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have already explained what is meant by the word "copy" in sub-s. (3) of s. 81 and we are of the view that the defects pointed out on behalf of the appellant are not of such a character as to invalidate the copy which was served on the appellant in the present case.

In conclusion we have to point out that we allowed one Dr. Z. A. Ahmed to intervene in these appeals on the grounds mentioned in his petition dated April 4, 1963. The intervener supported the arguments advanced on behalf of the appellant. We have fully dealt with those arguments in this judgment and nothing further need be said about the intervener's petition.

For the reasons given above, we see no merit in these two appeals. The appeals are accordingly dismissed with costs.

Appeals dismissed.

1968

May 7.

SUBODH GOPAL BOSE

v.

AJIT KUMAR HALDAR AND OTHERS

(B. P. SINHA C.J., J. C. SHAH and N. RAJAGOPALA AYYANGAR JJ.)

Revenue Sale—Suit for recovery of possession on annulment of encumbrance—Execution of decree during the pendency of appeal but before amendment of law—Abatement of suit—Bengal Land Revenue Sales Act, 1859 (XI of 1859), s. 37—Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950 (W.B. VII of 1950), ss. 4,7.

The appellant purchased a Touzi at a revenue sale held under the Bengal Land Revenue Sales Act, 1859, annulled

the encumbrances under s. 37 of the Act and sued the respondents for ejectment and recovery of possession. The trial court decreed the suit and an appeal was taken to the High Court. While the appeal was pending the Bengal Land Revenue Sales (West Bengal Amendment) Act came into force on March 15, 1950. The High Court found that the respondents' property was a tenure in existence at the date of the issue of the notification of sale as mentioned in cl. b (1) of s. 37 of the Act as amended by s. 4 of the Amending Act and possession of the disputed property had been delivered to the appellant before commencement of the Amending Act but during the pendency of the appeal. It held that the land in dispute came within the protection of ss. 4 and 7 of the Amending Act, allowed the appeal and directed the trial court to record an order of abatement of the suit under s. 7 (2) thereof.

It was contended by the appellant in this Court that after the delivery of possession no controversy remained in existence and that s. 4 of the Amending Act had no retrospective operation.

Held that although s. 4 of the Amending Act was *prima facie* prospective, it was retrospective to the extent it was made so by s. 7 of the Amending Act and applied to pending litigation.

It is well settled that an appeal is a continuation of the original suit and as the present suit was pending in appeal before the High Court and the decree had not become final before the commencement of the Amending Act, it must be held to have abated under s. 7 (1) (a), and not s. 7 (2) of the Amending Act as decided by the High Court, as soon as that Act came into force and it was not necessary to consider the effect of the delivery of possession during the pending of the appeal.

The Amending Act of 1950 intended to grant relief to tenure holders if their tenures had not been wiped out by annulment under s. 37 of the old Act before the Amending Act came into force.

Section 4 of the Amending Act read with s. 7 of the Act granted relief even in respect of revenue sales held before its commencement.

Section 7 contemplated three kinds of cases, namely, (i) a pending suit or proceeding for ejectment; (2) pending

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appeal or application for review or application for revision arising out of the first category made by an unsuccessful plaintiff, and (3) a final decree or order made for ejectment. A decree or order against which an appeal had been filed and was pending on the date of the commencement of the Amending Act, if by the unsuccessful plaintiff or applicant would be covered by s. 7 (1) (b), whereas a decree or order for ejectment which became final because either no appeal was preferred against it, or if there had been one, it was finally decided, would be within the purview of s. 7 (2). If such a final decree for ejectment had been executed by delivery of possession before the commencement of the Amending Act, the Legislature did not intend to reopen such closed transactions. But except those, in all the above categories, if the suit, appeal or proceeding could not have been validly instituted, preferred or made, in terms of the Amending Act, all those pending suits or appeals or applications would abate according to s. 7 (1) (a) and (b); and the decrees would become void under s. 7 (2).

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 250 of 1961.

