

Himatrao

Vs

Jaikishandas and Ors.

Civil Appeals Nos. 1034 and 1035 of 1963

(A. K. Sarkar, J. R. Mudholkar, R. S. Bachawat)

04.03.1966

JUDGMENT

MUDHOLKAR, J. –

Both these appeals arise out of a suit instituted by Himatrao, appellant in C.A. 1034 of 1963 for declaration that he is owner of 1 anna 5 pies share in the village Mozara, District Yeotmal and for partition and separate possession of the property that would fall to the aforesaid share. Certain other reliefs were also prayed for by him; but it is not necessary to refer to them for the purpose of deciding these appeals. To this suit he joined other co-sharers in the village as alienees from some of the co-sharers. This suit was instituted by him on December 7, 1939 and was partially decreed on July 31, 1944 by the Court of Sub-Judge, second class, Darwha. He preferred an appeal from the decree of the trial court. So also Pusaram one of the defendants to the partition suit preferred an appeal from the decree of the trial court and some other defendants preferred a cross-objection against that decree. The appeal of Himatrao was allowed while that of Pusaram was dismissed. The cross-objections of Jugalkishore and Jaykumar succeeded while that of Laxman Vinayak who is appellant's brother in C.A. 1035 of 1963 was dismissed. Pusaram preferred two appeals before the High Court from the judgment of the lower appellate court, Second Appeal No. 574 of 1946. Laxman Vinayak preferred Second Appeal No. 608 of 1946. All these appeals were heard together and disposed of by a common judgment. It was urged before the High Court on behalf of Pusaram that the suit for partition had become infructuous because of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. I of 1951) and, therefore, as held in Chotte Khan v. Mohammad Obedullakhan (I.L.R. (1953) Nag. 702 (F.B.) the suit should be dismissed. This contention was upheld by the High Court and an order to this effect was made in all the appeals.

The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (hereafter referred to as the Act of brevity) was enacted, as the long title thereof shows, to provide for the acquisition of the rights of proprietors in estates, mahals, alienated villages and alienated lands in Madhya Pradesh and to make provision for other matters connected herewith. It was not intended to take away each and every kind of right possessed by a person in immovable property situate in such villages. The vesting section is section 3. Sub-section (1) thereof makes it clear that the rights which are acquired by the State were proprietary rights save as otherwise provided in the Act, but not any other kind of right possessed by an owner of property. The consequences of vesting are dealt with by section 4 of the Act, sub-section (2) of which reads thus :

"Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of his homeland, home-farm land, and in the Central

Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting."

It is not disputed on behalf of the respondents and indeed it cannot be disputed, that home-farm land is not affected by the provisions of the Act. In other words, such land was not acquired by the State but was left with the owners thereof. The definition of home-farm is given in section 2(g) of the Act. Clauses (i) and (ii) of this provision give the definition of home-farm in relation to the Central Provinces. But with that definition we are not concerned. The village Mozara was not situate in that part of the former Madhya Pradesh which was within the area of the still earlier Central Provinces of the British times. It is situate in the part of the former Madhya Pradesh which was and is still known as Berar. Clause (3) of that definition gives the definition of home-farm in relation to Berar. According to this definition all land included in holdings which is "(i) under the personal cultivation of the superior holder including land allowed to lie fallow in accordance with the usual agricultural practice; (ii) held by a lessee from the superior holder; and (iii) held by a tenant from the superior holder other than a specified tenant." The village Mozara was one of the villages in which Izara rights were granted under the Waste Land Rules of 1865. The grantees of the rights were known as Izardars or proprietors of the village and they were called superior holders. There were various classes of tenants in the Izara villages such as ante-alienation tenants, permanent tenants, tenants of antiquity and ordinary tenants. In addition, there were also lessees from the superior holders. The aforesaid definition excludes from the home-farm land all land held by ante-alienation tenants, permanent tenants and tenants of antiquity. The result of this is that land under personal cultivation of the superior holder as well as land held by a lessee or ordinary tenant from him became his home-farm land. Quite often, as is the case here, the proprietary right in the village was held by a large number of persons and those persons were thus co-sharers in the village. Some of these villages were partitioned with the result that lands including lands in possession of tenants were separately allocated to the share of each co-sharer. In many cases, however, there was no partition, but various co-sharers by some sort of agreement used to retain possession of some lands in the villages, some of which they used to cultivate personally and grant leases over some of them or create tenancy rights over some of them. An arrangement of the latter kind was only tentative and subject to the result of a perfect partition in strict accordance with the share of each co-sharer in the village. It is the plaintiff's allegation that his case fell in the second category. According to him, out of the original 16 annas interest in the Izara village an interest of 6 annas had already been separated from an interest of 10 annas and that in this 10 annas share he had an interest of 1 anna 5 pies. No doubt, his father was actually in possession of 7 specified fields which had been sold in execution of a decree and latter came in the possession of Pusaram. But this did not represent the full 1 anna 5 pies share to which his father was entitled or to which he is entitled. He admits that these 7 fields were sold in execution of the decree obtained by one Girdharilal against Basantrao, his father, in civil suit No. 43 of 1925. According to him, however, it is only these fields that were sold in execution and not his share in the Izara itself. However, the sale certificates and receipts for possession mention not only these 7 fields but also Basantrao's one anna 3 pies' share in the village. His contention which was accepted by the trial court as well as by the lower appellate Court was that the mention of 1 anna 3 pies' share in the warrant of attachment and receipt was the result of a fraud practiced on the Court by interested persons. According to the trial court Himatrao's share is 1 anna 3 pies while according to the lower appellate Court it was 1 anna 5 pies, In the light of this findings a decree for partition and separate possession of 1 anna 5 pies' share in the village, that is, of land falling to the share of 1 anna 5 pies was granted by the lower appellate Court to Himatrao. It may be mentioned that Himatrao had said in his plaint that the 7 fields which were sold in execution and which later came into possession of Pusaram should be allocated to Himatrao's 1 anna 5 pies' share. The main

