

Mool Chand And Ors vs Dy. Director Consolidation And Ors on 16 August, 1995

Equivalent citations: AIR 1995 SUPREME COURT 2493, 1995 (5) SCC 220, (1995) 4 SCJ 1, 1996 (1) IJR 3, 1995 (5) SCC 631, 1995 (2) ALL CJ 987

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Bench: S.C Agrawal, S. Saghir Ahmad

CASE NO.:

Appeal (civil) 10214 of 1981

PETITIONER:

MOOL CHAND AND ORS.

RESPONDENT:

DY. DIRECTOR CONSOLIDATION AND ORS.

DATE OF JUDGMENT: 16/08/1995

BENCH:

S.C AGRAWAL & S. SAGHIR AHMED

JUDGMENT:

JUDGMENT 1995 (2) Suppl. SCR 763 with Civil Appeal No. 2635 of 1980 The Judgment of the Court was delivered by S. SAGHIR AHMAD, J. Since in these two appeals, common question of law relating to the abatement of suit or proceedings under Section 5(2) of the U.P. Consolidation of Holdings Act (for short 'Act') is involved, both the appeals which were heard together, are being disposed of by this judgment.

In Civil Appeal No. 10214 of 1983, Plots No. 139 and 240 situate in Village Rampur, Paragana and Teshsil Hapur, District Meerut, were recorded in the basic year, in the name of the appellants against whom respondents 3 to 6 filed objections claiming co-tenancy but the appellants contested their claim and pleaded that they, namely, the appellants were exclusive tenure- holders of the aforesaid plots in which respondents 3 to 6 had no share.

The Consolidation Officer by his order dated 23rd January, 1973, dismissed the objections with the finding that respondents had no share in the plots but the Settlement Officer, Consolidation (for short, SOC) in appeal, allowed the claim of the respondents by judgment and order dated 12th July, 1973 which was also upheld by the Deputy Director of Consolidation (for short, DDC) by his judgment and order dated 17th September, 1973. The basis of judgments passed by the SOC & DDC was the preliminary decree passed on 17.9.80 in the suit for partition filed by the respondents. This suit while pending in the Board of Revenue was abated on account of Notification dt. 2.4.1994

issued under Sec, 4 of the Act. Still the SOC, DDC & the High Court followed the preliminary decree and, there-fore, the question involved in this appeal is whether the preliminary decree would also abate if the suit is abated u/s 5(2) on account of Notification for consolidation operation issued under Sec 4 of the Act.

Similar question is involved in Civil Appeal No, 2635 of 1980 in which it was found by the Deputy Director that Raj Naraian as also other sons of Mala Prasad, had filed a suit under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act (for short, ZA & LR Act) for partition of their 2/3rd share in the holding which was decreed and the appeals which were filed against the preliminary decree by Chanderbali and others were dismissed. The Writ Petition filed in the Allahabad High Court was also dismissed. Proceedings for preparation of final decree were then initiated in the Court of the Judicial officer who passed the final decree for partition but Chanderbali and others challenged the final decree in appeal during the pendency of which the village was notified for consolidation operations and consequently the Additional Commissioner abated the appeal as also the suit by his order dated 1st August, 1967, Which is quoted below:

"The village in suit is under consolidation of holdings operation. The appeal along with the suit, therefore, abate under the provisions of Section 5(b) of the U.P. Consolidation of Holdings Act as amended by U.P. Act No. 21 of 1967"

It is contended by the learned counsel for the appellants that since the Village had already been notified under Section 4 of the Act, the suit which, on the date of the aforesaid notification, was pending before the Board of Revenue, abated in view of the provisions contained in Section 5(2) of the Act and, therefore, the consolidation authorities viz., the Settlement Officer and the Deputy Director were not justified in relying upon the judgment of the Revenue Courts as the effect of abatement was that the judgment and the decree, passed by the Revenue Courts, became non-existent. The consolidation authorities, it is contended, ought to have investigated the claim of the respondents irrespective of the judgment passed by the Revenue Courts and should have recorded their own independent findings on the questions, specially the question of title, involved in the case.

