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HIRAJI TOLAJI BAGWAN

v.

SHAKUNTALA

JANUARY 16, 1990.

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[K.N. SAIKIA AND P.B. SAWANT, JJ.]

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958: Sections 38 and 46—Transfer of land after Ist August, 1953 by partition—Whether confers on transferee a right to terminate tenancy.

C

The appellant was a protected lessee or tenant of the agricultural land in dispute, under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. The respondent became the landlady of the land on June 29, 1959 when her father effected a partition of his ancestral lands between himself, on the one hand, and his wife and his two minor daughters, including the respondent, on the other. This was the third partition effected by the respondent's father, who had earlier also twice partitioned the same lands.

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Sometime in 1962, the respondent initiated proceedings against the appellant for recovery of possession of the suit land on the ground of default. The Tehsildar dismissed the application holding that the respondent was not a landlady since the partition in question was illegal. The Deputy Collector in appeal confirmed this decision, and the Maharashtra Revenue Tribunal rejected the respondent's revision.

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In the Writ Petition filed before the High Court under Article 227 of the Constitution against the above decision of the three authorities below, the High Court remanded the matter to the Tehsildar for investigation into the validity of the partition. On remand, the Tehsildar held that the partition effected on June 29, 1959 was bogus.

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Thereafter, in a different proceeding the Maharashtra Revenue Tribunal had held that the said partition was binding. Therefore, in the appeal against the decision of the Tehsildar, the Deputy Collector following the said decision of the Revenue Tribunal, held the partition valid and allowed the respondent's application for eviction. The Revenue Tribunal, in revision, confirmed this order of the Deputy Collector.

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The appellant preferred a writ petition before the High Court. It was, *inter alia*, contended before the High Court that: (1) the partition was contrary to the provisions of Hindu Law; and (2)even assuming that the partition deed of June 29, 1959 was a valid document, the same had to be ignored since it could not confer the title of ownership on the respondent transferee in view of the provisions of section 38(7) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. The High Court however dismissed the petition holding that what was produced before the courts below was a family settlement.

Allowing the appeal, this Court,

HELD: (1) A partition of the property can only be among the parties who have a pre-existing right to the property. Under the Hindu Law, a female, major or minor has no share in the ancestral property. A female is given a share either in the self-acquired property of the husband or the father, or in the share of the husband or the father in the coparcenary property after the property is partitioned. There cannot, therefore, be a partition and hence a family settlement with regard to the ancestral property so long as it is joint, in favour of either the wife or the daughter. [70C-D]

(2) The position that obtain under section 38(7) after the Amending Act of 1963, is that any transfer of land effected after 1st August 1953 whether by way of partition or otherwise, has no effect of conferring on the transferee a right to terminate the tenancy of the tenant who was a protected lessee and whose right as such protected lessee had come into existence before such transfer or partition. This amendment is admittedly retrospective in operation. [71G-H; 72A]

(3) The appellant was tenant since prior to 1st August 1953 and had also continued to be such tenant till April 1, 1961. Hence he became a statutory owner under section 46 of the Act on and from April 1, 1961. Any proceedings for evicting him on the ground that he was a tenant and, therefore, had fallen in arrears of rent could not have, therefore, been adopted in 1962. [72C-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 735 of 1975.

From the Judgment and Order dated 21.6.1974 of the Bombay High Court in Spl. Civil Appln. No. 15 of 1971.

U.U. Lalit and A.G. Ratnaparkhi for the Appellants.

M.S. Gupta for the Respondent.

The Judgment of the Court was delivered by

A

SAWANT, J. These proceedings arise under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as the Act). The appellant Hiraji Tolaji was admittedly a protected lessee or tenant of the agricultural land being Survey No. 30 of Village Madha, Taluqa Chikhali District Buldana. B The land measures approximately 25 acres and 31 gunthas. The respondent who is mentally disabled became the landlady of the land in question in quite queer circumstances which to say the least are indefensible in law. Her father, one Mr. Brijlal Bansilal owned as many as 568 acres of land of which the suit lands are a part. The lands admittedly are ancestral. He effected first partition of his entire holding of lands on January 31, 1949 between himself on the one hand and his C wife and a minor son on the other. On December 16, 1950, he effected a second partition of the very same lands between himself on the one hand and his wife and his son on the other. Again on June 29, 1959 he effected a third partition of the said lands between himself on the one hand and his wife and his two minor daughters including the respon- D dent on the other. There is further no dispute that it is in this third partition that the suit lands were given to the share of the respondent and the respondent became the alleged landlady w.e.f. the date of the said partition.

