A

JIJABAI VITHALRAO GAJRE

v.

PATHANKHAN & ORS.

September 1, 1970

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[J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.]

Hindu Law—Hindu adoption and Guardianship Act 32 *of* 1956—*Father and mother living separately—Minor daughter living with mother—Mother is natural guardian.*

Constitution of India, Art. 227—*Jurisdiction of High Court.*

C

The Bombay Tenancy & Agricultural Lands (Vidarbha Region) Act, (Bombay Act 99 *of* 1958), *ss.* 38, 39—*Application under s.* 39 *does not lie when tenancy created prior to April* 1, 1957—*Application under s.* 39 *may be treated as one under s.* 38 *in suitable circumstances.*

The appellant obtained from her father under a gift a piece of land admeasuring 27 acres and 37 gunthas. As owner of the land she served a notice dated March 31, 1962 on the tenant informing him of her intention to terminate his tenancy of the land on the ground that she

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required the land *bona fide* for her personal cultivation. On March 30, 1963 she filed an application before the Naib Tahsildar under s. 36 read with s. 39 of the Bombay Tenancy & Agricultural Lands (Vidarbha Region) Act (Bombay Act 99 of 1958) for termination of the tenancy of the tenant and for directing him to surrender possession of the entire land. Later the application was amended to include an alterntive plea for being given possession of half the land in question in case possession

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of the entire land could not be given. The tenant resisted the application. The Naib Tahsildar held : (1) that the application filed by the landlord under s. 36 read with s. 39 was maintainable and that the notice issued by her on March 31, 1962 was valid; (2) that the landlord was born on July 6, 1944 and attained majority on July 6, 1962; (3) that under s. 39 (as interpreted by the Naib Tahsildar) the landlord was entitled to file the application within one year after her attaining majority and in this case the application had been filed within that time; (4) that there

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were oral leases granted by the mother of the landlord in favour of the tenant from 1951 onwards and that the tenant had also executed a *kabuliyat* in favour of the landlord represented by her mother on February 12, 1956 for the year 1956-57 and that he had been in possession of the land as tenant even during the period 1958-59; (5) that since, however, the father of the landlord was alive, and was in law her natural guardian, the leases granted by the mother were not valid; (6) that, nevertheless, since the tenant was in occupation of the land during 1958-59 he was

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a deemed tenant under s. 6 of Bombay Act 99 of 1958; (7) that since the deemed tenancy arose after April 1, 1957 the landlord was entitled to get relief under s. 39 of the Act; (8) that the landlord had no other land and no other source of income and the suit land were less than a family holding. In the result the Naib Tahsildar ordered that the possession of the entire land be granted to the appellant. The order was confirmed by the Sub-Divisional Officer and substantially confirmed by the Revenue Tribunal. These three orders were challenged by the tenant in

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a writ petition under Act 227 of the Constitution. The High Court taking into account the finding of the Revenue Tribunal that the appellant's

father was not taking any interest in his minor daughter's affairs and the mother was looking after her and managing her properties, held that in the circumstances the mother must be considered the natural guardian. Consequently in the High Court's view the lease granted by the mother on February 12, 1956 was legal and valid. The lease being one recorded prior to April 1, 1957, s. 39 was not attracted. The High Court further held that since the application under s. 39 was not filed within one year of the coming into force of Bombay Act 99 of 1958, it was time-barred. However treating the application as one under s. 38 of the Act the High Court remanded the case to the Naib Tahsildar to give effect to its view that the appellant was entitled to resume for cultivation one third of the family holding or half of the land leased by her whichever was more. Appeal against the High Court's order was filed in this Court by special leave. The questions that fell for consideration were : (i) whether the High Court had exceeded its jurisdiction under Art. 227; (ii) whether the appellant's mother was entitled in law to grant a lease of her land and whether the tenancy of the tenant was one created prior to April 1, 1957 to which s. 39 was not applicable; (iii) whether the application under s. 39 was barred by limitation.

