Bikarma Singh and ors. Vs. the State of U.P. and ors.

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Court : Allahabad

Decided On : Apr-29-1969

Reported in : AIR1970All344

Judge : S.D. Khare, ;B.B. Misra and ;M.N. Shukla, JJ.

Acts : Tenancy Law; Uttar Pradesh Consolidation of Holdings Act, 1954 - Sections 4, 5 and 49; Uttar Pradesh Consolidation of Holdings (Amendment) Act, 1961; Code of Civil Procedure (CPC) , 1908 - Sections 9 and 115; Uttar Pradesh Consolidation of Holdings (Amendment) Act, 1958

Appeal No. : Special Appeal No. 472 of 1966

Appellant : Bikarma Singh and ors.

Respondent : The State of U.P. and ors.

Advocate for Def. : Ram Surat Singh, Adv.

Advocate for Pet/Ap. : R.B. Misra, ;Radhey Shyam, ;R.S. Misra, ;Ambika Pd. and ;Krishna Pd., Advs.

Judgement :

S.D. Khare, J.

1. This reference to a Full Bench arises out of a Special Appeal filed against an order of a learned single Judge of this Court, dismissing the writ petition. The Division Bench, which heard the Special Appeal, was of the opinion that the case of Tribeni v. State of U. P., 1968 All LJ 570 affirming the view taken in Lakhpat Singh v. Dal Singh, 1964 All LJ 1049 required reconsideration. It has, therefore, referred the following question for the consideration of this Full Bench:--

'Whether the judgment and decree of the learned Additional Civil Judge was a nullity when a notification under Section 4 of the U. P. Consolidation of Holdings Act in respect of the land in dispute in the appeal before him was made during the pendency of the appeal and that fact had been brought to his notice.'

2. Considering all the facts of the present case we would slightly modify the point for reference by adding one more clause (underlined (here in ') towards the end so that it will read as follows:--

'Whether the judgment and decree of the learned Additional Civil Judge was a nullity when a notification under Section 4 of the U. P. Consolidation of Holdings Act in respect of the land in dispute in the appeal before him was made during the pendency of the appeal and that fact had been brought to his notice 'and he had recorded a decision that the provisions of Section 5 did not apply in the facts of the case'.'

3. The facts leading to the Special Appeal, out of which this reference has arisen, might be briefly stated as follows.

4. Originally Dalai Singh, Daljit Singh and Hanuman Singh were the fixed rate tenants of plot No. 10, situate in village Chanchalia, pargana Kiriyat Sikhar, district Mirzapur. They mortgaged that plot in favour of Jokhu Singh, father of the respondents Nos. 4 to 6. Subsequently Dalai Singh executed a sale deed in respect of his one-third share in favour of the aforesaid Jokhu Singh. The equity of redemption in the remaining two-thirds share of the property vested In Daljit Singh and Hanuman Singh. On llth December. 1907, they also executed a sale deed in respect of their two-thirds share in that plot in favour of Vikrama Singh (appellant). The plaintiff's case was that it had been agreed between Jokhu Singh and Vikrama

Singh that Jokhu Singh will remain in possession over his one-third share of the plot No. 10 in dispute towards the north while Vikrama Singh will remain in possession over the two-thirds share of the same plot towards the south.

5. There was litigation between JokhuSingh and Vikrama Singh and the latter was directed to deposit Rs. 300 in Court He could not do so and, therefore, he executed a usufructuary mortgage deed on 14th February, 1928, in favour of one Sitaram Tiwari with the condition that the mortgagee should pay Rs. 300 to Jokhu Singh. This mortgage was in respect of two-thirds southern share of plot No. 10 and certain other plots. Sitaram Tiwari deposited Rs. 300 in Court and redeemed the two-thirds share of plot No. 10. Later on, as a result of an agreement between Vikrama Singh and Sitaram Tiwari, the two-thirds share in plot No. 10 came into possession of Vikrama Singh.

