakrapani. In this case a Full Bench of this Court consisting of Bachawat, D.N. Sinha, P. N. Mookerjee, G.K. Mitter and C.N. Laik JJ. has held that where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground, common to all the plaintiffs or to all the defendants and all or several of the plaintiffs or defendants appeal against the decree, the appellate Court can, in view of the provisions of Order 41 Rule 4 proceed with the appeal and reverse the decree of the trial Court in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal.

18. In support of this proposition the Full Bench has relied on certain decisions which are referred to in the Supreme Court judgment in to which I have just now made reference and are commented on by the Supreme Court as not laying down the correct law. So it appears that the decision of the Full Bench of Calcutta High Court has been impliedly overruled by the Supreme Court.

19. It has however been argued on behalf of the appellants that the provisions with regard to abatement as contained in Order 22 of the Code of Civil Procedure do not and cannot apply to writ proceedings under Article 226 of the Constitution. The reasons adduced are firstly that the jurisdiction exercised by Court under Article 226 is a special jurisdiction or an extraordinary original jurisdiction and so the provisions of the Code of Civil Procedure are not in general applicable to such proceedings. In support of this proposition reliance is placed on a decision of the Full Bench of this High Court (FB) Budge-Budge Municipality v. Mungru Mia, and on a judgment delivered by me and Bharat Board Mills Ltd. v. Regional Provident Fund Comnr., where it has been incidentally observed that neither Order 27-A nor Section 141 of the Civil

Procedure Code literally applies to proceeding under Article 226 of the Constitution. Reference was also made to the decision of the *Supreme Court State of Uttar Pradesh v. Dr. Vijay Anand Maharaj*[2] where if was held that a jurisdiction to issue writ under Article 226 was not an appellate or revisional jurisdiction, but it might he described as an extraordinary original jurisdiction. Attention of the Court was also invited to the decision of the Supreme Court , Khajoor Singh's case--paragraph 16 of the judgment to show that a proceeding under Article 226 could not be treated as a suit.

20. But it is to be pointed out that it is fairly well settled that an application under Article 226 of the Constitution is a proceeding in a Court of Civil jurisdiction and as such Section 141 of the Code of Civil Procedure is attracted to such proceedings. Section 141 is as follows:Section 141:-- "Miscellaneous Proceedings--The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction."

21. In a decision of the Nagpur High Court reported in AIR 1956 Nag 27 Nimar Cotton Press v. Sales Tax Officer, Khandwa it has been observed that the proceedings under Article 226 are civil proceedings, and subject to the Rules made by that Court to regulate proceedings under that Article, are regulated by the Code of Civil Procedure (paragraph 13 at p. 31).

22. In a decision of the High Court of Andhra Pradesh reported in AIR 1956 Andh Pra 16 (sic) it has been held that an application under Article 226 of the Constitution of India is a proceeding in a Court of Civil Jurisdiction and the provisions of Order 1 and 2 can be invoked as far as they can be made applicable to the proceedings in a Writ application under Article 226. In this case it was pointed out that the decision of the Calcutta High Court in Manindranath v. Baranagore Municipality, expressing the view that in a Writ proceeding the provisions of Order 1, Civil Procedure Code, could be followed, was in accord with the view expressed by the Andhra Pradesh High Court.

23. Similar views as to applicability of the Code have been expressed by the Allahabad High Court in the case of Dan Singh Bist v. Additional Collector, Bijnor (paragraphs 6 to 9 of the judgment) and in the case of State of Rajasthan v. Ugam Singh, reported in AIR 1981 Rai 268 (paragraph 10 of the judgment).

24. It may also be pointed out in this connection that as early as in the case of The Justices of the Peace for the *Town of Calcutta v. The Oriental Gas Co. Ltd., reported in*[6] it has been laid down by Sir Richard Couch that a proceeding for a Writ of Mandamus is a civil proceeding. The legal position therefore seems to be clear that Section 141 of the Code is directly attracted, to an application under Article 226 of the Constitution and so such provisions of the Code of Civil

Procedure as can be suitably applied to Writ proceedings are applicable to such proceedings.

