

VENKATRAO ANANTDEO JOSHI AND ORS.

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v.

SAU MALATHIBAI AND ORS.

NOVEMBER 15, 2002

[M.B. SHAH AND D.M. DHARMADHIKARI, JJ.]

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Hindu Law: Joint Family property—Suit challenging the transfer of certain land and for partition of property—Decreed by the trial Court for 2/3rd share of suit property in favour of appellants—Appeals for mesne profit and tenancy rights—Appellate Court referred back the matter to trial Court for determination of issue of tenancy right—Affirmed by High Court—On appeal, Held, since transfer of suit property by the father of Appellant No.1 in favour of wife of appellant No.1 was without any legal necessity, compromise decree between respondents and tenant on the suit property did not confer any title against appellant—Order of trial Court restored.

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Civil Procedure Code, 1908; Section 97: Suit for partition—Raising of plea of tenancy at the time of passing of final decree—Validity of—Held, when no appeal was preferred by the aggrieved party against the preliminary decree, it is not open for him to raise contention in the appeal preferred from final decree.

E

Words and Phrases:

'batai patra' and 'lis pendens'—Meaning of.

Appellant No.1 and his mother filed a suit for partition in the joint family property against respondents (wife and father of appellant No.1), and challenged transfer of certain property by the father in favour of wife of appellant No.1. Trial Court passed preliminary decree holding that appellants were entitled to 2/3rd share in the entire property and that father of appellant No.1 had no right to transfer the suit property. Appeal filed by aggrieved father and wife of appellant No.1 was dismissed by the appellate court, and the preliminary decree became final. In the meanwhile, respondent No.3 filed a suit for injunction against the father and wife of appellant No.1 claiming tenancy rights over the suit property, though later on obtained a compromise decree in the matter. Trial Court

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A partly allowed and decreed the pending suit holding that appellants were entitled to 2/3rd share in the suit property and respondent No.3 was not having tenancy rights over the suit property. Appellants preferred appeal for mesne profit and Respondent No.3 filed appeal claiming tenancy rights. Appellate Court directed trial Court to frame a specific issue on the point of tenancy for determination by the competent Court. High Court affirmed it. Hence this appeal.

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C It was contended for the appellants that since preliminary decree became final it was not open for the respondent to raise contention claiming tenancy right at the time of passing of final decree for partition; and that since batai patra was executed pending the suit for partition, it would not confer any rights on respondent (tenant) on the principle of *lis pendens*.

Allowing the appeal, the Court

D **HELD: 1.1.** With regard to *lis pendens*, presuming that batai patra was at all executed by father of Appellant No.1, it was not open to him to execute the same pending disposal of the suit filed by appellant No.1 for partition of the property. [215-E]

E 1.2. Trial Court specifically arrived at the conclusion that father of Appellant No.1 was in possession of the suit property and transfer of part of suit property was without any legal and family necessity as alleged and, therefore, appellants were entitled to 2/3rd share in the suit property. In the Revenue Records also, there is no mutation in favour of Respondent No.3. Further, so called compromise decree in the Suit against father and wife of Appellant No.1 would not confer any title against the appellant.

F [215-G, H; 216-A]

G 2. In a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. The judgment and order passed by the High Court confirming the judgment and order passed by the appellate Court is set aside. The order passed by the trial Court is restored. [216-B-D]

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Mool Chand and Ors. v. Dy. Director, Consolidation and Ors., [1995] A
5 SCC 63, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7295 of
2002.

From the Judgment and Order dated 12.7.2001 of the Bombay High B
Court in AFO No. 48/97.

Manoj Swarup, for the Appellants.

B.N. Deshmukh, Satijit A. Desai Venkateswara Rao Anumoju for
the Respondent. C

The Judgment of the Court was delivered by

SHAH, J. Leave granted.

In appeal from Order No.48 of 1997, the High Court of Bombay, bench D
at Aurangabad by its judgment and order dated 12.7.2001 dismissed the
appeal and confirmed the order passed by the Additional District Judge,
Latur in Regular Civil Appeal No.314 of 1993 directing the trial Court to
frame a specific issue on the point of tenancy and to refer it to the competent
Court for its determination under the Tenancy Act.

Before deciding the question involved, brief resume of facts is necessary. E
Appellant No.1 Venkatrao Anantdeo Joshi and his mother Bhagirathibai (since
deceased) filed Civil Suit No.51 of 1973 for partition against Anantdeo (father
of appellant No.1 since deceased) and Malatibai (wife of appellant No.1). It
was alleged that Anantdeo and Malatibai were residing separately from F
appellant No.1 and his mother at different place. The suit was filed for
partitioning the joint family property, namely, agricultural land in Survey
No.60/A admeasuring 7 acres 3 gunthas, a house and plot at village
Hippalgaon, Taluka Nilanga, District Latur. It was contended that Anantdeo
had transferred a portion of ancestral property in Survey No.60/A in favour
of defendant No.3 (Malatibai) by a registered sale deed dated 25.4.1973. It G
is alleged that Anantdeo was the person of easy virtue and was having drinking
habits and was staying in the company of one Baburao @ Tukaram Khandekar
and Malatibai. The so-called transfer in favour of Malatibai was illegal. By
judgment and decree dated 10.10.1979, preliminary decree for partition was
drawn up holding that Venkatrao and Bhagirathibai were entitled to 2/3rd
share in the entire property. The Court considered the various contentions H

A raised by Anantdeo and arrived at the conclusion that it was joint family property and that defendant No. 1 had no right to transfer it. The Court directed the Collector or any Gazetted subordinate officer to effect the partition of the suit property and separate possession and also directed the Court Commissioner to effect the partition of the suit house and the plot. The Court also directed mesne profits from the date of the suit until delivery of possession.