Learned counsel for the respondents on the contrary contended that the suit for partition or, for that matter, any other suit, for example, a suit for redemption or foreclosure, based on a mortgage in which two decrees, viz., a preliminary decree and a final decree are passed, has to be distinguished from an ordinary suit in which only one decree is passed and since in the instant cases, a preliminary decree for partition had already been passed, the notification issued under Section 4 read with Sec. 5(2) of the Act would have the effect of abating the proceedings for preparation for final decree which, at the relevant time, were pending in the Court but the preliminary decree would not be abated as it had attained finality, It is, therefore, contended that since the rights of the parties had already been determined by a preliminary decree for partition, the consolidation authorities, as also the High Court were justified in relying upon that decree and in granting a share to the respondents in the plots in question.

Relevant portions of the provisions contained in Sections 4 & 5 of the Act are quoted below:

"4. Declaration and notification regarding consolidation - (1)(a) The State Government may, where it is of opinion that a district or part thereof may be brought under consolidation operations, make a declaration to that effect in the Gazette.....

(i).....

(ii).....

(iii).....

(b).....

(2)(a) When the State Government decides to start consolidation operations, either in the area covered by a declaration issued under sub-section (1) or in any other area, it may issue a notification to this effect.

(b) Every such notification shall be published in the Gazette and in a daily newspaper having circulation in the said area and shall also be published in each unit in the said area in such manner as may be considered appropriate."

"5. Effect of (notification under Section 4(2)).

(1).....

(a).....

(b).....

(c).....

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

(a) 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 regard to which proceeding 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 proceedings is pending, stand abated:

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard:

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated;

(b) Such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made there under.

(Explanation - For the purposes of sub-section (2), a proceeding Under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 shall not be deemed to be a proceeding in respect of declaration of rights or interest, in any land).

On the publication of the notification under Section 4, the following proceedings or suit, irrespective of the stage at which, or, the court in which, they are pending, are abated under Section 5(2) :

"(i) proceedings for the correction of records;

(ii) every suit, in respect of the declaration of rights or interest in any land lying in the area covered by the Notification ;

(iii) Proceedings in respect of declaration of rights or interests in such land;

(iv) suits or proceedings for declaration or adjudication of any other right in regard to which proceedings are ought to be taken under the Act.

What, therefore, abate are suits or proceedings relating to declaration of right or interest in the land lying in the consolidation area. This abatement takes place on an order passed in that behalf by the Court or Authority before whom such suit or proceedings were pending.

It will be noticed that this abatement, as provided by sub-section 2(b) of Section 5 takes place without prejudice to the rights of the persons affected, to agitate the right or interest involved in the said suit or proceedings, before the appropriate consolidation authorities.

Now, "Decree" is defined in Section 2(2) of the Code of Civil Procedure as under:

"(2)"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of

any question within Section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

The definition provides that the decree will either be preliminary or final or partly preliminary or partly final. Explanation appended to section 2(2) indicates that a decree would be a preliminary decree where further proceedings have to be taken before the suit can be completely disposed of.

Order 20 Rule 18 which provides for a decree in a suit for partition of property of separate possession of a share therein, is quoted below:

"18. Decree in suit for partition of property or separate possession of a share therein, then, -

(a) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

Sub-Rule (2) of Rule 18 as quoted above would indicate that the Court has to pass a preliminary decree where it cannot immediately partition the property in respect of which the suit was filed.

Order 26 Rules 13 & 14 provide as under:

"13. Commission to make partition of immovable property-Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of commissioner-(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order

under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court set aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

The definition of "decree" contained in Section 2(2) read with the provisions contained in Order 20 Rule 18(2) as also Order 26 Rule 14 of the Code indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order

26. There are, thus, two stages in suit for partition. The first stage is reached when the preliminary decree is passed under which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is treated to have come to an end for all practical purposes.

Unless otherwise expressly provided, suits filed in the Revenue Court under the U.P.Z.A. & L.R. Act are regulated by the provisions of the Code of Civil Procedure as provided by Section 341 of that Act.

A suit for partition of a "Holding" is filed under Section 176 of the U.P.Z.A. & L.R. Act. Section 178 provides for the modes of division. Section 179, 180, 181 & 182-B are other relevant sections.

Rules 156 & 157 of the Rules made under the ZA & LR Act provided as under:

"156. Sections 176 to 182. (Division) of holdings-(1) A plaint for (division) of a holding under Section 176 shall contain the particulars mentioned in clauses (1) to (6) of Rule 127 and the land revenue payable for the holding.