Appeal from the judgment and decree dated June 16, 1958, of the Calcutta High Court in Appeal from Original Decree No. 144 of 1948.

B. Sen, S. N. Mukherjee and *R. R. Biswas* for the appellant.

N. C. Chatterjee and *P. K. Ghosh* for the respondents.

1963. May 7. The Judgment of the Court was delivered by

Sinha C. J.

SINHA C.J.—The main question for determination in this appeal, on a certificate granted by the High Court of Calcutta, is the scope and effect of ss. 4 & 7 of the Bengal Land Revenue Sales (West Bengal Amendment) Act (West Bengal Act VII of 1950)—which hereinafter will be referred to as the Amending Act—which came into force on March 15, 1950.

The suit out of which this appeal arises was instituted as long ago as December 6, 1945, and has had rather a long and chequered career. The plaintiff, who is the appellant in this Court, instituted the suit for ejectment of the defendants from the disputed property on the ground that he had annulled the defendants' interests, whatever they were, under s. 37 of the Bengal Land Revenue Sales Act (Central Act XI of 1859), by virtue of his auction purchase, on January 6, 1936, of the entire revenue paying estate, Touzi No. 6 of the 24 Parganas collectorate. After the auction purchase aforesaid, he obtained possession from the Collector in May-June, 1936, and thereafetr annulled and avoided all intermediary interests except those protected under s. 37 of Act XI of 1859, by appropriate notices, in or about June, 1936. The land in dispute was described in the plaint as Mal land of the said Touzi and other Touzies and the plaintiff asked for *Khas* possession to the extent of his 1/6th share, jointly with the defendants. The suit was contested by the first defendant-respondent on a number of grounds, of which it is necessary to mention only the contention of fact, that the suit lands were not Mal lands, as alleged by the plaintiff, and had never been assessed to revenue, nor were they included in the Mal assets of Touzi No. 6. It was also claimed by the defendants that the lands in dispute were *Brahmottar Lakheraj* lands which were never within the regularly assessed estate, Touzi No. 6. Hence, the main issue, on question of fact, between the parties was: "Is the land in dispute Mal land of Touzi No. 6 or is it *Lakheraj*?" On this question, the learned Subordinate Judge, by his judgment and decree dated April 20, 1948, held in favour of the plaintiff and decreed the suit for possession, with *mesne profits*, to be ascertained later. The learned Subordinate Judge held that the land in suit was Mal land of the Touzi No. 6 and other Touzies, and that the defendants' interest was not protected from annulment under s. 37 of the Act

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of 1859. The first defendant appealed to the High Court in July, 1948; and the appeal was pending when the Amending Act was enacted. When the appeal was put up for hearing before a Division Bench on March 8, 1954, the learned Judges thought it necessary to call for a finding on the question whether possession had already been delivered to the successful plaintiff in execution of the decree of the Trial Court, before the Amending Act came into force. This enquiry was instituted in view of the sworn petition filed on behalf of the plaintiff at the hearing in the High Court that he had already obtained possession in execution of the decree on March 29, 1949, and that, therefore, s. 7 of the Amending Act did not render the appeal void. The defendant-appellant in the High Court contested this statement of fact. The learned Subordinate Judge submitted a finding to the High Court to the effect that possession of the disputed property had been delivered to the decree holder, as alleged by him, on March 29, 1949.

The High Court accepted the finding of the Trial Court that possession had been delivered to the decree-holder in pursuance of the Trial Court's decree. The High Court further considered the effect of the proceedings taken at the execution stage. It appears that the plaintiff had made an application for delivery of possession on March 28, 1949, and the following day, on March 29, 1949, the judgment debtor, who had already preferred his appeal to the High Court, filed a petition to the Court praying for one month's time to bring a stay order from the High Court and for stay of process meanwhile. The learned Subordinate Judge disposed of the petition, in the following terms :

> "Judgment-debtor files a petition, praying for one month's time to bring a stay order and for stay of process in the meantime. Heard learned

lawyer. Re-call and put up in the presence of both parties. Inform Nazir."