2. It appears that sometime in 1962, the respondent through her guardian, namely her father Brij Lal initiated proceedings against the E appellant for recovery of possession of the suit land on the ground of default in payment of rent for three years, namely 1959-60, 1960-61 and 1961-62. By his decision of April 30, 1963 the Tehsildar dismissed the application holding that the respondent was not a landlady since the partitions in question were illegal. The Deputy Collector in appeal confirmed the said decision by his Order dated November 26, 1963. F The respondent's revision before the Maharashtra Revenue Tribunal also failed when the Tribunal rejected it by its decision of April 29, 1965. In the Writ Petition filed before the High Court under Article 227 of the Constitution against the said decision of the three authorities below, the High Court by its Order dated October 4, 1966 remanded the matter to the Tehsildar for investigation into the validity G of the partition.

3. Then started the second round of litigation. On remand, the Tehsildar by his decision of March 16, 1968 held that the partition effected on June 29, 1959 (which was the only material partition so far as the respondent was concerned) was bogus. Hence the notice of H demand and therefore the proceedings for recovery of possession pursuant thereto, were bad in law.

It appears that thereafter in a different proceeding the Maharashtra Revenue Tribunal on June 25, 1968 had held that the said partition was binding. It is after this decision of the Tribunal as stated earlier in an altogether different proceeding, that the matter came up for hearing in appeal filed by the respondent before the Deputy Collector, against the decision of the Tehsildar given on March 2, 1968. The Deputy Collector, therefore, followed the said decision of the Revenue Tribunal, and by his decision of April 16, 1969 held that the partition being valid, the respondent was the landlady of the suit land and, therefore, notice given by her, terminating the tenancy on the ground of default of rent and the proceedings filed for recovery of the suit land, were proper. He also held that the appellant was in arrears of rent for three years as contended by the respondent and, therefore, allowed the said application for eviction of the appellant from the suit land.

Against the said decision, the appellant preferred a revision before the Revenue Tribunal and the Tribunal by its decision of September 15, 1970 confirmed the findings of the Deputy Collector.

Aggrieved by the decision, the appellant preferred a Writ Petition before the High Court under Article 227 of the Constitution, and the High Court by its impugned decision of June 21, 1974 dismissed the petition. Hence this appeal.

4. Before the High Court, two obvious illegalities committed by the lower authorities were highlighted on behalf of the appellant. The first illegality was that the property being admittedly ancestral, Brijlal could not have effected partition of the property between himself on the one hand and his wife and his daughter on the other. In all the three partitions effected on July 31, 1949, December 16, 1950 and June 29, 1959, wife was one of the parties to the partitions. In the third partition made on June 29, 1959 besides his wife, the other parties to the partition were two minor daughters. Secondly, the same property is shown to have been partitioned by Brij Lal on three occasions. Admittedly, the partition of June 29, 1959 is between Brij Lal on the one hand and his wife and two minor daughters including the respondent on the other. This partition was obviously contrary to the provisions of Hindu Law. Hence the respondent in any case could not have become a landlady of the suit land because it is in this third partition of June 29, 1959 that the said land is alleged to have gone to the share of the respondent. The High Court dismissed this contention with regard to the patent illegality by giving a spacious reason that the question

A referred to the Tehsildar in its earlier remand order, namely the validity or otherwise of the partition, was investigated by the three authorities and that they had given a finding upholding the partition. The High Court further held that what was produced before the courts below was a family settlement and since the said family settlement created a right in favour of the respondent she should be held to have
B become the owner of the suit land. Unfortunately, the High Court lost sight of the fact that the family settlement which is accepted by the Courts in lieu of partition, is a settlement which gives share to the parties as per their legal entitlement and not a settlement which is made or purported to have been made to circumvent the law. A partition of the property can only be among the parties who have a pre-
C existing right to the property. Under the Hindu Law, a female, major or minor has no share in the ancestral property. A female is given a share either in the self-acquired property of the husband or the father, or in the share of the husband or the father in the coparcenary property after the property is partitioned. There cannot, therefore, be a partition and hence a family settlement with regard to the ancestral
D property so long as it is joint, in favour of either the wife or the daughter. Since this obvious illegality was ignored by the High Court, it will have to be held that the High Court's decision was patently wrong. The respondent, therefore, never became the landlady of the land and it was Brij Lal who continued to be the landlord of the same. Hence the notice given by the respondent and the proceedings for
E eviction adopted by her are misconceived. Her application for possession of the land has, therefore, to be dismissed.