(2) Where a suit has been filed for division of more than one holding, the particulars referred to in sub-rule (1) shall be mentioned in the plaint for all such holdings. 157. Before making a (division) the court shall -

- (a) determine separately the share of the plaintiff and each of the other co-tenure-holders,
- (b) record which, if any, of the co-tenure-holders wish to remain joint,
- (c) make a valuation of the holding (or holdings) in accordance with the rent-rate applicable to each plot in the holding, and
- (d) determine separately the value of the share of the plaintiff and each of the co-tenure-holders."

From a perusal of the above provisions it would appear that in a suit for partition, the Revenue Court also, like the Civil Court, has first to pass a preliminary decree determining and declaring the rights of the parties and their shares, if any, in the holding. Thereafter, proceedings for the preparation of the final decree are initiated under Rules 158 to 164 which lay down the various modes in which a decree for partition can be implemented and the respective shares of the tenure-holders separate, in accordance with the rights and shares already determined under the preliminary decree.

The question, therefore, is whether a notification under Section 4 of the Consolidation Act would abate the entire suit or will it not affect the proceedings up to the stage of, and, including, preliminary decree, if the notification was issued after the passing of the preliminary decree?

The question of abatement of suit as a consequence of a notification issued under Section 4 of the Act was examined by this Court in several decisions.

In *Ram Adhar Singh v. Ramroop Singh*, [1968] 2 SCR 95 = AIR (1968) SC 714, an appeal was pending in this Court and it was held that the suit as a whole would abate, rendering the appeal pending in this Court, as infructuous. The decision in *Ram Adhar Singh's* case was followed in *Chattar Singh v. Thakur Prasad Singh*, [1915] 4 SCC 457 where, too, the appeal was pending in this Court and, therefore, when a notification under Section 4 was issued, an application filed in this Court that the suit and the appeal be abated so that the parties may legitimately agitate their claims before the consolidation authorities, was allowed and it was held that the suit and the appeal both stood abated. Similar view was taken in *Munshi Muqbool Raza v. Hasan Raza*, [1977] 3 SCC 578.

The decision of this Court in *Ram Adhar* and *Chattar Singh's* case (*supra*) were noticed by this Court in *Satyanarayan Prasad Sah v. State of Bihar*, AIR (1980) SC 2051 - [1980] Supp. SCC 474 and both the decisions were affirmed. All these cases, namely, *Ram Adhar's* case, *Chattar Singh's* case and *Satyanarayan Prasad Sah's* case were considered again by this Court in *Mst. Bibi Rahmani Khatoon and Ors. v. Harkoo Gope & Ors.*, [1981] 3 SCC 173 and the views expressed therein were followed with the finding that as a consequence of the notification issued under Section 4 of the Act, proceedings pending in the Civil Court or in appeal stand abated.

But the matter, so far as preliminary decree is concerned, does not end here.

Preliminary Decree is an appealable decree. Section 97 of the Code of Civil Procedure provides as under:

"97, Appeal from final decree where no appeal from preliminary decree - 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."

Thus, if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the party aggrieved thereby will not be permitted to challenge its correctness in an appeal against final decree.

The Privy Council in Ahmed Musaji Saleji and others v. Hashim Ebrahim Saleji and Others, AIR (1915) PC 116, held that failure to appeal against a preliminary decree would operate as a bar to raising any objection to it in an appeal filed against final decree. Thus Court in Venkata Reddy v. Pothi Reddy, [1963] Supp. 2 SCR 616 = AIR (1963) SC 992, 993 has held that the impact of Section 97 is that the preliminary decree, so far as the matters covered by it are concerned, is regarded as embodying the final decision of the Court passing that decree. It observed as under:

"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 embodying the final decision of the Court passing that decree,.....".

This decision was relied upon in Gyarsi Bai and Ors. v. Dhansukh Lal and Ors., AIR (1965) SC 1055 in which it was observed as under :

"It is true that a preliminary decree is final in respect of the matters to be decided before it is made. It is indisputable that in a mortgage suit there will be two decrees, namely preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights."

In Shankar Balwant Lokhande (d) by Lrs. v. Chandrakant Shankar Lokhande & Anr., JT (1995) 3 SC 186 while considering the provisions of order 20 Rule 18, Code of Civil Procedure as also the period prescribed for the execution of decree, under the Limitation Act, it was observed as under:

Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property, The Court is also empowered to give such further directions as may be required in this behalf, A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcenar or co-sharer, the court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them

parties and then to pass a preliminary decree.