HELD : (i) The powers of the High Court under Art. 227 are not greater than the powers under Art. 226 of the Constitution. The powers of interference under Art. 227 are limited to seeing that the tribunals function within the limits of their authority and that the High Court cannot sit in appeal against the order of a tribunal in a petition under Art. 227. In the present case the High Court could not be said to have exceeded its jurisdiction under Art. 227 because it was only on two material aspects of the case which affected the jurisdiction of the tribunals to grant relief, namely, (a) the power of the mother, on the facts found by the tribunals, to grant the lease on behalf of the minor daughter and (b) the maintainability of the application under s. 39 of the Act, that the High Court had differed from the tribunals. [7 C-D]

Nagendra Nath Bora & Anr. v. *Commissioner of Hills Division and Appeals, Assam & Anr.* [1958] S.C.R. 1240 and *Rambhau* v. *Shankar Singh & Anr.* C.A. No. 35/1966 dt. 17-3-1966, applied.

(ii) Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. The High Court was therefore right in holding that in the particular circumstances of this case the mother could be considered to be the natural guardian of her minor daughter. This was the position in Hindu law both before and after the passing of the Hindu Minority and Guardianship Act, 1956. [8 E-H]

There was o evidence to establish that the transaction in question was in any way imprudent or not in the interest of the minor. [9 A-B]

The leases granted by the mother being valid, the tenancy was clearly one granted before April 1, 1957 to which s. 39 was not applicable. [9 E]

(iii) Section 39 being inapplicable the question whether the appellant's application under that section was within the period of limitation did not arise for consideration. [10 B-C]

(iv) The High Court even after holding that s. 39 did not apply had shown consideration to the appellant by treating her application as one

A under s. 36 read with s. 38. Applying s. 38 the appellant would not be entitled to the possession of the entire field. As per cl. (a) proviso (i) of sub-sec. (4) of s. 38 she would be entitled to resume for personal cultivation either one-third of the family holding or half of the lands leased by her, whichever was more. On this basis the directions given by the High Court in remanding the case to the Naib Tahsildar were correct. [10 D-F]

B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 40 of 1967.

Appeal by special leave from the judgment and order dated July 13, 1966 of the Bombay High Court, Nagpur Bench in Special Civil Application No. 499 of 1965.

C *G. L. Sanghi* and *A. G. Ratnaparkhi*, for the appellant.

Danial A. Latifi and *M. I. Khowaja*, for respondent No 1.

The Judgment of the Court was delivered by

Vaidialingam J. This appeal, by special leave, is directed D against the judgment and order dated July 13, 1966 of the High Court of Bombay (Nagpur Bench) in Special Civil Application No. 499 of 1965 filed under Art. 227 of the Constitution by the first respondent herein (to be referred as the tenant).

The appellant (to be referred as the landlord) was the daughter of one Champatrao. She had obtained from her father E under a gift deed dated September 15, 1944 the suit field survey No. 56 of an extent of 27 acres 37 gunthas. As owner of the lands she served a notice dated March 31, 1962 on the tenant informing him of her intention to terminate his tenancy of the lands on the ground that she required the lands bonafide for her personal cultivation. On March 30, 1963 she filed an applica- F tion before the Naib Tahsildar, Darwha under s. 36 read with s. 39 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, Bombay Act No. XCIX of 1958 (hereinafter referred to as the Act) for termination of tenancy of the tenant and for directing him to surrender possession of the entire lands comprised in field survey No. 56. Later on she amended her application and prayed in the alternative that if for any reason G she was found not entitled to get possession of the entire lands, she may be allowed to recover half of the lands in the possession of the tenant and that in respect of that half, in the eastern portion 13 acres and 38 gunthas may be allotted to her.

The tenant resisted the claim of the landlord on various H grounds. He pleaded that the father and mother of the landlord had fallen out very long ago and that the landlord was a minor, was being looked after and protected by her mother Smt. Chandrabhagabai and the mother was managing the suit

properties on behalf of her minor daughter. In the course of such management the suit properties were being leased in his favour from time to time beginning from 1951-52 and as such he has been in possession as tenant from April, 1951. Though the original leases granted by the mother were oral, for the year 1956-57 he had executed a *kabuliyat* in favour of the landlord represented by her mother as guardian. In as much as he has been the tenant of the properties under a lease created prior to April 1, 1957, he had acquired the status of a protected lessee even before the coming into force of the Act. He further pleaded that as the landlord had not filed the application within one year of the coming into force of the Act, her claim was barred by limitation and the application under s. 39 was not maintainable. He had also raised a controversy regarding her date of birth as well as the validity of the notice dated March 31, 1962, issued by the landlord.

