Sarbeswar Ghatak Vs Executor, Estate of Aswini Kumar Das

Court: Calcutta High Court

Date of Decision: Aug. 9, 1974

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27, 47
Transfer of Property Act, 1882 â€" Section 117
West Bengal Estates Acquisition Act, 1953 â€" Section 18, 2, 6(1)
West Bengal Estates Acquisition Rules, 1954 â€" Rule 4

Citation: (1975) 1 ILR (Cal) 467

Hon'ble Judges: Laik, J; K.J. Sen Gupta, J

Bench: Division Bench

Advocate: P.N. Mitra, Ambika Charan Bhattacharya, Subodh Kumar Bhattacharya, Satyabrata Dutta and Dwariha Nath Trivedi, for the Appellant;S.C. Mitter, Shyama Prasanna Roy Chowdhury, Panchanan Pal, Amar Nath Dhole, S.C. Das Gupta and Tapan Kumar Sen Gupta, for the Respondent

Final Decision: Dismissed

Judgement

Laik, J.
These are the five appeals heard together by consent of parties. Common question of law and fact arises in them.

2. The first one is F.A. No. 270 of 1959 which arose out of a suit for partition of C.S. Plot No. 1817 in mourn Ranaghat within the Ranaghat

Municipality. Ghataks were admittedly the owners of the property. On August 24, 1943, the Plaintiff Loharam purchased an undivided share from

one of the co-sharers, viz. Sushil. On November 1, 1.945, another co-sharer Subhash Ghatak sold out his undivided share to Sarbeswar Ghatak

who is the Defendant in all these suits. On January 16, 1946, Loharam brought the suit for partition. On December 19, 1946, a preliminary decree

for partition was passed. On August 7, 1947, the final decree was passed accepting the Commissioner''s report. Allotment was made thereon.

3. An appeal was taken against the final decree to this Court by the Defendants Nos. 1, 2, 3 and 6, viz. Bisseswar, Nepal, Purna and Sarbeswar.

On August 13, 1949, Nepal, the Defendant No. 2, sold his share to Aswini and Amarendra, hereinafter referred to as ''Dasses''. They were added

as Appellants. On August 5, 1950 and during the pendency of the appeals in this Court, Sarbeswar obtained two leases, one from the Dasses and

the other from Purna, the period of which was only for six years. On June 9, 1952, the appeal was decided. The final decree was set aside. The

case was remitted back to the trial Court with direction to issue a fresh commission to another Commissioner with certain other directions. On

March 7, 1953, the new Commissioner submitted his report. He maintained the same allotments after giving reasons therefor. However, he made

certain changes as regards the payment of the owelty money. Against this report, the Defendants Nos. 1 and 6 (Bisseswar and Sarbeswar) filed

objections. On April 8, 1953, by order No. 106 the trial Court overruled those objections, accepted the Commissioner''s report and directed that

the final decree be passed in accordance with the report. In January/February 1954, Bisseswar died.

4. On April 15, 1955, the West Bengal Estates Acquisition Act, hereinafter referred to as the Act, came into force and the right of the

intermediaries vested in the State of West Bengal.

5. On August 4, 1956, Sarbeswar''s leases expired. Dasses made an application for drawing up the final decree. The trial Court by order No. 116

dated August 29, 1956, recorded that the order for final decree had been passed in 1953. He also noted that the prescribed time had been passed

and directed the Petitioner to take steps for the service of the notice upon the parties. On November 24, 1956, objection was taken by Sarbeswar

and his five brothers to the effect that the interest of Purna Ghatak and those of Dasses were those of tenure-holders and that had vested in the

Government under the Act. It was further stated in the said objection that Sarbeswar had paid rent to the Government and had got dakhilas for the

same. It was further asserted in para. 3 of the said objection that the Applicants had not retained the lands in suit under the Act. The Plaintiffs,

therefore, have got no right to apply for the final decree in respect of the lands in suit. The said application was, however, rejected as the

Applicants were not ready on the date of the hearing, November 23, 1957, but the trial. Court gave direction that fresh objection might be filed if

the parties so desire.

6. On February 13, 1958, Dasses and Purna filed a fresh application for drawing up of the final decree. On May 26, 1958, the same objection

was filed by Sarbeswar and his five brothers asserting that Sarbeswar was a lessee under the Applicants-Defendants with respect to their shares in

the said right. The other ground that the interest of the Applicants being that of intermediary had vested in the State of West Bengal, was also

taken.

7. By order No. 80 dated November 21, 1958, the learned Subordinate Judge, Nadia, (trial Court) overruled all the objections raised by

Sarbeswar and others and held that the Applicants were entitled to apply for the final decree in the partition as prayed for. It was definitely held by

the trial Court that the lands were non-agricultural lands and were situate within the area of the Ranaghat Municipality. It was further held that it

was a khas property of the Applicants and they were co-sharers as non-agricultural tenants. The Court below had also noticed that Sarbeswar''s

lease was for six years and it was executed during the pendency of the suit and that it expired long ago. It was also found as a fact that the

property had been retained u/s 6(1) of the Act by the Applicants. It was also held that the Applicants were not the intermediaries but they were

non-agricultural tenants. It was also noticed that Sarbeswar attempted to pay the rent direct to the Government and the State at the first instance

accepted the same. The mistake was thereafter detected by the State and the rents paid by Sarbeswar in respect of the leases were refunded to

him by an order of the Board of Revenue.

