Vithaldas Jagannath Khatri (D) Through ... vs The State Of Maharashtra Revenue And ... on 29 August, 2019

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Bench: K.M.Joseph, Sanjay Kishan Kaul

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6006 OF 2009

VITHALDAS JAGANNATH KHATRI (D)
Through SHAKUNTALA ALIAS SUSHMA & ORS. ...

VERSUS

THE STATE OF MAHARASHTRA REVENUE
AND FOREST DEPARTMENT & ORS. ...Re

JUDGMENT

SANJAY KISHAN KAUL, J.

1. The socialistic agenda of the nascently formed Indian State with large landless poor population was given an impetus inter alia by a number of State legislations for re-distribution of agricultural land, by putting a ceiling limit on the same, and then allotting it to the landless poor. We are concerned here with the Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961 (hereinafter referred to as the 'said Act'). The said Act also went through many amendments top fine tune different aspects, most importantly the aspect of plugging loopholes, whereby owners having land in excess of the ceiling limit would endeavour to somehow re-distribute it among the family to bring it within the ceiling limit, or at least, to reduce the excess land. The objective of the said Act can well be deciphered from its preamble, which reads as under:

> "An Act to impose a maximum limit (or ceiling) on the holding of agricultural land in the State of Maharashtra; to provide for the acquisition and distribution of land held in excess of such ceiling; to provide that the lands taken over from undertakings and the integrity of which is maintained in compact blocks, for ensuring the full and efficient use of the land for agriculture and its efficient management through corporations (including a company) owned or controlled by the State, be granted to

such corporations or company; and for matters connected with the purposes aforesaid"

2. Chapter III of the said Act made provisions restricting transfers and acquisitions and the consequences of contraventions. The relevant Sections falling in the Chapter are reproduced hereunder:

> "Section 8 - Restriction on transfer Where a person, or as the case may be, a family unit holds land in excess of the ceiling area on or after the commencement date, such person, or as the case may be, any member of the family unit shall not, on and after that date, transfer any land, until the land in excess of the ceiling area is determined under this Act.
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> Explanation :- In this section, "transfer" means transfer, whether by way of sale, gift, mortgage with possession, exchange, lease, assignment of land for maintenance, surrender of a tenancy or resumption of land by a landlord or any other disposition, whether by act of parties made inter vivos or by decree or order of a court, tribunal or authority (except where such decree or order is passed in a proceeding which is instituted in such Court, Tribunal or before such authority before the 26th day of September, 1970), but does not include transfer by way of sale or otherwise of land for the recovery of land revenue or for sums recoverable as arrears of land revenue, or acquisition of land for a public purpose under any law for the time being in force." ....
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> Section 10 - Consequences of certain transfers and acquisitions of land (1) If -
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> (a) any person or a member of a family unit, after the 26th day of September, 1970 but before the commencement date, transfers any land in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972, or
>
> (b) any land is transferred in contravention of section 8, then, in calculating the ceiling area which that person, or as the case may be, the family unit, is entitled to hold, the land so transferred shall be taken into consideration, and the land exceeding the ceiling area so calculated shall be deemed to be in excess of the ceiling area for that holding, notwithstanding that the land remaining with him or with the family unit may not in fact be in excess of the ceiling area.

If by reason of such transfer, the holding of a person, or as the case may be, of the family unit is less than the area so calculated to be in excess of the ceiling area, then all the land of the person, or as the case may be, the family unit shall be deemed to be surplus land; and out of the land so transferred and in possession of the transferee [unless such land is liable to forfeiture under the provisions of sub-section (3)], land to the extent of such deficiency shall, subject to rules made in that behalf, also be deemed to be surplus land, notwithstanding that the holding of the transferee may not in fact be in excess of the ceiling area. Explanation :- For the purposes of clause (a)

'transfer' has the same meaning as in section 8.