25. It has been argued that there is no judicial decision which holds that Order 22 is applicable to Writ proceedings under Article 226 of the Constitution but there are decisions which have held that Order 1 Rule 1 of the Code applies to such proceedings. It has also been held that Order 1 Rule 8 applies to Writ proceedings--see paragraph 11 of the judgment, and that Order 1 Rule 10 of the Code and Order 19 of the Code are also applicable to such proceeding: see AIR 1954 Assam 161 and other eases.

26. So, from these decisions it is to be presumed that since there is no express decision holding that Order 22 is applicable, the said Order is not applicable to Writ proceedings; but the short answer to this argument is that the cases died are merely illustrative and not exhaustive. Therefore, no conclusion is deducible from the absence of any decision with regard to applicability of Order 22 of the Code that this Order 22 of the Code is not applicable to Writ proceedings. It is significant that there is no decision of any Court to show that substitution is not necessary in case of death of a party to a proceeding under Article 226 nor is there any decision to the effect that an appeal preferred from the Order of a single Judge in a Writ proceeding does not abate by reason of the death of an appellant or a respondent who is a necessary party to the proceeding.

27. It has been argued that although this Court has framed Rules under Article 226 of the Constitution, no specific Rule has been framed applying Order 22 of the Code to Writ proceedings and so Order 22 is not applicable to Writ proceedings. But in answer to this contention our attention has been drawn to Rule 30 and particularly to Rule 43 of the Writ Rules framed by this Court which makes the Original Side Appeal Rules and the Appellate Side Appeal Rules applicable to appeals in Writ proceedings accordingly as they are instituted in the Original Side or Appellate Side of this Court. Mr. Chakravorty, the learned Government Pleader, has drawn the attention of the Court to Chapter II Rule 2, Sub-rule (5) of the Appellate Side Rules which empowers the Registrar of the Appellate Side of this Court to dispose of all matters relating to substitution of the heirs of parties provided no question of limitation arises, and also applications under Order 22 Rule 10 of the Civil Procedure Code to record an assignment, creation or devolution of an interest during the pendency of an appeal provided that such assignment, creation or devolution is not disputed. The learned Government Pleader has also invited the attention of the Court to Chapter V Rule 25 of the Appellate Side Rules which provides that an application supported by an affidavit shall be filed for an order for amendment of the memorandum of an appeal consequent on the death of a party including a party whose heirs are already on the record.

27A. So it is clear from these Appellate Side Rules that it is contemplated by these Rules that Order 22 of the Code normally applies to appeals and an amendment of the memorandum is necessary in the event of a death of a party to the appeal. So some indication is furnished by the Appellate Side Rules that the provisions of Order 22 of the Code are attracted to appeals and there is therefore good ground for supposing that Order 22 of the Code is attracted to Writ appeals. If we were to hold that Order 22 of the Code cannot apply to Writ proceedings, it would lead to an absurd situation. If a sole petitioner or all the petitioners in a Writ application or the sole appellant or all the appellants in a Writ appeal dies or die, can it be suggested that the Writ application or the Writ appeal can continue without bringing on records the legal representative of the deceased? The answer must obviously be in the negative because in such a case there will be no living person to continue the proceedings nor can any lawyer represent the persons who are dead and the Court also will be powerless to make any order affecting the deceased persons or their legal representatives. Even an order for costs cannot be made in such cases even if the Court is inclined to make any such order. So, to avoid this absurdity, it must be held that Order 22 of the Code is applicable to Writ proceedings.