8. In pursuance of the said order the final decree had been drawn up on January 28, 1959 and against the said final decree the instant appeal, viz.

F.A. No. 270 of 1959 was filed by Sarbeswar and his five brothers against the Plaintiff and the other Defendants.

9. The other appeal is the Second Appeal No. 120 of 1970 arising out of money suit for recovery of rent in suit No. 12 of 1957/1 of 1967 filed by

Purna as the sole Plaintiff originally against Sarbeswar for the period from December 1954 to July 1956. The suit came up previously in the

Second Appeal to this Court, but it was remanded with a direction that the State of West Bengal should be impleaded. Thereafter, the suit was

decreed in full after remand and after the State was impleaded as pro forma Defendant therein. It was, inter alia, held that the right of the Plaintiffs

in the property did not vest in the State under the provisions of the Act. (Sarbeswar preferred an appeal to the Court of Appeal below, but he lost

and hence the instant Second Appeal. Purna having died in the meantime his heirs have been substituted. This suit relates to the C.S. Plots Nos.

1817 and 1816 within the Municipality of Ranaghat.

10. The next appeal is S.A. No. 1160 of 1971 arising out of Money Suit No. 195 of 1955 for recovery of arrears of rents for the period from

September 1954 to September 1955 instituted by Dasses against Sarbeswar. This case also Sarbeswar lost. The suit was decreed and Sarbeswar

preferred the Second Appeal. The State of West Bengal is one of the Respondents.

11. The fourth one is the Second Appeal No. 1158 of 1971 arising out of T.S. No. 260 of 1956 started by Dasses, viz. against Sarbeswar, being

the Defendant No. 1 and the State of West Bengal, the Defendant No. 2. It was filed on July 9, 1956. The Plaintiff prayed for an injunction

restraining Sarbeswar from making pucca constructions on the disputed plots. This suit was also decreed in both the Courts below and Sarbeswar

is the sole Appellant. Aswini in the meantime had died.

12. The last and fifth one is the Second Appeal No. 1159 of 1971 arising out of T.S. No. 267 of 1959/292 of 1956. It is a suit for eviction by

Dasses of Sarbeswar, the Defendant, from the disputed property on the ground that he is a trespasser on the expiry of the leases. There was also a

prayer for rent and mesne profits. This suit was also decreed in both the Courts below and Sarbeswar alone is the Appellant.

13. The Court of Appeal below disposed of the appeals before him by one judgment which gave rise to the above three Second Appeals, viz.

S.As. Nos. 1159 and 1160 of 1971. There was a separate judgment of the Court of Appeal below in Purna"s suit which gave rise to S.A. No.

120 of 1970. This would be referred to hereinafter as Puma"s suit.

14. In the said two title appeals and the money appeal, which have been disposed of by one judgment, the Court of Appeal below I found on

evidence as a fact that the Plaintiffs are not tenure-holders or intermediaries in respect of the suit property under the provisions of the West Bengal

Estates Acquisition Act and that the Plaintiffs had retained the property by filing "B" Form in time and their interest have not vested in the State.

The Board"s circular (Ex. 3) was relied on by which the Board of Revenue directed its employees to refund to Sarbeswar the amount which was

realised from him as rent in respect of the suit property. In the said exhibit the State of West Bengal admitted the Plaintiffs to be non-agricultural

tenants in respect of the suit property. The Court of Appeal below had also noticed that though the State of West Bengal was impleaded but it did

not prefer an appeal to the Court of Appeal below. He considered the entries in the Record of Rights and noted that there were only bhities,

buildings, structures and homestead on the suit land. Sarbeswar took the leases for six years during the pendency of the suit, for starting a market

(bazar) on the property. On the aforesaid findings, the three appeals preferred by Sarbeswar were dismissed by the Court of Appeal below. In this

Court also Sarbeswar alone was the Appellant. The State did not prefer an appeal. In Puma"s suit which gave rise to S.A. No. 120 of 1970,

similar findings were arrived at by the Court of Appeal below and the appeal was dismissed against which Sarbeswar alone preferred the appeal.

15. Mr. P.N. Mitra (referred to Mr. Mitra hereinafter), the learned Advocate appeared in all these appeals on behalf of one of the main

Appellants, viz. Sarbeswar, who is a lawyer himself. In his opening he stated that the only point he would argue that as the Plaintiffs were

intermediaries under the provisions of the Act and as their rights having vested in the State of West Bengal, all these suits should be dismissed and

the appeals should be allowed. He submitted that the Supreme Court decisions were in his favour.

16. Mr. Subodh K. Bhattacharjee, the learned Advocate who appeared for the other Appellants, viz. the other three brothers of Sarbeswar in the

First Appeal, filed two applications and stated before us that he had got instructions from his clients not to challenge the decree appealed against

and he prayed therein that the appeal preferred by them should be dismissed, so far as they are concerned and the Applicants should be

transposed to the category of the Respondents. His clients are satisfied with the allotments. There is no opposition. We allow the said applications.