6. After the death of Sitaram Tiwari, his son Lakshmi Shanker filed a suit against Vikrama Singh and the aforesaid two-thirds share in plot No. 10 was put to sale in execution of the decree. Respondent No. 4 claimed to be an adhivasi and sirdar of the land in dispute on the allegation that Sitaram Tiwari had sublet the land to him. The Judicial Officer in whose Court the decree was being executed held by his order dated 6th April, 1959, that respondent No. 4 had failed to prove any sub-letting in his favour. His objection was dismissed and he, therefore, filed a suit in the Court of the Munsif Tor declaration that his two-thirds share in plot No. 10 was not liable to sale in execution of the aforesaid decree. By his judgment dated 24th May, 1961, the learned Munsif decreed the suit. While the appeal against the decision of the learned Munsif was pending in the Court of the Additional Civil Judge a notification under Section 4 of the U. P. Consolidation of Holdings Act (hereinafter referred to as the Act) was published in the U. P. Gazette on May 27, 1961, and thefact was brought to the notice of the Court. The learned Additional Civil Judge, however, held that Section 5 of the Act could not apply to a suit of that nature and, therefore, he heard and allowed the appeal on 12th October, 1961.

7. When the Consolidation proceedings started the petitioner-appellant filed an objection before the A. C. O. for expunction of the names of respondents Nos. 4 to 7, and the said respondents also filed a cross objection claiming themselves to be

sirdars of the land in dispute. The Consolidation Officer on 30th April 1962, allowed the objection of the present appellant and dismissed the objection of respondents Nos. 4 to 7. Respondents Nos. 4 to 7 filed an appeal against the decision of the Consolidation Officer. The appeal against the order of the Consolidation Officer was dismissed. Respondents Nos. 4 to 7 filed a second appeal before the Deputy Director of Consolidation who, without referring to the order passed by the Additional Civil Judge, allowed the appeal and declared respondents Nos, 4 to 7 to be the tenure holders.

8. Thus respondent No. 4, whose suit for declaration under Order 21, Rule 63, C. P. C. had been dismissed by the Civil Court was successful before the Deputy Director of Consolidation, who allowed the second appeal against the order of the Settlement Officer.

9. It was against that order of the Deputy Director of Consolidation passed on 30th March, 1963, that the writ petition was filed by the present appellant. The learned single Judge who heard the writ petition, dismissed it on the ground that the matter was concluded by a finding of fact, based on evidence, recorded by the consolidation authorities, as between the same parties regarding one and the same property.

10. It has been contended on behalfof the respondents that the effect of the notification under Section 4 of the Act is automatic and as soon as the notification is published in the Gazette the jurisdiction of Courts other than the consolidation Courts is suspended and, therefore, any decree passed by the Civil Court in its appellate jurisdiction after the issue of the notification under Section 4 of the Act without taking into consideration the final decision of the consolidation authorities, must be considered to be a nullity.

11. The contention of the learned counsel for the appellant, on the other hand, is that the decree passed by the civil appellate Court cannot be considered to be a nullity because that Court, and no other Court, had the jurisdiction to dispose of the appeal. It is further contended that the decision given by the appellate Court, even, though it might have been erroneous on the point that the stay as contemplated under Section 5 of theAct did not apply to that appeal, could have

been questioned only by way of an appeal or a revision.

12. Section 5 of the Act, as it stood in the year 1961, read as follows:--

'Upon the publication of the notification under Section 4 in the official gazette, the consequences, as hereinafter set forth, shall, subject to the provisions of this Act, from the date specified thereunder till the publication of notification under Section 52 or Sub-section (1) of Section 6, as the case may be, ensue in the area to which the declaration relates, namely--

(a) the district or part thereof, as the case may be, shall be deemed to be under consolidation operations and the duty of maintaining the record of rights and preparing the village map, the field book and the annual register of each village shall be performed by the District Deputy Director of Consolidation, who shall maintain or prepare, them, as the case may be, in the manner prescribed.

(b) (i) all proceedings for correction of the records and all suits for declaration of rights and interests over land, or for possession of land, or for partition pending before any authority or Court whether of first instance, appeal or reference or revision, shall stand stayed, but without prejudice to the right of the persons affected to agitate the right or interests in dispute in the said proceeding or suits before the consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder.