28. Now once it is held that Order 22 of the Code is applicable to Writ proceedings, there is hardly any room for doubt that me conclusion which must follow in the facts and circumstances of this case is that upon the death of Krishnalal Sadhu the appellant No. 1, the appeal has abated as a whole. It is to be noted that alt the appellants are the joint owners of the plots in question which are sought to be acquired and taken possession of. It is not alleged in the petition that the owners have any separate or defined shares in the properties. Each co-owner is interested in every inch of the joint properties having an undivided interest therein. The order of G.K. Mitter, J. discharging the Rule has in effect adjudicated or determined that the acquisition of the properties is not illegal and the appellants had no right to withhold delivery of possession. Whether the adjudication is in the form of an order or decree is immaterial. In substance, the order of the learned trial Judge is an order adjudicating on the rights of the parties and if the order has become final so far as the deceased appellant is concerned by reason of the abatement of the appeal consequent upon the death of the said appellant, it appears to me that it is not competent for the Court to allow other appellants Nos. 2, 3 and 4 to proceed with the hearing of the appeal and make any order in the absence of the heirs and legal representatives of the deceased appellant. If the appeal is allowed at the instance of the appellants Nos. 2, 3 and 4, there will be conflict of decisions in the sense that so far as the deceased appellant is concerned, the order discharging the Rule will stand as having become final by abatement; but it will be set aside so far as appellants Nos. 2 to 4 are concerned. This will be clearly against the principle laid down by the Supreme Court in the decisions referred to by me in the earlier part of the judgment. In my opinion, the preliminary objection raised on behalf of the respondents should succeed and the

entire appeal must be held to have abated by reason of the death of the appellant No. 1 whose heirs and legal representatives have not been brought on record within the time allowed by law.

29. Thus although the appeal must tail on the ground of abatement, as we have also heard the parties on merits, we propose to deal with the same and to record our findings on the points raised.

30. The first point urged is on the basis of ground No. 1 in the petition on which the Rule was issued. It is submitted that the notices issued on 21st June 1957 being annexures C-1 and C-2 of the petition directing the appellants to deliver vacant possession of the plots in question are not in accordance with the law and so no action could be taken on the basis of such notices. It is argued that the steps which were purported to be taken tinder the provisions of Section 47 of the Land Acquisition Act were not warranted by the provisions of that section and the notices C-1 and C-2 are illegal.

31. Section 47 is as follows :--

Section 47--"If the Collector is opposed or impeded in taking possession under this Act of any land, he shall, if a Magistrate, enforce the surrender of the land to himself, and, if not a Magistrate, he shall apply to a Magistrate or (within the towns of Calcutta, Madras and Bombay) to the Commissioner of Police, and such Magistrate or Commissioner (as the case may be) shall enforce the surrender of the land to the Collector."

32. So the requirements of the section are that if obstruction or resistance is offered to taking of possession of any land under this Act, the Collector can, if he is himself a Magistrate, enforce delivery of possession to himself; but if he is not a Magistrate, then he has to apply to a Magistrate for enforcing delivery of possession of the land except within the towns of Calcutta, Madras and Bombay where the Collector has to apply to the Commissioner of Police for enforcing surrender of the land and such Commissioner of Police will proceed to enforce delivery of possession to the Collector.

33. In the present case the affidavits make it clear that on the 15th May 1957 the appellants were informed by Office Memo No. 1313 L. A. that a Kanungo of that Office would go to take possession on the 27th May 1957 and it appeals that on that day a Kanungo went to take possession amicably, but he failed to obtain delivery of possession. As a result of that the Land Acquisition Officer, Hooghly, on the 27th May 1957 wrote a letter to the Sub-Divisional Magistrate, Chinsurah Sadar, intimating that a further attempt made by Sri N. K. Sen, a Kanungo of the Department, to take delivery of possession of the lands in question, had failed and so the only course open was to request the Sub-Divisional Magistrate to enforce delivery of possession

and make over the same to the Land Acquisition Department of the Collector of Hooghly as provided in Section 47 of the Land Acquisition Act 1 of 1894. It also appears that along with this letter the report of the Kanungo showing that resistance was offered to the taking of possession was enclosed for the information of me Sub-Divisional Magistrate. On receiving this letter the Sub-Divisional Officer authorised Sri P. C. Dutta, Sub-Deputy Magistrate, Second Class, Chinsurah, Hooghly, to enforce surrender of the disputed property and wrote a letter to Sri Dutta on the 18th June 1957 the relevant portions whereof are as follows:--