17. Mr. Syamacharan Mitter (referred to Mr. Mitter hereinafter), the learned Advocate appeared on behalf of the Plaintiffs-Respondents giving

rise to the four Second Appeals. Mr. Panchanan Pal appeared on behalf of Loharam, the Plaintiff/Respondent, giving rise to the First Appeal. Mr.

S.C. Dasgupta, the learned Senior Government Pleader appearing for the State, attempted to support Mr. Mitra generally, but he frankly

conceded that the partition suit can be continued and can be proceeded with even after the vesting under the Act.

18. The first question that needs be decided is as to whether the Plaintiffs in all these suits are the intermediaries or non-agricultural tenants and

whether their rights have vested in the State. A learned argument was advanced by Mr. Mitra oh behalf of the Appellant. His main argument was

that there was a taidad referring to the disputed property and which is also found recorded in the C.S. Records of Rights (Ex. 2). According to

him, mere reference to a taidad would conclusively prove that the Plaintiffs are the proprietors and therefore, intermediaries and their rights have

consequently vested in the State. He placed before us Regulation 19 of 1973 and Non-Badsahi Regulation being Regulation 37. For understanding

the true import of the meaning of the expression taidad he also referred to a Bench decision of this Court in Tarakeshwar Pal Chowdhury v.

Kumar Satish Kanta Roy and Ors. (1930) 51 C.L.J. 297 (301-2). He also placed emphasis on the expression " " and referred to khatian No. 775

and subordinate khatians Nos. 776-781. He also referred to another decision of this Court in the case of Sk. Abdul Hossain v. The Shalimar Paint

Colour and Varnish Co. Ltd. 81 C.L.J. 138. According to him, there was no distinction between agricultural and non-agricultural leases before the

Transfer of Property Act in the year 1882. He placed Section 117 of the said Act. He referred to the Privy Council decision in the case of Satya

Niranjan Chakravarty v. Sarajubala (1929) 33 C.W.N. 865 (P.C.). Mr. Mitra had to admit, however, that the Privy Council decision was not

correctly read by the Bench in deciding the case of Sk. Abdul Hossain Supra (142, 145), because the judgment of the Privy Council was only on

the third issue and was not on all the issues. Accordingly, the observation that the said Privy Council case

is an authority for the proposition that an ijara for the purpose of collecting rent from agricultural tenants does not fall within Section 117 of the

Transfer of Property Act and so part V of the Act applies to it.

is not a correct reading of the Privy Council judgment. Even in 81 C.L.J. 145 it is laid down that to determine the nature of the tenancy of the

superior landlord as to whether he is a tenure-holder or not the purpose of the sub-tenancies under him would be the most material factor.

19. On the point as to whether a person is a tenure-holder or not, whether the Bengal Tenancy Act would apply or the Transfer of Property Act

would apply, the following decisions in the cases of Mohesh Jha v. Manbharan Mia (1901) 5 C.L.J. 522 and Bibhudendra Mansingh Bhramarbar

Rai v. Debendra Nath Das 20 C.L.J. 140 affirmed by the Judicial Committee of the Privy Council in Debendra Nath Das v. Bibudendra Mansingh

ILR (1918) Cal. 805 (P.C.), Raja Pramada Nath Roy v. Raja Ramani Kanta Roy and Ors. (1907) L.R. 35 IndAp 73, Satya Sankar Ghoshal v.

Monomohan Guha (1917) 22 C.W.N. 131, Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose (1902) 6 C.W.N. 794 and Kiriti Bhushan

Saha Mandal Vs. Tarubala Dasi, were placed.

20. A certified copy of a sheet of paper has been filed before us for reception of an additional evidence under Order 41, Rule 27 of the CPC on

behalf of the Appellant in order to show therefrom that the disputed property formed the basis of a taidad. The said certified copy is itself an

incomplete one. It does not contain the heads even of different columns. We gave time to the learned Advocate for the Appellant to produce the

entire copy in order to understand the said document whether it is a taidad or not, but the same was not produced, though the appeal came up for

re-hearing after seven months. Accordingly, the said document being admittedly an extract, cannot be admitted into evidence. Even for argument''s

sake, if the said document be admitted in evidence, it has got only presumptive value about the status of proprietorship which is rebuttable and

which is rebutted in the instant case. Mere reference of taidad in Ex. 2 would not carry the matter any distance.

21. It is well-known that a taidad is an extract from the Public register or other document of authority in confirmation of a claim that the property is

exempted from payment of revenue. The so-called taidad which has been tendered as an additional evidence no doubt refers to the year 1127

B.S., i.e. August 12, 1865, i.e. the date of the grant of Dewani, but we could not accept the said document in additional evidence for the reasons

recorded above. Mr. Mitter for the Respondents rightly pointed out that nothing was produced before us to show that the Appellant even made an

attempt to get the entire copy of the taidad. According to him, we should not act on the extract or a portion of a document which has got no

meaning.