(ii) the findings of the consolidation authorities in proceedings under this Act in respect of such rights or interest in the land, shall be acceptable to the authority or Court before whom the proceeding or suit is pending which may on communication thereof by the parties concerned, proceed with the proceedings or suit, as the case may be.

(c) .....'

13. Section 5 of the Act is couched in general terms and it was for the Courts, where proceedings of the nature which could be disposed of by consolidation Courts were pending, to decide whether or not the proceedings were of such nature to which the bar of Section 5 of the Act could apply. Therefore, even in

cases where the notification under Section 4 of the Act came to the notice of the Court the Civil Court, where the proceedings were pending could, after hearing the parties, arrive at a decision that the bar of Section 5 of the Act did not apply to the proceedings before it and that the same could be disposed of by it. All the proceedings before the Civil Court were not to be stayed merely because consolidation proceedings had been started and a notification under Section 4 of the Act had been issued. The bar of Section 5 could apply only to those proceedings where anymatter could be finally disposed of by the consolidation authorities. If the Civil Court before which any proceeding was pending wrongly arrived at the conclusion that, considering the nature of the proceedings pending before it, the bar of Section 5 did not apply to it, the mistake could be corrected either by the appellate Court or by the revisional Court. It is obvious that in a case like the present one no application under Section 151, Civil P. C. for vacating the order could be filed and it was only for the appellate Court or the revisional authority to correct the mistake, if any.

14. On the point of the jurisdiction of the learned Additional Civil Judge to dispose of the appeal the following facts are not disputed:--

(1) The Civil Court had the initial jurisdiction to entertain the appeal and the Additional Civil Judge could hear it and dispose it of.

(2) After the stay period provided under Section 5 of the Act was over the appeal could be heard and finally disposed of by the Additional Civil Judge.

(3) No other Court or authority was competent to hear and dispose of the appeal.

The contention, however, is that--

(i) the operation of stay under Section 5 of the Act was automatic and the stay took effect from the date the notification under Section 4 was published, and

(ii) the effect of the notification under Section 4 of the Act was that the jurisdiction of the Civil Court was suspended so that any disposal of the case or appeal made during the period the jurisdiction remained suspended, was without jurisdiction and, therefore, a nullity.

15. In our opinion there is no force in the contention that the effect of the stay under Section 5 of the Act was automatic. From the language of Section 5 of the Act it is clear that the legislature did not take away the jurisdiction of the Civil Court completely. It merely directed the stay of the proceedings to avoid conflict of decisions by two competent authorities on one and the same point and between the same parties. If the matter had already been finally disposed of between the parties by a competent Court that decision had to be accepted by the consolidation authorities. However, the scheme of the Act is that if no such decision had been given or if the matter was still pending before any civil or revenue Court it was to stay its hands and ultimately, at the end of the consolidation proceedings, to record its decision in accordance with the decision of the consolidation authorities (vide Section 5 of the Act). The consolidation authority, while giving its decision, was to be deemed to be a Court of competentjurisdiction (vide Sections 10 and 11 of the Act).

16. Section 49 of the Act (as amended up to the year 1958) reads as follows:--

'No person shall institute any suit or other proceeding in any Civil or RevenueCourt with respect to any matter arising out of consolidation proceedings or with respect to any other matter in regard to which a suit or application could be filed under the provisions of this Act.'

17. Even under Section 49 of the Act the jurisdiction of the Civil Court was not absolutely barred. It was barred only in respect of matters for which a proceeding could or ought to have been taken under the Act.