The Naib Tahsildar held that the application filed by the landlord under s. 36 read with s. 39 was maintainable and that the notice issued by her on March 31, 1962 was valid. He further found that the landlord was born on July 6, 1944 and attained majority on July 6, 1962. An interpretation of s. 39, the Naib Tahsildar found that the landlord was entitled to file the application within one year after her attaining majority and in this case the application has been filed within that time. He further found that there were oral leases granted by the mother of the landlord in favour of the tenant from 1951 onwards and that the tenant had also executed a lease deed in favour of the landlord represented by her mother on February 12, 1956 for the year 1956-57 and that he has been in possession of the lands as tenant even during the period 1958-59. But the Naib Tahsildar held that as the father of the appellant was alive and was in law her natural guardian, the lease executed by the tenant on February 12, 1956 was not legal and valid as the mother was not entitled to represent her minor daughter. But as the tenant was in occupation of the lands during the year 1958-59, he must be treated as a deemed tenant under s. 6 of the Act. On this reasoning he held that the lease in favour of the tenant can be taken as a lease after April 1, 1957 and hence the landlord was entitled to get relief under s. 39 of the Act. In view of his further finding that the landlord had no other land and no other source of income and as the suit lands were less than the family holding, she was entitled to get possession of the entire lands from the tenant. Accordingly he granted the relief asked for by the landlord in full. The findings of the Naib Tahsildar enumerated above were confirmed by the Sub-Divisional Officer, Darwha in the appeal filed by the tenant. The Maharashtra Revenue Tribunal, whose revisional jurisdiction was invoked by

A the tenant also substantially confirmed the findings of the two subordinate authorities.

All these three orders were challenged by the tenant before the High Court in the writ petition under Art. 227 of the Constitution. The High Court, in its order under appeal, has accepted B the findings of facts regarding the date of birth of the landlord; the date of her attaining majority as well as the legal validity of the notice issued by her on March 31, 1962. The High Court also accepted the finding recorded by the Revenue Tribunal that the father and mother had fallen out and were living separate and that the father was not looking after the interests of his minor daughter and that, on the other hand, the landlord was living C under the care and protection of her mother Smt. Chandrabhagabai, who was also managing the suit properties on her behalf. The High Court also found that the tenant has been in possession of the lands on the basis of the lease granted in his favour by the mother from 1951 onwards. But the High Court differed from the views expressed by the Revenue Tribunal on two important D aspects, namely, (i) legal validity of the lease granted by the mother of the landlord in favour of the tenant and (ii) the maintainability of the application filed by the landlord under s. 39 of the Act. Regarding validity of the lease granted by the mother, the High Court held that even if the oral leases from 1951 onwards are eliminated, there has been a written lease executed E by the tenant on February 12, 1956 in favour of the landlord represented by her mother for the year 1956-57. As the father was not taking any interest in his minor daughter's affairs and as the mother was looking after her minor daughter's interest and managing the suit properties, the mother must be considered, in the circumstances, to be the natural guardian of the landlord and as natural guardian she was entitled to lease the properties and F hence the written lease granted by her on February 12, 1956 was legal and valid, and therefore the lease in favour of the tenant is one created prior to April 1, 1957 and hence s. 39 was not attracted.

The High Court on a construction of s. 39 of the Act held G that as the Act had come into force on January 28, 1961, the application should have been filed within one year, namely, on or before January 28, 1962. The landlord was not entitled to file the application as she has done in the present case within one year of her attaining majority as s. 39 does not give any such extended period for minors. Hence the High Court held that the applica- H tion filed on March 30, 1963 was barred by limitation. Notwithstanding the finding that the application under s. 39 was not maintainable the High Court held that the landlord's application could be treated as one filed under s. 36 read with s. 38 and as

the application had been filed within the period referred to in s. 38, she could be granted relief under the later section. In this view the High Court held that though the landlord was not entitled to possession of the entire field as claimed by her, she is nevertheless entitled to resume for personal cultivation one third of the family holding, or half of the land leased by her, whichever is more. In this view the High Court remanded the proceedings to the Naib Tahsildar for passing necessary orders treating the application filed by the appellant as one under s. 36 read with s. 38.

Mr. G. L. Sanghi, learned counsel for the appellant raised three contentions: (i) the High Court in exercising jurisdiction under Art. 227 of the Constitution has functioned in this case as a Court of Appeal and interfered with the concurrent findings of facts recorded by the three revenue tribunals and such exercise of jurisdiction is not warranted by the decisions of this Court. (ii) the High Court's view that the lease executed by the mother on behalf of the appellant on February 12, 1956, as guardian of the appellant is valid in law, is erroneous: (iii) the High Court's view that the application filed by the appellant before the Naib Tahsildar on March 30, 1963 is barred by limitation and as such the application under s. 39 is not maintainable, is again erroneous.