All transfers made after the 26th day of September, 1970 but before the commencement date, shall be deemed (unless the contrary is proved) to have been made in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972. Explanation :- For the purposes of this sub-section, a transfer shall not be regarded as made on or before 26th September, 1970 if the document evidencing the transfer is not registered on or before that date or where it is registered after that date, it is not presented for registration on or before the said date. (2) If any land is possessed on or after the commencement date by a person, or as the case may be, a family unit in excess of the ceiling area, or if as a result of acquisition (by testamentary disposition, or devolution on death, or by operation of law) of any land on or after that date, the total area of land held by any person, or as the case may be, a family unit, exceeds the ceiling area, the land so in excess shall be surplus land. (3) Where land is acquired in wilful contravention of section 9, then as a penalty therefor, the right, title and interest of the person, or as the case may be, the family unit or any member thereof in the land so acquired or obtained shall, subject to the provisions of Chapter IV, be forfeited, and shall vest without any further assurance in the State Government:

> Provided that, where such land is burdened with an encumbrance, the Collector may, after holding such inquiry as he thinks fit and after hearing the holder and the person in whose favour the encumbrance is made by him, direct that the right, title and interest of the holder in some other land of the holder equal in extent to the land acquired in wilful contravention of section 9, shall be forfeited to Government.
>
> Section 11 - Restriction on partition Where any land held by a family is partitioned after the 26th day of September, 1970, the partition so made shall be deemed (unless the contrary is proved) to have been made in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972, and shall accordingly be ignored, and any land covered by such partition shall, for the purposes of this Act, be deemed to be the land held by the family; and the extent of share of each person in the land held by the family shall be taken into consideration for calculating the ceiling area in accordance with the provisions of section 3.
>
> Explanation :- For the purposes of this section, 'partition' means any division of land by act of parties made inter vivos, and includes also partition made by a decree or order of a court, tribunal or authority."

3. A reading of the aforesaid provisions would show that a fiction is sought to be created (whereby a transfer made from a prior date, of 26.9.1970, is sought to be nullified, other than by way of a bona fide transaction) by the Amendment Act of 1972, by providing for the cut-off date of 26.9.1970 qua any transactions or transfers, transactions after which date being deemed to be transfers in anticipation, or in order to defeat the object of the Amendment Act of 1972. It may also be noticed that it is only by the Amendment Act of 1975 that the commencement date was specified as 2.10.1975. Thus, while normally all the relevant provisions of the legislation, having come into force from 2.10.1975, the provisions would have applied from that date, i.e. 2.10.1975, a legal fiction was

created to apply the provisions retrospectively, from 26.9.1970. It does appear from the submissions that as the legislation appears to have been debated and been in contemplation for some time, the apprehension of transactions during this window of time, in anticipation of the amendments, was taken care of by the aforesaid provisions.

4. The factual matrix has to be examined in the context of the aforesaid provisions, and in the present appeal we are practically concerned with one document, which is the Partition Deed dated 31.1.1970, which has been duly registered, i.e., both the document and its registration are undisputedly before the cut-off date of 26.9.1970.

5. The Partition deed has been executed between five parties – late Shri Vithaldas Jagannath Khatri and his then minor son and three minor daughters. It may, however, be noticed that two of the minor daughters attained majority before the commencement date of 2.10.1975, though they were not major on 26.9.1970. In terms of this document, the agricultural land of the Hindu Undivided Family ('HUF') is sought to be divided by mentioning all the parties as part of the HUF. The lands were stated to be used jointly and shares in the lands were given to both, the minor son and the daughters stating as under:

> "....Party No.2 to 51 have to take the education & to see that each of them take it freely & to provide for the expenses therefore and to see that each of them will meet the expenses out of their own property and that no dispute took place between them in future, therefore we are executing & keeping with us this deed of partition....."

6. After setting out the aforesaid recital, the property falling to each of the parties is mentioned and post that, before the signatures, it is further stated as under:

> "In this way we have partitioned over estate, the property fallen to the share of party have taken its possession & became the full owner thereof. Now nobody is concerned with the property of others. Out of us for the education & marriage purpose of party No.2 to 5 and for the benefits of our family and for the successful future, we of our free will & consideration executed & kept this deed of partition, on this 31st day of January 1970."

7. We may also notice that the prelude to the aforesaid Partition Deed on account of an earlier Partition Deed executed between Vithaldas and his father Jagannath, on 20.1.1955, when a separate provision was also made through a Gift Deed by Jagannath, in favour of the wife of Vithaldas.