18. The law relating to the stay of proceedings by a superior Court was considered and clarified by the Supreme Court in the case of Mulraj v. Murti Raghunathji Mahraj : [1967]3SCR84 . Till then there was good deal of difference of opinion between the High Courts in India on the question of the effect of the stay order, particularly with a reference to execution proceedings. The High Courts of Calcutta (vide Hakum Chand Boid v. Kamalanand Singh, (1906) ILR 33 Cal 927. Patna (vide Liakat Mian v. Padampat Singhania, AIR 1951 Pat 130 (SB1 and Punjab (vide Din Dayal v. Union of India, had held that in such a case the stay order takes effect from the moment it is passed and the fact that the Court executing the

decree has no knowledge of it makes no difference and all proceedings taken in execution after the stay order has been passed are without jurisdiction. On the other hand, the view taken by the Calcutta High Court in an earlier decision (vide Bessesswari Chowdhurany v. Horro Sundar Mazumdar, (1897) 1 Cal WN 226) and the High Courts of Madras (vide Venkatachalapati Rao v. Kameswaramma, ILR 41 Mad 151 : (AIR 1918 Mad 391) (FB)) and Kerala (vide C. Alikutty v. T. Alikutty, ILR (1960) Ker 528) was that the executing Court does of lose its jurisdiction from the moment the stay order is passed and that the order being in the nature of a prohibitory order, the Court carrying on execution does not lose its jurisdiction to do so till the order comes to its knowledge and that the proceedings taken in between are not a nullity.

The Allahabad High Court took an intermediate view in the Full Bench case of Parsotam Saran v. Brahma Nand : AIR1927 All401 and held that where the rights of third parties, like a stranger auction purchaser, have intervened, the fact that the executing Court had no knowledge would protect third parties. The Supreme Court, in the case of Mulraj (Supra) arrived at the con-clusion that the view of the Madras High Court and of the Calcutta High Court taken in its earlier decision (vide (1897) 1 Cal WN 226 (Supra)) was correct and that the order of stay in an execution matter was in the nature of a prohibitory order and is addressed to the Court that is carrying out execution and that a mere order of stay of execution does not take away the jurisdiction of the Court. In that connection the Supreme Court observed:--

'An order of stay..... Is not of thesame nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the Court executing the decree as there is nothing left to execute thereafter. But a mere order of stay or execution does not take away the jurisdiction of the Court. All that it does is to prohibit the Court from proceeding with the execution further, and the Court unless it knows of the order, cannot be expected to carry it out. Therefore, till the order comes to the knowledge of the Court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing Court which continues to have jurisdiction

to stay its hands till further orders. It is clear that as soon as a stay order is withdrawn, the executing Court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the Court is there all along. The only effect of the stay order is to prohibit the executing Court from proceeding further and that can only take effect when the executing Court has knowledge of the order'.

19. From what has been stated above it is clear that the Supreme Court in the case of Mulrai, (1967 All LJ 593) : (AIR 1967 All 1386) (Supra) not only affirmed the Allahabad view but went one step further in affirming the view held by the Madras High Court.

20. The question whether or not the Civil Court lost its jurisdiction from the date of the notification under Section 4 of the Act was considered by Hon'ble Jagdish Sahai and Hon'ble G.C. Mathur, JJ. in the case of 1964 All LJ 1049 and it was held that if an appeal is decided on merits in ignorance of the fact that a notification under Section 4 of the Act has been issued the judgment would not be a nullity but it would be a case of the Court acting with material irregularity in the exercise of its jurisdiction. It was further held that the effect of the notification under Section 4 of the Act is that even though the Court has jurisdiction to entertain and hear the appeal it cannot pass an orderIn derogation of the provisions of Sub-clauses (i) and (ii) of Clause (b) of Section 5 of the Act. The Court has, therefore, to stay the hearing of the appeal until the consolidation authorities have decided the matter and thereafter to pass an order in accordance with the decision of the consolidation authorities.

21. The same view was reiterated in the case of 1968 All LJ 570 (Supra) decided by a Division Bench of this Court. It was held by Hon'ble Jagdish Sahai and Hon'ble Gangeshwar Prasad, JJ. that--

'It is clear from the language of the unamended Section 5 (b) (i) and (ii) of the Act that merely because a village came under consolidation operations, the Court seized of a suit or an appeal was not divested of the jurisdiction to hear and decide it. All that the law required was that the proceedings before it should be stayed and after the matter had been decided by the consolidation authorities the decision

was to be communicated to the Court who shall 'proceed with the proceeding or suit, as the case may be'. It is, therefore, clear that the effect of Section 5 (b) (i) of the Act was not to destroy or take away the jurisidiction of the court before whom a suit or an appeal was pending. It remained seized of the case throughout and ultimately it had to pass a judgment or order or decree in the case. It was that court and that court alone which had the jurisdiction to and could finally dispose of the matter. Therefore it cannot be said that a decree or order or judgment passed by such a court would be nullity even though it alone had the jurisdiction to pass the order or the decree of the judgment.'