22. It was further argued with force on behalf of the Respondent that a tenure-holder must have his base on agricultural land in order to become a

tenure-holder. Mr. Mitter refers to several provisions of the Bengal Tenancy Act and the Estates Acquisition Act for appreciation of the meaning of

the expressions ''proprietor'' and ''estate''. He places also Sarada Charan Mitra''s Tagore Law Lectures : Land Laws of Bengal (p. 92) whereof

there occurs a discussion on Regs. of 1793 and 1800 and on the question how a taidad is created and the evidentiary value of a taidad. Baden

Powell''s Land System of Bengal, CD. Field''s Introduction to the Land Laws of Bengal, Ranjit Singh''s Laws on Landlord and Tenant and the

cases in Taruk Podo Ghosal v. Shyama Churn Napit (1881) 8 C.L.R. 50, Hurryhur Mookhopadhya, Madhab Chunder Baboo, Naba Krishto

Mookerjee v. Koylas Chundro Buttacharjee 8 B.L.R. 566 (571) : 14 M.I.A. 152 (164) and Prosunno Coomaree Debee v. Sheikh Rutton Bepary

ILR (1878) Cal. 696 were also placed. The unreported judgment of myself sitting with R. Bhattacharya J. in the case of Pritish Chandra Biswas v.

Subodh Gopal Bose L.P.A. No. 13 of 1972 decided on April 24 1973 was also placed.

23. Mr. Mitter distinguishes the case in Sk. Abdul Hossain''s case Supra cited by Mr. Mitra on behalf of the Appellant and places the Bench

decision in the case of Alauddin Ahammed v. Tomizuddin (1937) 41 C.W.N. 1001 and Secretary of State for India v. Digambar Nanda ILR 46

Cal. 160 (165) : 27 C.L.J. 334 (337) and the Privy Council decision in the case of Wali Mohammad v. Mohammad Bakshi 57 I.A. 86 51 C.L.J.

518. Mr. Mitter also relies on the facts of the decision in Secretary of State Vs. Ramcharan Acharjee and Others, and Makhan Lal De Vs. Arun

Bala Devi and Others, following the case of Ismail Khan Mahomed v. Jaigun Bibi ILR 27 Cal. 570 : 4 C.W.N. 210 decided by Sir Gooroodas

Banerjee and rightly contends that after all the evidence in a given case would decide the nature of tenancy whether it is agricultural or non-

agricultural. The evidence in the instant case is overwhelmingly against the Appellant. Our attention was drawn to the case of Shyam Rangini Roy

Choudhurani v. Ajindra Nath Tagore ILR (1949) Cal. 165 (170) where the surrounding circumstances were also considered.

24. The argument of Mr. Mitra, though very learned, assumes a certain amount of unreality.

25. In the instant case, we are of opinion that the origin of the tenancy is not known though there has been a reference to a taidad in C.S. records.

Moreover, the presumption of proprietorship of the Ghataks flowing from the taidad, if there be any, has been amply rebutted from the evidence in

the instant case which we would presently discuss. Our attention was also drawn to the fact that Sarbeswar was also a co-sharer in the disputed

property along with the other Defendants and his possession is also the possession of the other co-sharer Defendants.

26. The Appellant also did not produce the copy of the register, particularly Register "B", prepared and maintained under the Land Registration

Act, VII of 1876. If the Plaintiffs were the proprietors, their names must appear either in Register "A" or "B" under the Land Registration Act.

27. It appears from the facts in this case that there is not an inch of agricultural land in the disputed property. All the Ghataks, including the

Defendant Sarbeswar, are non-agricultural tenants. P.Ws. 4 and 5 have proved the same and have also proved that the lands have been retained

by filing the return under "B" Form of the West Bengal Estates Acquisition Act.

28. Exhibit 3 is a general circular by the Board of Revenue dated February 12, 1957. It is a document admitted without objection. The

Government has admitted in this circular that the Ghataks are not intermediaries in respect of this very disputed property. The circular further states

that the Government cannot realise the rent from the sub-lessee (meaning Sarbeswar) and if they have been realised, they will have to be refunded.

It appears that Sarbeswar tendered certain amount as rent to the Government, but the Government directed that the said amount was to be

refunded to Sarbeswar. It proves that this particular estate of the Ghataks had not vested in the State of West Bengal. This document clinches the

issue. It would be seen that the Government did not prefer any appeal against the decree which was in favour of the Plaintiffs in all these several

suits. In the trial Court no witness was also cited on behalf of the State after remand.

29. In the instant case, the record shows 10 plots of lands. All of them are niskar. Four plots are in khas and there are six subordinate tenants all of

whom have already raised dwelling houses. If we read khanda khatians under the Revisional Record of Rights along with Section 6(1) of the West

Bengal Estates Acquisition Act and Rule 4 of the West Bengal Estates Acquisition Rules, we find that the tenants are non-agricultural. They record

forcible possession of Sarbeswar along with all his brothers in the disputed property after the expiry of the lease. R.S. khatians do not support the

Appellant.

30. It further appears from the Revisional Record of Rights, Exs. 16 and 16(a) in Money Suit No. 195 of 1955 out of which S.A. No. 1160 of

1971 arises, that Dasses were recorded as non-agricultural tenants (vide C.S. Plot No. 1870) under Rule 4 of the West Bengal Estates

Acquisition Rules.