> "The Special Laud Acquisition Officer. Hooghly, has applied under Section 47 of the L.A. Act 1 of 1894 to enforce possession of the land as description given below which has been acquired in Land Acquisition case No. V-II of 1950-51 for Balika Bani Mandir Chinsurah.
>
> As the Land Acquisition staff has been impeded in taking the possession, so you arc requested and hereby authorised to take possession as a Magistrate on my behalf."

34. Pursuant to this authority contained in this letter Sri. P. C. Dutta on the 21-6-1957 issued the two impugned notices C-1 and C-2 to the appellants intimating that possession would be taken on the 26th June 1957 and on the 26th June 1957 the Magistrate along with the Land Acquisition Officer Parimal Chandra Banerjee and a Kanungo went to take possession of the land but failed to enforce delivery of possession on account of obstructions offered on behalf of the owners of the land, that is, the appellants.

35. It has been argued that the Land Acquisition Officer who made the application under Section 47 of the Act on the 27th May 1957 had no power to do so but only a Collector had such a power under Section 47 of the Act. But it is to be pointed out that neither in the petition nor in any of the affidavits the authority of the Land Acquisition Officer to write the letter dated 27th May 1957 has been disputed or challenged. This question of authorisation is a question of fact and cannot be allowed to be disputed before us at the hearing of the appeal.

36. Section 3(c) of the Land Acquisition Act defines Collector as follows :--Section 3(c)--"The expression 'Collector' means the Collector of a district and includes a Deputy Commissioner and any Officer specially appointed by the appropriate Government to perform the function of a Collector under this Act."

37. So it may very well be that the Land Acquisition officer is an Officer specially appointed by the Government to perform the functions of a Collector and so he had the authority to write the letter dated 27th May 1957. But apart from this, the letter of the 27th May 1957 itself shows that it is purported to be written on behalf of the Collector. At the top of this letter appear words

"from the Collector of Hooghly" and above that there is a heading "Office or the Collector of Hooghly, Land Acquisition Department". So it is clear that this letter was written on behalf of the Collector of Hooghly. The letter of the 18th June 1957 written by the Sub-Divisional Officer to Sri P. C. Dutta, Sub-Deputy Magistrate, Second Class, Chinsurah, shows that it was as a result of the application made by the letter dated 27th May 1957 written by the Special Land Acquisition Officer, Hooghly who had applied under Section 47 of the Act to enforce possession of the land, that the Sub-Divisional Officer who was undoubtedly a Magistrate had authorized the Sub-Deputy Magistrate, Second Class, to take possession as a Magistrate on behalf of the Sub-Divisional Officer. So this letter authorized and deputed another Magistrate to enforce surrender of the land on behalf of the Sub-Divisional Officer. It is true that the person deputed or authorized was a Second Class Magistrate, hut there is nothing in Section 47 of the Act to show that a Second Class Magistrate is not a Magistrate within the meaning of Section 47 of the Act. Our attention was drawn to the relevant provisions of the Criminal Procedure Code which set out the different classifications of the Magistrates appointed by the Government. But it appears to us that there is no substance in the contention that a Second Class Magistrate duly authorized has no power to enforce surrender of a land as contemplated in Section 47 of the Act on behalf of the Sub-Divisional Officer to whom the original application under Section 47 had been made by the Office of the Collector of Hooghly. Section 47 also does not enjoin that the Magistrate before whom the application under Section 47 of the Act is actually made must be personally present to take or enforce possession. To put such construction on the section will be to impose on the Magistrate an obligation about which the section is silent and it will be unreasonable to hold that a Magistrate to whom an application is made under Section 47 of the Act in discharging his duties under that section cannot rake the assistance of subordinate Officers specially authorised by him to take possession on his behalf. Section 47 of the Act also does not require issuing of any notice as a condition precedent to enforcement of delivery of possession or surrender of the land. The notices set out in annexnres C-l and C-2 were in the nature of intimation in writing given to the owners ot the date of enforcing of delivery of possession, although no such intimation was required to be given in writing by the provisions of the Statute. An argument was advanced that these notices C-l and C-2 were not served on the appellants in the manner required under Section 45 of the Land Acquisition Act and so no action could be taken on the basis of these two notices. But as pointed out already, the annexures C-l and C-2 are notices with are not required to be given under this Act and as Section 45 has application only in case of notices which are enjoined under the provisions of the Land Acquisition Act, the argument advanced on the basis of Section 45 must be held to be of no force and it must be rejected. It appears to us that there is no substance in the first point of the appellants and this contention must therefore fail.