" The words "Declaring the rights of the several parties interested in the property, in sub-rule (2) would indicate that shares of the parties other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for parties is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper."

(Emphasis supplied) There is, thus, a distinction between a case in which an appeal is filed against a preliminary decree and a case in which a preliminary decree is not appealed against and its correctness is not assailed. If, therefore, a Notification under Section 4 of the Act is issued in a case where an appeal against the preliminary decree was not pending, the latter, viz. the preliminary decree, will remain unaffected and will not abate but if the preliminary decree had been assailed in appeal, and the appeal is pending on the date of Notification, the latter, namely the Notification, will have the effect of abating the entire suit/proceedings including the preliminary decree passed therein. On contrary, if an appeal is filed against the final decree without there being any appeal against the preliminary decree and the preliminary decree becomes "unassailable" on account of Sec. 97 C.P.C., the Notification under Section 4 would abate the proceedings relating to the final decree without in any way touching, impairing or affecting the preliminary decree. The reason to repeat, is obvious. Once, a preliminary decree is passed, the proceedings so far as declaration of rights or interests in the land are concerned, comes to an end. Those rights are to be worked out by the final decree. In a case, therefore, where a preliminary decree has already been passed and only the proceeding relating to the preparation of final decree and pending in any Court, either at the original stage or at the appellate or revisional stage, it cannot be said that proceedings relating to " declaration or determination of rights in the land" within the meaning of Section 5(2) of the Act are pending.

The above view was also expressed by the Allahabad High Court first in *Ruderal Singh v, Rompal Singh*, AIR (1972) Allahabad 67 and then in *Satish Kumar v. Lalta Tiwari*, (1974) Revenue Decision 379. These two decisions were followed in another case, namely, in *Mohan Lal v. Deputy Director of Consolidation*, (1981) Allahabad law Journal 350. However, a Division Bench of the Allahabad High Court in *Ram Garib v. Bhagwati Din*, (1976) 2 RD 47 decided the matter as follows :

"As the notification under Section 4 of the Act had been issued in respect of the land in dispute and the suit related to the determination of the rights of the Parties and the matter had gone before the Board of Revenue validity and in accordance with law and the Board of Revenue was considering the revision in exercise of its jurisdiction, it did not have jurisdiction to decide the question about the abatement of the suit under Section 5(2) of the Act, If the Board had jurisdiction to decide the question whether the suit had abated or not, its decision one way or the other can only suffer from an error of law. It cannot be held to be passed in exercise of jurisdiction not vested in it by law. Hence, so long as the order of the Board of Revenue passed under Section

5(2) of the U.P. Consolidation of Holdings Act stands, the preliminary decree passed in the suit will be deemed to be wiped off the record and the suit from the stage of the plaint will be deemed abated."

We reiterated that Ruderpai Singh's case (supra) and that of Satish Kumar as also Mohan case (supra) were correctly decided but the Division Bench decision in Ram Garib's case (supra) does not lay down the correct law which is hereby reversed.

The preliminary decree can nevertheless be given effect to in proceedings before the consolidation authorities in view of the provisions contained in Sections 9 and 9A of the Act which enables the consolidation authorities to specify the share of individual tenure holders in joint holdings for purpose of effecting partitions to ensure proper consolidation and to settle the dispute between the parties with regard to their claims to land or partition of joint holdings.

In Civil Appeal No. 2635 of 1980, the High Court had held on the basis of the Division Bench's Decision in Ram Garib's case (supra) that the preliminary decree was wiped out on account of the Notification issued under Section 4 of the Act. The decision being erroneous cannot be sustained. Consequently, Civil Appeal No. 2635 of 1980 is allowed and the judgment of the High Court dated 08.04.1980 is set aside and the case is remanded to it for a fresh decision in accordance with law in the light of the judgment passed in this case.

In Civil Appeal No. 10214 of 1983, the High Court did not treat the preliminary decree as having abated and has upheld the judgment and order of the Assistant Director (Consolidation) who had decided the case on the basis of the decree passed in the partition's suit under Section 176 of the U.P.Z.A. & L.R. Act. This appeal is consequently dismissed. There will be no order as to costs in both the cases.

Civil Appeal No, 2635 of 1980 allowed.

Civil Appeal No. 10214/83 dismissed.