31. It is pointed out that the suit filed by Purna was dealt with in a separate judgment which gave rise to S.A. No. 120 of 1970. Mr. Mitter submits

that Puma''s suit should be dealt with as a special case, because Puma''s lease itself includes two rooms with tiled shed, privy and well. It was

further pointed out that Sarbeswar made an application for expunging Puma''s name which application contained certain admissions of Sarbeswar

which go against him (vide Ex. 9). Mr. Mitra for the Appellant concedes that Purna was entitled to rent for the period before vesting but not after

that; but Mr. Mitter reminds him that during the continuance of the partition suit, one co-sharer gave lease to another and that lease was for a short

period which expired even when the partition suit was still pending. Accordingly, the said lease would have no effect on the decision in the suit. It

was further pointed out that Puma''s evidence was there showing that he was in khas possession of the plots on the date of the lease to Sarbeswar

and it was a piece of land appertaining to buildings which Purna was entitled to retain u/s 6(1)(b) of the West Bengal Estates Acquisition Act.

32. Though there are certain special features in Puma''s suit, he did not require them to press them into service in order to get a decree. There are

other good grounds in his suit also which are common to all the other suits as discussed above.

33. Having considered all the arguments on all sides and having gone through all the decisions cited above, we reach the following conclusions:

(i) Though the application under Order 41, Rule 27 is entertained but the certified copy of the extract of the taidad being an incomplete copy

cannot be admitted into evidence.

(ii) Even if the same be accepted it is not conclusive in establishing the status of the Plaintiffs as proprietors in all the suits.

(iii) Even if it raised a presumption in favour of the status of the proprietorship, the presumption is amply rebutted by the facts in these cases.

(iv) Though there is no categorical and express finding of rebuttal of the presumption as to the correctness of the entries in the Record of Rights to

the effect recording intermediary '' by the Court of Appeal below, we are of opinion that the said presumption has been rebutted as already noted.

And the question whether presumption is rebutted or not, is a question of fact. Vide Wall Mohammad v. Mohammad Bakshi (Supra).

(v) On the character and nature of the lands being non-agricultural and the entry of the tenure being wrong, we agree with the concurrent findings

of facts of the Courts below that the disputed lands are non-agricultural and that the Plaintiffs are neither proprietors nor tenure holders but non-

agricultural tenants and their rights have not vested in the State of West Bengal.

(vi) It is admitted by Sarbeswar, the Appellant, in Ex. 4 that the share is undivided and that he has got no separate interest in the disputed property

unless the allotment is made on a specific portion of the land under the final decree.

(vii) In view of the above findings we thought it unnecessary to discuss the decisions, cited above, on this point.

34. Mr. Mitra for the Appellant next contends that there are many Supreme Court decisions which have held that such suits, of the like of which

we are dealing in these appeals, can no longer proceed in view of the vesting of the interest of the Plaintiffs in the property under the West Bengal

Estates Acquisition Act and other similar Acts of different States. On behalf of the Appellant the following decisions were cited : Raja Sailendra

Narayan Bhanj Deo Vs. Kumar Jagat Kishore Prasad Narayan Singh, , Haji Sk. Subhan Vs. Madhorao, and Krishna Prasad and Others Vs.

Gauri Kumari Devi, , Surajnath Ahir and Others Vs. Prithinath Singh and Others, , Ram Ran Bijai Singh and Others Vs. Behari Singh alias

Bagandha Singh, , Raj Kishore Prasad Narain Singh Vs. Ram Partap Pandey and Others, and Shivashankar Prasad Shah and Others Vs.

Baikunth Nath Singh and Others, . Three decisions of this Court were also cited on behalf of the Appellants. Kali Pada Saha v. Kishore Singh

Sreemal (1970) 74 C.W.N. 887, Rabindra Nath Pat v. Subodh Gopal Bose ILR (1969) 2 Cal. 315 and unreported judgment of a Single Bench

in Ananta Rai v. Indian Iron and Steel Co. S.A. 2250 of 1961 decided on September 29, 1969.

35. On behalf of the Respondents the following Supreme Court decisions were cited : P. Lakshmi Reddy Vs. L. Lakshmi Reddy, , Rana Sheo

Ambar Singh Vs. Allahabad Bank Ltd., Allahabad, , Himatrao Vs. Jaikishandas and Others, , Shibsankar Nandy Vs. Prabartak Sangha and

Others, , Nain Singh Vs. Koonwarjee and Others, , Meharban Singh and Others Vs. Naresh Singh and Others, and Bhubaneshwar Prasad Narain

Singh and Others Vs. Sidheswar Mukherjee and Others, . Two Bench decisions of this Court were also cited on behalf of the Respondents, viz.

Md. Idris v. Sm. Lakhpati ILR (1971) Cal. 354 and Fakir Chandra Chakraborty v. Lakshmi Kanta Jha ILR (1971) Cal. 567 : 74 C.W.N. 946.

Mr. Mitter contends that the Supreme Court held just in favour of the Plaintiff, even after the Estates Acquisition Acts or the Zemindary Abolition

Acts have come into force in all the different States of India.