On the other hand, Mr. Danial A. Latifi, learned counsel appearing for the tenant respondent has urged that the High Court has not exceeded its jurisdiction under Art. 227, but has strictly limited its inquiry to find out whether the subordinate tribunals have functioned within the limits of their jurisdiction. All the findings of facts recorded by those tribunals have been accepted by the High Court. The High Court has only differed on the question of interpretation to be placed on the material sections so as to find out whether the revenue tribunals had jurisdiction to entertain the application of the appellant under s. 36 read with s. 39 of the Act. The learned counsel also pointed out that on the findings recorded by the revenue tribunals about the father not taking any interest in the affairs of the minor daughter, the High Court has come to a different conclusion of law that the mother under the circumstances, was the natural guardian of her minor daughter and was competent to enter into lease transactions on behalf of the appellant. If it was found that the lease transaction entered into with the tenant by the mother of the appellant was valid, the nature of the reliefs to be granted to the appellant under the Act will radically differ. The counsel further urged that the construction placed upon s. 39 of the Act by the High Court is also correct.

A Mr. Sanghi in support of his first contention has drawn our attention to the principles laid down in *Nagendra Nath Bora and another* v. *The Commissioner of Hills Division and Appeals, Assam and others*(1) and (in *Rambhau* v. *Shankar Singh and another*(2). It is no doubt true that this Court has held in those decisions that the powers of the High Court under Art. 227 are B not greater than the powers under Art. 226 of the Constitution.

It has been further laid down that the power if interference under Art. 227 was limited to seeing that the tribunals function within the limits of their authority and that the High Courts cannot sit in appeal against the order of a tribunal in a peti- C tion under Art. 227. In our opinion, the High Court in this case cannot be considered to have exceeded its jurisdiction under Art. 227 of the Constitution. We have already stated that all findings on material facts have been accepted by the High Court. It is only on two material aspects which affect the jurisdiction of the revenue tribunals to grant the necessary relief under D the Act, that the High Court differed. Those were : (i) the power of the mother on the facts found by the tribunals to grant the lease on behalf of her minor daughter and its legal effect; and (ii) the maintainability of the application of the appellant under s. 39 of the Act. Therefore, we cannot accept the contention of Mr. Sanghi that any error has been committed by the High Court in considering these aspects in proceedings under Art. 227.

E The nature of the relief that could be granted to the appellant under the Act depends upon the question whether the tenancy in this case has been created "not earlier than the first day of April, 1957." There is no controversy that the appellant was not owning lands exceeding a family holding. If the tenancy in favour of the tenant in this case is one created "not earlier than F the first day of April, 1957" and if the other conditions mentioned in s. 39 are satisfied, relief could be granted to the appellant under that section. We have already referred to the facts that the appellant's application was under s. 36 read with s. 39. In order to find out whether the lease in this case is one created "not earlier than the first day of April, G 1957", it is really necessary to inquire about the legal effect of the lease executed by the mother as guardian of the appellant on February 12, 1956 for the year 1956-57. If that lease is valid and binding on the appellant, the result will be that s. 39 will not be attracted. Therefore, we will first consider the question as to the legal effect of the lease granted by the mother, which is the subject of the second contention raised by Mr. Sanghi. Mr. H Sanghi urged that on the findings of all the revenue tribunals and

(1) [1958] S.C.R. 1240.

(2) Civil Appeal No. 35 of 1966, decided on March 17, 1966.

accepted by the High Court, Champatrao, the father of the appellant was admittedly alive. If so, the father is the natural guardian of the appellant under the Hindu Law. Though the appellant may have been staying under the protection of her mother Smt. Chandrabhagabai, the mother had no authority in law to execute the lease deed so as to bind the appellant. The counsel further urged that even if it be held that the mother was competent to enter into lease transactions on behalf of her minor daughter, there is no evidence led by the tenant that the lease is beneficial or advantageous to the interest of the minor. Under those circumstances, the counsel urged, the lease is void and has to be ignored, and if so, this is not a case of tenancy created "not earlier than the first day of April, 1957" and hence s. 39 fully applies to the facts of this case.