8. On the provisions of the said Act coming into force, the Surplus Children of Vithaldas Lands Distribution Tribunal (for short 'SLDT') instituted proceedings in exercise of suo moto powers in respect of the return filed under Section 12 of the said Act by Vithaldas, which Section falls in Chapter IV, dealing with 'surplus land'. In the course of the assessment proceedings regarding surplus land, the holdings of the entire family were taken into consideration, as in terms of Section 2 (11) of the said Act, the family would include an HUF, which is joint in estate, or possession, or residence. A family unit, under Section 11-A of the said Act, for definition, has referred to Section 4,

defining 'land held by a family unit'. In terms of order dated 19.11.1976, 60 acres and 27 gunthas of land of late Vithaldas was declared surplus. This order was assailed before the Maharashtra Revenue Tribunal, Bombay Bench, Nagpur, which dismissed the appeal on 16.2.1977, resulting in proceedings being filed by Vithaldas, before the Bombay High Court, Nagpur Bench. In terms of order dated 2.3.1982, learned Single Judge of the Nagpur Bench of the Bombay High Court remitted the matter back to the SLDT for fresh inquiry, on the ground of lack of adequate opportunity provided to Vithaldas and others to present their case.

9. On remand, a fresh order was passed by the SDO, Chikhali District, Buldana on 7.5.1984. Various aspects of holding of Vithaldas were examined. On the matter being revisited in these proceedings, land measuring 59 acres and 35 gunthas was deemed surplus, under Section 3(2) of the said Act, while excluding (a) Potkharab land of Vithaldas, to the extent of 12.16 acres; (b) Field Survey No.106, which was stated to be vesting with the wife of Vithaldas, having been gifted by her father-in- law Jagannath, and found that the same continued to be in possession of Jagannath, as also recorded in the Record of Rights and crop statements;

(c) the land allotted to the two major daughters of Vithaldas, Shakuntala and Durgadevi.

10. The appeal proceedings were lodged by Vithaldas, his wife, the son and the third daughter, Beladevi, under Section 33 of the said Act. The other two minor daughters, who had attained majority before 2.10.1975, however, did not file the appeal as they were apparently satisfied with the view adopted by the SDO. The State also filed cross-objections challenging the exclusion of the land by the SDO qua (b) & (c) aforesaid. Since the two elder daughters were not aggrieved, they were neither the appellant, nor the respondent before the appeal proceedings. Nor did the State take care to implead them, despite having filed cross-objections qua their land. The appeal court, however, dismissed the appeal, and allowed the cross-objections vide order dated 3.12.1984. Since the land of the two elder daughters is the only concern, in this matter, the rationale for allowing the cross-objections has been set forth.

11. The principal plea, which found favour with the appellate authority, was that the Partition Deed dated 31.1.1970 was against the principles of Hindu law to the extent it gave a share to minor daughters in ancestral land. The land is stated to have also continued in the possession of Vithaldas. Even though the Partition Deed was pre the cut-off date of 26.9.1970, it was opined that the document could be looked into, in a case like the present one, where the property was apportioned to the two daughters who were not entitled to a share.

12. The aforesaid appellate order was challenged by Vithaldas and his wife in the writ proceedings before the Bombay High Court, Nagpur Bench, but that petition was dismissed vide oral judgment dictated over a period of 7.9.1987 to 15/16.9.1987. There were certain other aspects also urged in those proceedings, but they are not relevant for the present appeal. The High Court agreed with the finding that the daughters, not having a share in the property, a Partition Deed could not have conferred any interest on them, albeit it was before the cut-off date of 26.9.1970.

13. An intra-court appeal was preferred, which was dismissed vide impugned order dated 27.11.2007. The Division Bench agreed with the findings that the partition effected vide Partition Deed dated 31.1.1970 was unnatural as it alienated properties to minor daughters, and that a female child could not get a share in the ancestral property, even though it was effected before the relevant date of 26.9.1970. Once again, as reflected in the records, the factum of cultivation of land by late Vithaldas was taken into account. The attainment of the age of majority by the elder two daughters, before the commencement date, 2.10.1975, was also ignored as irrelevant.

14. The appellants before the Division Bench also sought to raise the issue of the two elder daughters not being arrayed as parties in the cross- objections, even though their existing rights were being affected. Further, it was argued that none of the members of the HUF had assailed the Partition Deed on any account. These pleas also did not find favour on the ground that it was late Vithaldas who sought to lose the land and, in effect, it was for him to see how to confer the rights on his two elder daughters. The two elder daughters were held to form part of the family unit.