38. The next point which is argued on the basis of ground No. 3 set out in paragraph 37 of the

petition and upon which the Rule was issued appears to us to be equally without any substance. The argument advanced is that the Institution Balika Bani Bidyalaya, Chinsurah was not a Company within the meaning of the Land Acquisition Act and as such no notification under Section 4 or any declaration under Section 6 of the Act could be made for acquisition of land for a playground and hostel for the students and teachers of the said Institution. It was said that the acquisition for a certain Institution which was not a Company was really for a private purpose, that is, for me benefit of the Institution and this is not warranted by the provisions of the Land Acquisition Act.

39. Now it is an admitted fact that this Chinsurah Balika Bani Mandir H. E. School is not a Company within the meaning of the Land Acquisition Act. The definition of the Company is given in Section 3(e) of the Land Acquisition Act and it is clear that the School does not come within the ambit of this definition. But this argument of the appellants overlooks the fact that both in the notification under Section 4 and in the declaration under Section 6 it is made clear that the land is required to be taken by the Government partly at the public expense and partly at the expense of Chinsurah Balika Bani Mandir and the acquisition was being made for a playground and a hostel for the students and teachers of the Institution. So as the acquisition was being made for a public purpose, it is immaterial whether the School Balika Bani Mandir, Chinsurah, was a Company or not. An analysis of the relevant provisions of the Land Acquisition Act makes it abundantly clear that under this Act an acquisition can be made (a) for a public purpose in which case the cost of acquisition for payment of compensation has to be paid wholly or partly out of the public revenues or some funds controlled or managed by local authority and (b) for a Company in which case the compensation has to be paid by the Company and in the case of acquisition for a Company the provisions of Part VII of the Land Acquisition Act have to be complied with, in other words, Sections 39 to 41 of the Land Acquisition Act which lay down conditions precedent to the application of the machinery of the Land Acquisition Act have to be complied with in the case of an acquisition meant for a Company. The proviso to Section 6 also makes it clear that the declaration under Section 6 for the acquisition of a Company cannot be made unless the compensation to be awarded for the property is to be paid by the Company and the opening words of Section 6(1) "subject to the provisions of Part VII of the Act" also make it clear that the provisions contained in Part VII have to be complied before a declaration under Section 6 of the Act can be made in respect of acquisition of a Company simpliciter. It may also be stated in this connection that the Supreme Court has laid down in the case of Jhandulal v. Slate of Punjab. that where an acquisition is made for a Company for a public purpose and a portion of the cost of the acquisition is to come out of the public funds and the balance out of the funds of the Company, it is not essential to comply with the requirements of Part VII of the Land Acquisition Act because in such a case the acquisition is not for a

Company simpliciter but also for a public purpose and the essential condition for acquisition for a public purpose is that the cost of the acquisition should be borne wholly or in part out of the public funds.