The High Court very elaborately considered the effect of this order with reference to decided cases of different High Courts, and came to the conclusion that the delivery of possession which had been given to the decree-holder was without authority and hence a nullity. The High Court then considered the effect of ss. 4 & 7 of the Amending Act and came to the conclusion that the land in dispute being part of a permanent tenure, held rent-free (Niskar), was protected under the provisions of the sections aforesaid. The High Court took the view that the decree passed by the Trial Court had become void under s. 7 (2) of the Amending Act, and that s. 7 (1) (b) had no application. It also took the view that s. 7 (1) (a) would apply and on that account the plaintiff would be entitled to refund of the court fees, as the suit had abated. But even so, the High Court was not prepared to accept the position that the defendant was entitled to the benefit of s. 7 (1) (a) to the effect that the suit pending at the appellate stage had abated.

In the result, the High Court allowed the appeal, set aside the judgment and decree of the Trial Court and directed that Court to record an order of abatement of the suit and to pass an order for refund of court fees in favour of the plaintiff. The High Court directed the parties to bear their own costs, both in the Trial Court and in the High Court.

On this appeal, it has been pointed out on behalf of the appellant, that the suit when instituted was a good one in view of the provisions of s. 37 of the Act XI of 1859, and that s. 4 of the Amending Act, which amended s. 37 of the main Act would not govern the present controversy for two reasons, namely, (1) that delivery of possession had already been given to the plaintiff in execution of the decree

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of the Trial Court in his favour, and that, therefore, the controversy had been finally closed in his favour and (2) because s. 4 was not in terms retrospective. It is true that s. 4 begins with the words "For Section 37 of the said Act, the following section shall be substituted," and then follow the terms of the section, as it is now. *Prima facie*, therefore, it is prospective in its operation. But when we look to the provisions of s. 7, it becomes abundantly clear, as rightly pointed out by the High Court, that the section was retrospective in so far as it was made applicable to pending litigations. Section 7 is in these terms :

> "7. (1) (a) Every suit or proceeding for the ejectment of any person from any land in pursuance of section 37 or section 52 of the said Act, and
>
> (b) Every appeal or application for review or revision arising out of such suit or proceeding, pending at the date of commencement of this Act shall, if the suit, proceeding, appeal or application could not have been validly, instituted, preferred or made had this Act been in operation at the date of the institution, the preferring or the making thereof, abate.
>
> (2) Every decree passed or order made, before the date of commencement of this Act, for the ejectment of any person from any land in pursuance of section 37 or section 52 of the said Act shall, if the decree or order could not have been validly passed or made had this Act been in operation at the date of the passing or making thereof, be void : Provided that nothing in this section shall affect any decree or order in execution whereof the possession of the land in respect of which the decree or order was passed or made, has already been delivered

before the date of commencement of this Act. (3) Whenever any suit, proceeding appeal or application abates under sub-section (1) or any decree or order becomes void under sub-section (2), all fees paid under the Court-fees Act, 1870, shall be refunded to the parties by whom the same were respectively paid."

It is common ground that the present suit is one for ejectment in pursuance of s. 37 of Act XI of 1859. Hence, s. 7 (1) (a) comes into operation. As will presently appear, s. 7 (1) (b) would not apply to the appeal pending in the High Court. There cannot be the least doubt that the suit was pending in the High Court, on appeal, at the commencement of the Amending Act, it being well-settled that an appeal is a continuation of the original suit. That being so, the question is whether the suit could have been validly instituted, had the Amending Act been in operation at the date of the institution of the suit. That brings in the provisions of s. 4. The relevant provisions of that section are as follows :

"4. For section 37 of the said Act, the following section shall be substituted, namely :—

"37. (1) The purchaser of an entire estate in the permanently settled districts of West Bengal sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed after the time of settlement and shall be entitled to avoid and annul all tenures, holdings and leases with the following exceptions :—