15. The Special Leave Petition ('SLP') was filed only by late Vithaldas, through his legal representatives. The two elder daughters are, thus, appellants as legal heirs of late Vithaldas, in the present proceedings. This is of significance as the contention of respondents is that the two elder daughters only stepped into the shoes of late Vithaldas, and that they cannot de novo start proceedings in their own rights. Leave was granted on 31.8.2009, and the interim order of status quo was directed to continue throughout. On 23.11.2016, during the course of hearing, an order was passed to obtain clarity, whether in pursuance of the Partition Deed, the transfer of rights was ever reported to the revenue authorities, in terms of Sections 148 & 149 of the Maharashtra Land Revenue Code, 1966. The action, if any, taken by the revenue authorities was also not apparently reflected in the records before the Court. Time was granted to place on record the requisite material qua the developments post the execution of the Partition Deed.

16. An additional affidavit was filed on behalf of the appellants, affirmed in March, 2017. On the appellants seeking the record from the Tehsil Office of the concerned district, they received a response, informing them that records from 1970 to 1975 are in a mutilated condition and that the mutation register for the period from 1964 to 1978 is not traceable. The crop statement was not available for the period 1970-1972 for Village Mangrul, while for Village Babulgaon the crop statement was not available for the period 1970-1973, for Survey No.14. It was thus notified that the crop statement for Survey No. 12 was not available for the period 1971-1972. The records made available, however, do show that from 1972- 1976, for Survey No. 12, and from 1973-1976, as gathered for Survey No. 14, the two daughters were shown as occupants, but through their guardian. It may be noted that somehow, on attaining the age of majority, apparently no endorsement was made qua the elder two daughters on that aspect. The Record of Rights also shows a similar position.

17. The picture which emerges from the documents produced is that in pursuance of the Partition Deed, which was obviously produced, both for the Record of Rights and the Crop Register, the names of the two elder daughters were entered though through their guardian, late Jagannath (the grandfather), as they were minors at the relevant time, while the corresponding endorsement on

their attaining majority, before the commencement date 2.10.1975 was seemingly not made.

18. We heard Mr. Krishnan Venugopal, learned Senior Counsel for the appellants and Mr. N.R. Katneshwarkar, Advocate on behalf of the respondent-State.

Deemed Fiction:

19. The legislation in question is a beneficial piece of legislation and, indeed, must be given the widest amplitude, the object being to distribute land among the landless. The preamble quoted aforesaid sets forth the object of the said Act. But, it is equally true that in giving wider amplitude to such legislation, it cannot be that the Court interprets the words of the statute beyond its plain reading reflecting the intent of the legislation. A preamble has its limitations insofar as being treated as an aid for the interpretation of a statute. It cannot restrict or enlarge the provisions of the Act.2 Thus, the provisions have to be read, to see whether there is any ambiguity, requiring any further aid for construction of those sections, or whether they are explicit and clear in their meaning.3

20. On a reading of the provisions of Chapter III, including Sections 8, Raymond Ltd. v. State of Chattisgarh (2007) 3 SCC 79; State of West Bengal v. Union of India AIR 1963 SC 1241 The Sussex Peerage Case (1844) 11 Cl & Fin 85 (HL). 10 & 11 of the said Act, there is no ambiguity as would require any aid to construct the meaning of those Sections.

21. The commencement date would be the date from which the provisions would come into force. However, the amendment of 1972 created a deemed fiction by inserting the provision for setting at naught transactions that may have occurred on a prior date, i.e., from 26.9.1970. The result is that the transactions or transfers in this window of about five years would also be hit by the provisions of the said Act insofar as the determination of surplus land is concerned. The object was "to prevent circumvention by dubious and indirect methods.4" This is the view also adopted by this Court in Gurdit Singh v. State of Punjab, 5 but then this Court had gone on to observe that that was no reason why a construction should be put on the Section which its language could hardly bear. The legislation in question in Gurdit Singh v. State of Punjab6 was a similar one, The Pepsu Tenancy and Agricultural Lands Act, 1955. It would be difficult to accept and countenance a situation where, irrespective of limitations imposed in considering the past time period, any transaction could be so assailed. In the wisdom of the legislature, the window of five Gurdit Singh v State of Punjab (1974) 2 SCC 260 (supra) (supra) years is provided as sufficient for scrutinizing transactions which could be called "dubious and indirect methods" to evade the result of the said Act. This is also reinforced by the provisions of Section 18, dealing with determination of the surplus area of land where clause (b) specifically provides as under:

"18. (a) xxxx xxxx xxxx xxxx

(b) whether any land transferred between the period from 26 th day of September, 1970 and the commencement date, or any land partitioned after the 26th day of September, 1970, should be considered or ignored in calculating the ceiling area as provided by sub-section (1) of section 10 or section 11;" Thus, once again, it is clearly stated that the lands transferred between the period

26.9.1970 and the commencement date (2.10.1975) is what is to be ignored in calculating the ceiling area.