36. Let us examine these decisions. I start with the latest decision of the Supreme Court first and then I go backwards.

37. The latest decision of the Supreme Court in Bhubneswar Prasad Narain Singh and Ors. v. Siddheswar (Supra), which arose out of the Bihar

Land Reforms Act and from a decree in a suit for partition which was filed in the year 1943. The learned Subordinate Judge decreed the suit in the

preliminary form. The High Court modified the decree only as to share. The Supreme Court upheld the preliminary decree passed on October 5,

1953, though the Bihar Land Reforms Act came into force in the year 1950. The Appellant to the Supreme Court made an application that the

proceedings for final decree abated in view of the vesting of the interest of the Plaintiff. The Supreme Court dismissed the appeal and allowed the

partition suit to continue. The Supreme Court made a distinction between a mortgage suit and a partition suit. In paras. 8 and 9 of the said

judgment their Lordships, inter alia, held that the principles laid down by the Supreme Court in the case of Shivasankar Prasad Sah (Supra) were

broadly stated. Relying on the earlier Supreme Court decisions in the case of P. Lakshmi Reddy v. L. Lakshmi Reddy (Supra) their Lordships held

that the possession of one Co-sharer is the possession of all the co-sharers. Their Lordships held that Ram Ram''s case (Supra) is no authority for

the proposition that a co sharer''s constructive possession is to be ignored u/s 6(1)(c) of the Act.

38. The facts in the instant case, which we are called upon to decide in the First Appeal arising out of a suit for partition, exactly fit in with the facts

of the said reported decision of the Supreme Court in Bhubneswar Prasad''s case (Supra). In other words, the Plaintiffs-Respondents, in our

opinion, are entitled to have the final decree for partition passed in their favour.

39. It might be noticed that the three cases of the Supreme Court, viz. Rana Sheo''s case (Supra), Krishna Prosad''s case (Supra) and Raj

Kishore''s case (Supra) which are discussed in some detail hereafter and which are accepted in another later Supreme Court decision in the case

of Shivasankar Prasad Sah v. Baikuntha Nath Singh (Supra), which is also discussed hereafter, were distinguished in the said latest Supreme Court

decision in the case of Bhubneswar Prasad Narain Singh v. Siddheswar Mukherjee (Supra). It also distinguished Suraj Ahir''s case (Supra) which

is discussed with some detail hereafter.

40. The case of Rana Sheo Amar Singh v. The Allahabad Bank Ltd. (Supra) is a decision arising out of the U.P. Act. It arose out of a mortgage

suit of the proprietary rights. It was decreed. Objection was taken in the execution proceedings. Their Lordships held that the mortgagee can

proceed only against the compensation money and not against the new right created by Section 18 of the said Act. This case is distinguishable on

facts. It should be noticed that the execution case was not dismissed on the ground of vesting. It is also a case of mortgage which is not the case

here. It might also be stated that this case was distinguished in a later decision by the Supreme Court in the case of Meharban Singh v. Naresh

Singh (Supra) which is discussed hereafter.

41. The decision of Raja Sailendra Narayan Bhanj Deo v. Kumar Jagat Kishore Prasad Narayan Singh and Ors. (Supra) is a decision on the

Bihar Act. It is a case arising out of a mortgagor''s suit for redemption. The case of mortgage stands on a different footing.

42. The case of Haji Sk. Subhan v. Madhorao (Supra) arose out of the M.P. Act. The Respondent sued for possession and based his claim on his

''proprietory right'' to recover possession and not on the basis of loss of possession on account of the Appellant''s dispossession. The trial Court

decreed the suit. The High Court upheld it. Before the delivery of the High Court judgment, the Act came into force. The Court''s notice was not

drawn to the passing of the Act. Execution for possession was levied. Appellants objected. The executing Court dismissed the execution. Held on

the facts of the case, that the rights of the proprietors vest in the State and the executing Court can refuse to execute it on the ground that the

decree-holder had no subsisting right to recover possession even if the Appellant was in wrongful possession. It is to be seen that there is

difference between the provisions of this Act with those of the Bengal Act. In the instant case, in hand, the right to sue for partition and for eviction

was based not on the basis of the Plaintiff''s proprietory rights. It should further be noticed even in this case that the decree was allowed to stand

even after the vesting, but it was held that it was inexecutable. All the instant appeals deal with decrees and not with execution.

43. The case of Krishna Prosad v. Gouri Kumari Devi (Supra) is again a case of mortgage. The property mortgaged was an estate and it

admittedly vested in the State. The mortgagee wanted to enforce the personal decree. It was held that the application of the decree-holder was not

maintainable at ''that stage''. It was observed that the decree-holder at the first instance should recover the amount as to be decided by the Claims

Officer. This case does not refer to the earlier decision in Raja Sailendra Narayan''s case (Supra). This case was followed in Shivasankar''s case

(Supra) which, however, was distinguished in the said latest Supreme Court decision in Bhubneswar Prasad''s case (Supra).