40. Now there is no doubt that in the present case the acquisition was being made for a public purpose as contemplated by the Land Acquisition Act. Section 3(f) contains an inclusive definition of the expression "public purpose" and as pointed out by the Supreme Court in the case of Somawanti v. State of Punjab, and other decisions of the Supreme Court, the definition contained in the Land Acquisition Act not being a compendious one is not useful in ascertaining the ambit of that expression. But broadly speaking the expression would include a purpose in which the general interest of the community as opposed to the particular interest of individuals is directly and vitally concerned. Acquisition for providing a playground and a hostel for an educational institution certainly answers the description of a public purpose. The acquisition is made for the benefit of the Institution, or in other words, for the benefit of a section of the public and as such the general interest of the community is served by such an acquisition.

41. It has also been argued that as only a sum of Rs. 100 is to come out of the public funds, the acquisition cannot be said to be for a public purpose. But in the case of to which reference has already been made it has been observed that it is not essential that the contribution by the State towards the cost of the acquisition must have to be a substantial part of the value of the property sought to be acquired although according to the supreme Court a taken contribution by the State towards the cost of acquisition may not be a sufficient compliance with the Statute in each and every case and the question whether the contribution meets the requirements of the law would depend upon the fads of every case. It was held in that case before the Supreme Court that a contribution of hundred rupees by the Government towards the cost of acquisition of the land which was worth Rs. 45,000 satisfied the requirement of the Statute and the declaration under Section 6 could not therefore be challenged as a colourable exercise of the power. The question of mala fide or colourable exercise of the power was raised in the application under Article 226 of the Constitution which came up before me sitting singly and was disposed of by me on the 20th July 1953 by an Order which discharged the Rule and against this Order an appeal was preferred as already stated and the same was dismissed by a Division Bench of this Court on the 9th February 1956. So the decision negativing the charge of mala fide became final, So no question can arise of attacking this declaration under Section 6 again on the ground of there being any colourable exercise of any power by the Government in respect of the acquisition in question.

42. In a Division Bench decision of this Court reported in (1963) 67 Cal WN 647 Amarendranath Nath v. State of West Bengal it has also been pointed out that merely because the amount paid

towards the cost of acquisition out of the public exchequer is small or insignificant, does not show, that the acquisition is not for a public purpose but for a private purpose. For these reasons it appears to us that the contention of the appellants based on ground No. 3 has also no force arid it must be rejected. The learned trial Judge has in course of his judgment in dealing with ground No. 3 observed that--

> "So far as challenge to the notification under Section 4 and declaration under Section 6 are concerned, in my opinion, it is not open to the petitioners to take that point after their failure in the first application. The principle of constructive res judicata must apply to application under Article 226 of the Constitution".

43. The learned Advocate for the appellants Mr. Dutt challenged this finding of the learned trial Judge and argued before us that there is no question of constructive res judicata in the facts and circumstances of the case and so the learned Judge's finding on this point is erroneous and attention of the Court was invited to the decision of the *Supreme Court Amalgamated Coal Fields Ltd. v. Janapada Sabha Chindwara* and to another decision of the Supreme Court dated 24th October 1964 in Debi Mohta's case which is not yet reported. The learned Government Pleader drew our attention to the Supreme Court case Daryao v. State of Uttar Pradesh and also a Bench decision of the Calcutta High Court Makhanlal Roy v. State of West Bengal. But in view of our findings on the other points raised, it is not necessary to express any opinion on this point and we refrain from doing so in the present case.

44. For the reasons given above, this appeal must fail and it is accordingly dismissed with costs to the respondents assessed at five Cold Mohurs for each set of appearing respondents.

45. Let the operation of this Order remain in abeyance for six weeks from date, as prayed for.

B.C. Mitra, J.

46. I agree.

Cases Referred.

1ILR 15 LAH 667: AIR 1934 LAH 206; (KB)
2AIR 1946 LAH 399 (FB)
3AIR 1956 ASS 164
4ILR (1943) BOM 143: AIR 1943 BOM 301
5ILR 40 MAD 846: AIR 1918 MAD 794(2)
6 (1872) 17 WR 364 AT P. 371