(a) tenures and holdings which have been held from the time of the permanent settlement either free of rent or at a fixed rent or fixed rate of rent, and

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(b) (i) tenures and holdings not included in exception (a) above made, and

(ii) other leases of land whether or not for purposes connected with agriculture or horticulture,

existing at the date of issue of the notification for sale of the estate under this Act :

x x x x

(2) For the purposes of this section :—

(a) (1) 'tenure' includes a tenure as defined in the Bengal Tenancy Act, 1885,

x x x x"

By virtue of s. 37(1), is amended, the plaintiff as the purchaser of the entire estate, Touzi No. 6, sold for recovery of arrears on account of that Touji, had acquired the estate free from all encumbrances and was entitled to avoid and annul all tenures except those detailed in (a) and (b) of that section. Section 37 (1) (a) would not come into operation in this case because the finding is that the defendants had failed to prove the existence of tenure since the time of the Permanent Settlement. But Cl. (b) (i) would apply if it was a tenure in existence at the date of the issue of the notification for the sale of the estate. The defendant's property was a tenure so in existence, on the finding by the High Court that the tenure had been in existence from before 1910.

On the facts so found, what is the legal position? The Amending Act of 1950 was intended to grant relief to tenure holders under proprietors whose estates had been sold under the Act of 1859, if those tenures had not been wiped out as a result of annulment under s. 37 of the old Act, and those

annulments had become accomplished facts before the Amending Act came into force on March 15, 1950. Section 4 grants relief to tenure-holders even in respect of revenue sales held before that date, if the provisions of s. 7 which give retrospective operation as aforesaid to the substantive provisions of the Amending Act, which had extensively cut down the rigours of the old s. 37 are attracted, Section 7 contemplates three kinds of cases, namely, (1) a pending suit or proceeding for the ejectment of any person in respect of his tenure or lease-hold, irrespective of whether or not the lease was for purposes connected with agriculture or horticulture; (2) pending appeal or application for review or application for revision arising out of (1) above, this appeal or application being one by an unsuccessful plaintiff and not by an unsuccessful defendant, because the abatement contemplated by the section intended to close the door against an attack on pre-existing title and not against defence of such a title ; and (3) a final decree or order made for ejectment. A decree or order against which an appeal has been filed and has been pending on the date of the commencement of the Act, if it is by the unsuccessful plaintiff or applicant, would be covered by s. 7(1)(b); whereas a decree or order for ejectment which has become final because either no appeal was preferred against it, or if there had been one, it has been finally decided, would be within the purview of s. 7(2). If such a final decree for ejectment has been executed by delivery of possession of the land in question, before the commencement of the Amending Act, the legislature did not intend to reopen such closed transactions. But except these, in all the categories (1) to (3) above, if the suit, appeal, or proceeding could not have been validly instituted, preferred or made, in terms of the Amending Act, all those pending suits or appeals or applications would abate according to s. 7 (1)(a) and (b); and the decrees would become void according to s. 7(2).

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Under which category would the suit in the instant case come? It is well-settled that a pending appeal is a continuation of the suit out of which it arises. In other words, the suit is pending on appeal. Hence, the present suit, which was pending in the High Court on the date the Amending Act came into force, will come within the purview of s. 7(1)(a). It will not come under the second category because it is not on appeal by an unsuccessful plaintiff, nor will it come under category (3) above, because the decree passed against the defendant had not become final in the sense already indicated. Hence, in partial disagreement with the High Court, we hold that the suit pending in the High Court on appeal had abated on March 15, 1950, under s. 7(1)(a) as soon as the Amending Act came into force. In this view of the matter, it is not necessary to consider the effect of the delivery of possession, given as aforesaid, during the pendency of the appeal in the High Court.

In the result, the appeal fails and is dismissed, though not for the same reasons as prevailed in the High Court. In view of the fact that the suit has failed on account of the coming into force of the Amending Act during the pendency of the litigation, there will be no orders as to costs in this Court also.

Appeal dismissed.