44. The case of Suraj Ahir and Ors. v. Prithinath Singh and Ors. (Supra) arose out of a suit for declaration and recovery of possession and mesne

profits after redemption. It is again a case of mortgage and relates to the provisions of the Bihar Land Reforms Act. The trial Court dismissed the

suit. It, inter alia, held that the Plaintiffs had no subsisting title on the ground that the Plaintiffs did not purchase those lands and that the suit was

barred by limitation and adverse possession. The High Court allowed the appeal and decreed the suit. It held, inter alia, that the Defendant was a

mortgagee and that the mortgage was redeemed. The Defendants were the Appellants in the Supreme Court which held that the Appellants were

in possession as mortgagees. It, further, held that after the vesting in the State no interest remained in the Respondent other than those which are

expressly saved by the Act. Even the right to recover possession from the trespassers got vested in the State. It relies on the earlier decision, viz.

Madho Rao''s case (Supra), which case, it should be remembered, has been distinguished in the said latest Supreme Court decision in Bhubneswar

Prasad''s case (Supra).

45. The decision, in Ram Ram Bijai Singh and Ors. v. Behari Singh and Ors. (Supra) is a case arising out of the Bihar Land Reforms Act. It was a

proprietor''s suit for declaration that the land was zeraiii land. Recovery of possession was sought for against the tenants. There was also a prayer

for mesne profits. The defence was setting up of adverse possession of tenancy. The trial Court decreed the suit. The tenants preferred an appeal

to the High Court. The Plaintiffs did not argue that their rights still remained in tact though during the hearing of the appeal the notification of vesting

was issued. The High Court affirmed the decree of the trial Court but no decree for possession was given. The Plaintiffs were the Appellants in the

Supreme Court which dismissed the appeal on the facts of that case. The Plaintiffs were given the declaration of title upto the date of vesting and

they were declared entitled to mesne profits upto December 31, 1954. The decree for possession was not granted. The Supreme Court further

held that the meaning of possession of a trespasser in the said Act cannot be equated with khas possession of the proprietor and that the

relationship of mortgagor and mortgagee did not subsist on the date of vesting, viz. on January 1, 1955. The Supreme Court did not allow the

Defendants to challenge the rest of the decree of the High Court as they did not prefer an appeal. It should be noticed that u/s 4 of the Bihar Act all

the interests of the proprietors did not vest. In the Bengal Act the whole interest vested. There was a concession in the said case that vesting

cannot be resisted which is not the case here. It was common ground there that the Plaintiffs were proprietors under the Act, which is not so here.

46. The decision in the case of Himmatrao v. Jaikishandas (Supra) is relied on by the Respondents. It is on M.P. Act. The suit was a suit for

partition as in the instant First Appeal. The Plaintiff sued for declaration that he was the owner of a certain share and prayed for partition and

separate possession of the property amongst the co-sharers who were parties. The trial Court decreed the suit in part. The Plaintiff''s appeal

therefrom for the rest of the claim was allowed. The Defendants then preferred a Second Appeal. There was cross-objection by other Defendants.

The High Court, inter alia, held that for the Abolition Act the suit for partition became infructuous. In appeal to the Supreme Court, it inter alia held

after referring to similar Acts of many other States of India, that the right to enforce the claim of partition is in no way affected by provisions of the

Act. The suit should not be thrown out as infructuous. Acquisition of right would not put an end to the suit. Every co-sharer can obtain a

declaration (see para. 3 at p. 1976). The Supreme Court also noticed in para. 2 that the parties were possessing as co-sharers, according to some

arrangements, which is exactly'' the case in hand.

47. The decision in the case of Raj Kishore Prasad Narayan Singh v. Ram Pratap Pandey and Ors. (Supra) is a case on mortgage and arises out

of the Bihar Land Reforms Act. It was a mortgage of both vested and non-vested properties. It is, inter alia, held that the mortgagee has a right to

proceed against the non-vested properties and the Court may have to apply the principle of marshalling. It is also observed that the parties can

pursue any other remedy open to them under the law and there is no provision in the Act placing a bar.

48. The case of. Shibsankar Nandy v. Prabartak Sangha A Ors. (Supra) is very strongly relied on by the Respondents. The West Bengal Estates

Acquisition Act has been construed in this case. It is, inter alia, held that a non-agricultural tenant cannot be an intermediary and that his interest

cannot vest under the Act. According to the definition of Section 2(i) of the West Bengal Act the expressions non-agricultural tenant'' and

''intermediary'' are mutually exclusive. According to the Respondent, it cuts at the root of argument of Mr. Mitra appearing on behalf of the

Appellant. But Mr. Mitra argued that we should look at this case from the other end, namely, that once it is established that the Plaintiffs are

tenure-holders (which the Defendants failed to establish in the instant case), they cannot be non-agricultural tenants. From whichever end I have

looked, I have found that the Plaintiffs in the instant suits are non-agricultural tenants.

49. The decision, in Shiv as an kar Prasad Sah and Anr. v. Baikuntha Nath Singh and Ors. (Supra) was relied on by Mr. Mitra for the Appellant.