We are not impressed with this contention of Mr. Sanghi. Mr. Sanghi referred us to certain decisions where the powers of a guardian of a minor have been considered. But in the view that we take that the contention of Mr. Sanghi in this regard is not acceptable to us, no useful purpose will be served by reference to those decisions. We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under s. 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu Law before this enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian.

A It has also been found by the High Court and all the revenue tribunals that the mother was protecting the appellant and looking after her interest and was also managing the suit lands by leasing them to the tenant. There is no evidence to establish that the transaction of lease is in any way an imprudent one or not in the interest of the minor appellant. It has also been found that B the lease in favour of the tenant has begun from 1951. Though the lease for some years was oral, for the year 1956-57 a written lease deed was executed on February 12, 1956 by the tenant in favour of the appellant represented by her mother as guardian. If so, if follow as held by the High Court that the tenancy had been created even prior" to the first day of April, 1957". Though C the revenue tribunals also found that the tenant was in possession of the properties as lessee from 1951 onwards, they declined to recognise his rights, on the view that those leases were not binding on the appellant. That view, as we have already pointed out, is erroneous. Therefore, it follows that the contention of Mr. Sanghi that the High Court's view about the validity and legality of the lease executed by the mother on February 12, 1956 D is not correct, cannot be accepted.

In view of the above finding that the lease executed on February 12, 1956 is valid and binding on the appellant, it follows that this is not a case of a tenancy created by the landlord "not earlier than the first day of April, 1957" which is one of the E essential ingredients for the maintainability of the application under s. 39. Therefore, the third contention of Mr. Sanghi that the construction placed upon s. 39 by the High Court and holding that the application of the appellant is barred by limitation is not correct, does not arise for consideration. The applicability of s. 39 would have arisen for consideration only if it had been found that the lease by the mother is not valid and F by virtue of occupation of the land in 1958-59 the tenant is to be considered as a 'deemed tenant' under s. 6.

We may, however, indicate that the High Court has held that s. 39 will not apply on the ground that the lease in this case is prior to April 1, 1957 and the application filed by the appellant G on March 30, 1963 was barred by limitation. So far as the view of the High Court that the lease in this case is one created prior to April 1, 1957 is concerned, we have already accepted that finding. Regarding the application being barred by limitation, the view of the High Court briefly is as follows: The Act in the Vidharbha region came into force on January 28, 1961. Under s. 39 sub-section 1, the application by the landlord should H be filed within one year from the date of the Act coming into force, *i.e.*, on or before January 28, 1962. Sections 38 and 39A while providing a period for making the application had

also enabled a minor to file an application within one year of his or her attaining majority. Similar provisions are not to be found in s. 39(1). Therefore, the fact that the appellant attained majority on July 6, 1962 and had filed the application within one year of her attaining majority, is of no avail. The High Court declined to accept the contention on behalf of the appellant that the words "but" subject to the provisions of sub-section (2) occuring in s. 39(1) referred to the enabling provisions in favour of the minor contained in sub-section 2 of section 38. At any rate, as one of the ingredients for attracting s. 39, namely, the tenancy having been created after April 1, 1957, is not present in this case and as such s. 39 stands eliminated, we do not think it necessary to express any opinion on the construction placed by the High Court on s. 39(1) regarding other aspects.

The High Court has rightly pointed out that the revenue tribunals have only proceeded to grant relief to the appellant on the basis that s. 39 is applicable. However, the High Court, even after holding that s. 39 does not apply, has shown consideration to the appellant when it has treated her application as one under s. 36 read with s. 38. Applying s. 38, the appellant would not be entitled to the possession of the entire field. As per clause (a) proviso (i) of sub-section (4) of s. 38, she would be entitled to resume for personal cultivation either one third of the family holding or half of the lands leased by her, whichever is more. It is seen that the High Court was informed that the family holding in this case consists of 32 acres and on that basis the High Court held that half of the land leased would be more and as such the appellant would be entitled to get possession of half of the area leased, namely, half of 27 acres and 37 gunthas. It is for the purpose of effecting a division of the leased properties into two halves and place the landlord and the tenant in possession of one portion, that the High Court after setting aside the order of the revenue tribunals remanded the matter to the Naib Tahsildar. Those directions given by the High Court, in our view, are perfectly correct and justified.

The appeal fails and is dismissed with costs of the first respondent.

G.C. *Appeal dismissed.*