contention of Pusaram in the second appeal before the High Court appears to have been that as a result of the previous execution sale he had become the owner not only of 7 fields but of Himatrao's share in the village. Apart from the fact that the finding on each of the points of two lower courts being one of the fact was binding on the High Court, the High Court has erred in the view which it took of the provisions of the Act and of the decision in Chotte Khan's case (I.L.R. (1953) Nag. 702 (F.B.)).

What we have, therefore, to consider is whether the High Court was right in throwing out the suit as infructuous. It is no doubt true that so far as the proprietary interest in the village is concerned the whole of it has now been acquired by the State and vests in it. But under the provisions of the Act compensation is payable to the ex-proprietors by virtue of the provisions of the Act. This proprietary interest is analogous to what is known as the interest of the intermediary in similar Acts enacted in many other States of India. The acquisition of such an interest by the State would not put an end to the various rights of ex-proprietors in their capacity as owners of property. Thus every co-sharer could, despite the acquisition of his proprietary right obtain a declaration from a civil Court as to the fact and extent of his share in the pre-existing proprietary rights of that village so that he could lay claim to a proportionate amount of compensation and to a proportionate extent of home-farm land in that village. The High Court seems to think that inasmuch as Himatrao was admittedly not in cultivating possession of any part of the land in the village he could not lay any claim to a partition of the home-farm land. We have already given the definition of home-farm. It would be clear from it that the village being still undivided every bit of land which was in cultivating possession of any of the co-sharers in the village would be deemed to be in possession of the entire body of co-sharers. The same would apply to land in possession of lessees or ordinary tenants. The right to enforce a claim to a partition of this land is in no way affected by any of the provisions of the Act or by the interpretation placed on the provisions of the Act in Chhote Khan's case (I.L.R. (1953) Nag. 702 (F.B.)). Suffice it to say that Chhote Khan's case (I.L.R. (1953) Nag. 702 (F.B.)) was concerned with the right of an ex-lumbardar to continue after the coming into force of the Act, a suit for possession of abadi land which had vested in the State. In the present suit a number of reliefs which Himatrao claimed are with respect to property which has not vested in the State. A somewhat similar argument was sought to be advanced before the Nagpur High Court on the basis of the decision in Chhote Khan's case (I.L.R. (1953) Nag. 702 (F.B.)) in Rahmatullah Khan v. Mahabirsingh (I.L.R. (1953) Nag. 983). While rejecting the argument the majority of the Judges who decided the case pointed out that a distinction has to be made between a suit brought by a proprietor in his character as proprietor for possession of property which the law then in force authorised him to claim by a suit for the benefit of the entire body of proprietors and a suit based upon trespass upon his individual rights obtained by him irrespective of his character as such proprietor. If this distinction had been borne in mind by the High Court it would not have dismissed the suit as wholly infructuous.

An argument was sought to be advanced on behalf of the respondents by Mr. Patwardhan that the suit was also barred by the principle of *res judicata*. However, learned counsel realising that there was no substance in that contention gave it up. We, therefore, need say nothing more on the point.

For the reasons which we have given, it is clear that the matter must go back to the High Court for deciding the appeals before it on their merits. Dr. Barlingay, who appears for Laxman Vinayak, has said that he adopts the arguments addressed before us on behalf of Himatrao by Mr. S. T. Desai and has nothing to add. He said he would be content with the order that the appeals be heard and decided on merits by the High Court.

In the result, therefore, we allow the appeals, set aside the decrees passed by the High Court and remit the entire suit to the High Court for decision on merit. The respondents should pay the costs in this Court and the High Court and the costs of the trial court and to be incurred hereinafter will be as in a partition suit.

Appeals allowed.

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