5. The seond obvious illegality which was brought to the notice of the High Court was that even assuming that the partition deed of June 29, 1959 was a valid document, the same has to be ignored since it
F could not confer the title of ownership on the respondent transferee in view of the provisions of Section 38(7) of the Act. Under Section 46 of the Act, a protected tenant becomes the owner of the land on and from April 1, 1961. Under section 38(1), however, a landlord is given a right to evict a tenant if he wants the land for *bona fide* personal cultivation. The right to adopt the proceedings for possession of the land has to be
G exercised on or before March 31, 1961. The condition precedent to such application, however, is that the landlord should have given a notice to the tenant, for the purpose, on or before November 15, 1961. Under Section 38(2), the time to apply for possession is extended in the case of the landlord who is a minor, widow or a person subject to any physical or mental disability. We are concerned in the present case
H with a person who is mentally disabled, since the respondent is alleged

to be a mentally disabled person. Further the proviso to sub-section (2) of Section 38 also makes it clear that where such person is a member of a joint family, the time given to the landlord to terminate the tenancy is not extended if atleast one member of the joint family is outside the categories of the disabled persons. Such disabled person, further, has to be the owner of the land on March 31, 1961.

6. The sum total of these provisions is that the appellant in the present case would become the owner of the suit land on and from Ist April, 1961 if the respondent did not intervene as the landlady of the suit land before that date. Admittedly, the respondent is alleged to have become the landlady by virtue of the partition effected on June 29, 1959. Section 38(7) of the Act, however, states as follows:

> "Nothing in this section shall confer on a tenure-holder who has acquired any land by transfer or partition after the Ist day of August 1953 a right to terminate the tenancy of a tenant who is a protected lessee and whose right as such protected lessee had come into existence before such transfer or partition."

It may be mentioned here that in some copies of the Act published by the Government Press, instead of the Ist day of August 1953, the date printed is Ist day of August 1963. That is admittedly wrong. We perused the Bombay Tenancy and Agricultural Lands (Vidarbha Region) (Amendment) Act 1963. By that Amending Act, all that was done was to add the words "or partition" after the word "transfer" in Section 38(7). No amendment was made of the date the transfer effected after which would not result in conferring title to the land. In fact, the Amending Act also states that the amendment was effected pursuant to the decision of the Full Bench of the Bombay High Court reported in 1969 Maharashtra Law Journal page 933 where the Court had taken the view that the "transfer" contemplated by the unamended provision of Section 38(7) did not include transfer by partition. It had, therefore, become necessary to include in the "transfer" also transfer by partition and, hence, the Amending Act was enacted only for the purpose of adding the words "or partition" after the words "by transfer" and "before such transfer" in that Section.

7. The position that obtains under Section 38(7) after the Amending Act 1963 is, therefore, that any transfer of land effected after Ist August 1953 whether by way of partition or otherwise, has no effect of conferring on the transferee a right to terminate the tenancy

A of the tenant who was a protected lessee and whose right as such protected lessee had come into existence before such transfer or partition. This amendment is admittedly retrospective in operation. Even assuming, therefore, that the partition of June 29, 1959 was a valid one, it did not give a right to the respondent to terminate the tenancy of the appellant who was admittedly a protected lessee prior to August 1, 1953 and was on the land as such tenant on April 1, 1961.

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8. The result therefore is that firstly, the respondent had not become the landlady of the suit land since the share given to her in the partition was *prima facie* illegal and contrary to the provisions of law. Secondly, assuming that the partition was valid, the respondent had no C right to terminate the tenancy of the appellant on any ground whatsoever. The appellant was a tenant since prior to Ist August 1953 and had also continued to be such tenant till April 1, 1961. Hence he became a statutory owner under Section 46 on and from April 1, 1961. Any proceedings for evicting him on the ground that he was a tenant and, therefore, had fallen in arrears of rent could not have, therefore, D been adopted in 1962. It is unfortunate that the High Court lost sight of the said patent legal position and brushed aside the contention in that behalf on the ground that the question involved was a question of law and fact. We are unable to see what questions of fact were necessary to investigate for the disposal ot the said question. It was a pure question of law arising out of the admitted facts on record.

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9. Hence we allow the appeal, set aside the decision of the High Court and hold that the appellant had become a statutory owner of the suit land on and from April 1, 1961. He was, therefore, not liable to be evicted at the hands of the respondent and the proceedings adopted by her were illegal and stand dismissed. The respondent will pay the costs F throughout.

R.S.S. Appeal allowed.