It considered the provisions of the Bihar Land Reforms Act and it arose out of the proceedings u/s 47 of the CPC in an execution of a mortgage

decree. The mortgagees were the Appellants before the Supreme Court which, inter alia, held that the decree-holders are not entitled to proceed

with the execution. It interpreted Section 4(d) of the Bihar Act. As the proprietor''s estate was mortgaged, it was held that the mortgage-decree

against quondam proprietor cannot be executed. Proceeding is to be dropped. It can proceed against compensation. It refers only to three earlier

decisions of the Supreme Court--Rana Sheo"s case (Supra), Krishna Prosad"s case (Supra) and Raj Kishore"s case (Supra) which have been

discussed above. It does not consider the decision in Shibsankar"s case (Supra) and other Supreme Court decisions. This case again is

distinguished in the said latest Supreme Court decision in Bhubneswar Prasad"s case (Supra).

50. The decision in Nam Singh v. Koonwarjee and Ors. (Supra) is on the M.P. Act. It was a suit by a Jaigirdar against the tenants for various

reliefs including recovery of possession. The trial Court dismissed the suit, inter alia, on the finding that the Plaintiff, after vesting, can claim no relief.

The lower appellate "Court reversed the decree and remanded the suit to the trial Court. After remand, the trial-Court decreed the suit. The lower

appellate Court, hereafter, affirmed the decree of the trial Court. The High Court held that the Plaintiff had lost his title on vesting. The Plaintiff

appealed to the Supreme Court. It, inter alia, held (see para. 5) that the High Court was not right and it remanded the suit with a direction that the

State of M.P. should be impleaded. It approves one of its earlier decisions in Himmatrao v. Jaikisandas (Supra), discussed above and-relied on by

the Respondent. If the Plaintiff had lost the title on vesting, it was not necessary for the Supreme Court to direct the remand. On the other hand, the

Supreme Court should have dismissed the suit at least in part, viz. for recovery of possession which the Supreme Court did not do.

51. The decision reported is Meharban Singh and Ors. v. Naresh Singh and Ors. (Supra) is on Madhya Bharat Abolition Act. It was a suit for

redemption. The possession of the proprietor was held maintain able by the Supreme Court. It distinguishes three other Supreme Court decisions

in Raja Sailendra Narayan"s case (Supra), Haji Sk. Subhan"s case (Supra) and Suraj Ahir"s case (Supra) which were held not applicable and it

refers to the decision in Rana Sheo"s case (Supra) which is relied on by the Respondents.

52. The Bench decision of this Court in the case of Rabindra Nath Pal v. Subodh Gopal (Supra) is based upon the said three decisions of the

Supreme Court, viz. Raja Sailendra Narayan"s case (Supra), Haji Subhan"s case (Supra) and Ram Ram"s case (Supra). In view of the other

decisions of the Supreme Court discussed above and particularly in view of the latest Supreme Court decision in Bhubneswar Prasad"s case

(Supra) the said Bench decision of this Court is no longer good law.

53. Another Division Bench of this Court did not approve of the said decision in the case of Rathindra Nath Pal (Supra) and referred the matter to

the Full Bench in S.A. No. 849 of 1960 giving rise to Full Bench Ref. No. 1 of 1970. The Full Bench Reference became abortive because it was

held to be infructuous on August 10, 1972, by the five learned Judges.

54. The unreported judgment in Ananta Rai v. Indian Iron and Steel Co. (Supra) was a decision of the Single Judge following the said Division

Bench decision of Rabindra Nath Pal (Supra). It was, inter alia, held therein that the company''s prayer for the recovery of possession should not

be allowed. We are told that the matter is pending decision in the Supreme Court being S.C.A. No. 8 of 1972. As the Bench decision in the case

of Rabindra Nath Pal (Supra) is in our opinion no longer good law, in view of the Supreme Court decisions, the Single Bench decision also falls in

the same line and cannot be regarded as laying down the correct principle. So is the decision in Kali Pada Saha''s case (Supra). Two Bench

decisions of this Court in Md. Idris'' case (Supra) and Fakir Ch. Chakraborty''s case (Supra) do not go against the principle laid down in these

appeals.

55. The net result of all this discussion is that the suit for partition giving rise to the First Appeal and the suits for recovery of possession and for

arrears of rent are maintainable and the application for final decree in the partition suit can successfully proceed. We have held that the Plaintiffs in

all these suits are not proprietors but non agricultural tenants.

56. Lastly, we may record that Mr. Das Gupta, the learned Senior Government Pleader, conceded that Ex. 3, viz. the circular discussed earlier

binds the State Government. We might also mention that the applications were filed and moved by and on behalf of the Plaintiff-Respondent for

reception of additional evidence of pattas of 1304 and 1311 B.S. for the purpose of showing that the land is non-agricultural. No objection is

raised by the Appellant for reception of the said pattas as additional evidence. Moreover, it is almost an admitted position that the lands are non-

agricultural. In that view we do not require the said documents for the purpose of arriving at the conclusion for which the said documents are filed.

Mr. Panchanan Pal appearing for the Plaintiff-Respondent in the First Appeal supported Mr. S.C. Mitter appearing on behalf of the Plaintiff-

Respondent in the Second Appeals.

57. In the result, all the appeals are dismissed with consolidated costs, hearing fee is being assessed at 10 gold mohurs for each day of hearing, to

be divided equally among the five appeals.

K.J. Sen Gupta J.

58. I agree.