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Against that preliminary decree, Anantdeo and Malatibai had filed Regular Appeal No.130/1979, which was dismissed on 31st December, 1981. Thereby, the preliminary decree for partition became final. Pending the said appeal, respondent No.3 Baburao filed a suit being Regular Civil Case No.288 of 1981 for injunction against Anantdeo and Malatibai, that is, father and wife of the present appellant No.1 praying that they should be permanently restrained from causing interference into the peaceful possession over the suit land and claimed tenancy rights over the suit property bearing Survey No. 60/A. A compromise decree was obtained on 23rd November, 1981.

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D Anantdeo died on 8.1.1987. Thereafter, appellant No.1 and his mother sold the entire suit property in favour of rest of the appellants by registered sale deed dated 23.8.1989. Thereafter, on 24.10.1989, appellants applied for passing of the final decree for partition in Civil Suit No. 51 of 1973. The trial Court partly allowed the said application and held that appellants were entitled to 2/3rd share of the suit property. The contention of respondent No.3 was negated by holding as under:

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“.....Under such situation to my mind the opponent no.3 was aware about the dispute between the original plaintiffs and Anantdeo and opponent no.1 and hence he could have *suo moto* joined as defendant in the earlier suit raising the contention that he is tenant in the suit land. ‘Batai Patra’ alleged to have been executed by Anantdeo in favour of opponent no.3 is not produced on record. Moreover, there is no entry in the record of right of the suit land to that effect. Hence, I am of the opinion that the opponent no.3 cannot be said to be in possession of suit land on the basis of ‘Batai Patra’ and his possession over the suit land is in other capacity.

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.....For these reasons I hold that the opponent no.3 is not having right over the suit land since 1977 as contended by him. Therefore, I answer this point in the negative.”

H The decree was sent to the Collector for effecting partition.

“Against that order, appellants preferred appeal which was dismissed by the trial Court. Baburao filed separate appeal claiming tenancy rights qua the agricultural land. In these appeals, the Additional District Judge vide its judgment and order dated 22.1.1997 held that claim of Baburao of being a tenant of agricultural land requires to be decided by a competent authority under the Tenancy Act. Hence, the issue is required to be raised before such Court.

Against that judgment and order, the appellants filed Appeal from Order in the High Court. The High Court dismissed the same by impugned judgment. Hence, this appeal.

At the time of hearing of this appeal, learned counsel for the appellants submitted that the plea of tenancy raised by Baburao is on the face of it, bogus so as to defeat the rights of the appellants which are crystalised at the time of passing of the preliminary decree. Presuming that pending the suit for partition, even if batai patra is executed, it would not confer any rights on Baburao as it is hit by principles of *lis pendens*. In any case, as the preliminary decree becomes final, it was not open for Baburao to raise such contention at the time of passing of final decree for partition.

With regard to *lis pendens*, learned counsel for the appellants rightly referred to the judgment and decree passed in Regular Civil Suit No.51 of 1973 and contended that presuming that the so-called batai patra was at all executed by Anantdeo, it was not open to him to execute the same pending disposal of the suit filed by appellant No.1 for partition of the property. In that suit, appellant no.1 and his mother had challenged the transfer of land out of Survey No.60/A and also for partition of the suit property. By elaborate judgment and order, the suit filed by the appellants was decreed to the extent that they were entitled to 2/3rd share in the suit properties. The Court had also directed mesne profits. Till the date of the decree, it was contended by Anantdeo that he was in possession of portion of the suit land and remaining portion was in possession of Malatibai, in view of sale deed in her favour. It has also been specifically contended that for some time, property was in possession of Baburao prior to marriage of Shakuntala Bai and then in possession of one Pandurang Saokar and lastly it was in possession of Malatibai and himself. The Court specifically arrived at the conclusion that Anantdeo was in possession of the suit property and so-called transfer was without any legal and family necessity as alleged and, therefore, appellants were entitled to 2/3rd share in the suit property. In the Revenue Records also, there is no

A mutation in favour of Baburao. Further, so called compromise decree in Civil Suit No.288 of 1981 against Anantdeo and Malatibai would not confer any title against the appellant.

B Further, in a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 of the CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. [Ref. *Mool Chand and Ors. v. Dy. Director, Consolidation and Others*, [1995] 5 SCC 631].

C In the result, the appeal is allowed accordingly and impugned judgment and order passed by the High Court confirming the judgment and order passed by the Additional District Judge, Latur in RCA No.314/93 is set aside. The order passed by the trial Court is restored. There shall be no order as to costs.

D S.K.S.

Appeal allowed.