22. We respectfully agree with the view taken by a Division Bench of this Court in the above mentioned case.

23. In the case of Bahadur v. Bechai : AIR1963 All186 , a Division Bench of this Court held that an appeal decided in ignorance of the notification under Section 4 of the Act could be reviewed and the order recalled under the provisions of Section 151, C.P.C. but not under Order 47, Rule 1, C.P.C., so that the appeal could remain pending till the consolidation proceedings were over. The decision in the case of : AIR1963 All186 , is hardly of any help for determining this reference for the simple reason that the court has always the power in the interest of justice to recall its own order under the provisions of Section 151, C.P.C.

24. After the publication of the notification under Section 4 of the Act the stay of the proceedings as provided under Section 5 cannot be automatic for one more reason. The Court before which the suit or the appeal or the proceedings are pending will have to decide whetheror not the provisions of Section 5 of the Act would apply to the case. A civil Court has inherent power to decide the question of its own jurisdiction, vide Gokul v. Deputy Director of Consolidation, 136 All LJ .77. Bhatia Co-operative Housing-Society Ltd; v. D. C. Patel : [1953]4SCR185 and Mohanlal v. Benoy Kishna. : [1953]4SCR377 .

25. It is well settled law that a decree passed without jurisdiction is a nullity--vide Kiran Singh v. Chaman Paswan. : [1955]1SCR117 .

26. It was held in the case of Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi : AIR 1959 SC492 , that there are two classes of cases dealing with the power of tribunal: (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists, and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. It was further observed that the difference between these two kinds of cases is that in the former case the tribunal has the power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists. It was further held that the assumption of jurisdiction by erroneous decision of jurisdictional facts could be questioned in a revision application filed under Section 115, C.P.C.

27. There can be no doubt that an erroneous decision of a jurisdictional fact can be set aside in an appeal or revision. The question before us is what can be done if a court having both initial and ultimate jurisdiction has given a wrong decision on a jurisdictional fact relating to its suspension of jurisdiction. In our opinion the answer to that question is a simple one. A court having jurisdiction can decide a matter rightly or wrongly (vide Laxmichand Nanhulal v. Mt, Sundrabai, AIR 1952 Nag 275.) If it decides a matter wrongly it is open to the appellate or the revisional Court to correct the mistake. However, if no appeal or revision is filed and the decision becomes final between the parties it will be difficult to say that the wrong decision on jurisdictional fact relating to its suspension of jurisdiction renders the decision in the appeal a nullity.

28. We have refrained from expressing any opinion on the point as to what the consolidation authorities should have done after the appeal had been disposed of by the learned Additional Civil Judge and the decision had become final between the parties, because this will be a matter for the consideration of the Division Bench, which will now hear and dispose of the Special Appeal. We are alsonot expressing any opinion on the point as to whether or not the decree passed in appeal by the learned Additional Civil Judge would be a nullity if the appeal was heard and decided (i) after the notification under Section 4 of the Act had been published and brought to the notice of the Court and (ii) the Court had taken no

notice of such publication without specifically holding that the bar of Section 5 of the Act did not apply to a case of this nature.

29. Our answer to the question referred to the Full Bench (and as subsequently modified by us) is as follows:--

'Inasmuch 'as the learned Additional Civil Judge had given a decision that the provisions of Section 5 of the Act did not apply to the facts of the case and that decision had been allowed to become final between the parties, the decree passed by the learned Additional Civil Judge after the publication of the notification under Section 4 of the Act, and after that fact had been brought to the notice of the Courts, is not a nullity.'