22. The effect of the aforesaid provision is that any land, even if it is obtained by partition or other transfer, after the date of 26.9.1970 would be included for the purposes of calculation of surplus land, as land of the person who so transferred the same.

23. The legislature has also taken another caution. The second Explanation to sub-section (1) of Section 10 also provides that documents evidencing such transfer even before 26.9.1970 would not be exempted if they are not registered on or before that date, or even if they are registered after that date, they are not presented for registration on or before that date. The requirement is for the transfer document to be, both executed and presented for registration before the cut-off date. Thus, the possibility of evading the land ceiling limits by creating documents on a back date and subsequently producing them for registration is obviated.

24. Section 11 specifically talks about the partition deed in a similar manner and, thus, not only transfers whether by way of sale, gift, mortgage with possession, exchange, lease, assignment of land for maintenance, surrender of a tenancy or resumption of land by a landlord or any other disposition, are included, even the avenue by way of a partition deed has been shut out, unless it has been executed prior to the cut-off date. There is no doubt that in the present case, the partition deed was executed before the cut-off date of 26.9.1970 and registered even prior to that date.

25. On behalf of the appellants, a number of judgments have been referred to, on how a deemed fiction should be construed. Thus, a legal fiction is to be limited for the purpose for which it is created and should not be extended beyond that legitimate field7. There are a number of judgments referred to in the context of taxing statutes, but then the rules of interpretation of taxing statutes, to be construed strictly, would be different and there is no purpose in referring to these judicial pronouncements. In the context of the Kerala Land Reforms Act, 1964, the issue of legal fiction was, once again, examined8. The same proposition was, once again, reiterated while observing that a legal fiction is not to be extended beyond the purpose for which it is created, and that it cannot be extended by importing another fiction. In the context of Section 4A of that Act, it was held to be circumscribed by express words – a mortgagee in possession was stated to be one who, for a continuous period of not less than 50 years immediately preceding the commencement of that Section held that capacity. The words “immediately preceding the commencement” were required to be given their ordinary and full meaning as reflecting the legislative intent and thus, only such type of cases where a mortgagee was in possession, immediately preceding the commencement of the Section, was extendable for a period of 50 years in the past alone. It was further Bengal Immunity Co Ltd. v. State of Bihar: (1955) 2 SCR 603 Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver (1996) 6 SCC 185 observed as under:

> “….However beneficial may be the scope and ambit of the legal fiction created by the legislature while enacting Section 4-A such fiction can arise only when the express language of the section laying down the conditions precedent for raising of such a fiction is complied with by the mortgagee-in-possession concerned seeking the

benefit of such a deeming fiction. Such a fiction cannot be extended by the court on analogy or by addition or deleting words not contemplated by the legislature."

26. This judgment has found support in a subsequent judgment of this Court in Raj Kumar Johri v. State of M.P. 9 Thus, the aforesaid being the manner of interpreting a provision for deeming fiction, the relevant dates provided, of 26.9.1970 and 2.10.1975, giving a window of five years for the State to take action and prevent any dubious transaction during this period of time, cannot be expanded to an unlimited prior period of time.

27. This Court, in Uttar Chand v. State of Maharashtra,10 while dealing with the very statute has opined that the cut-off date would be sacrosanct. The factual contours dealt with partition before the cut-off date, as also sale of land. Once the cut-off date is provided, it was observed that they fell completely outside the ambit of the provisions of the Act and, thus, the High Court would not be justified in presuming that (2002) 3 SCC 732 (1980) 2 SCC 292 the transfers made were either collusive or fraudulent. The appellate authority allowing the cross-objections:

28. The order passed by the competent authority, being the SDO, insofar as the two elder daughters are concerned, held in their favour as far as the lands vested in them, in pursuance of the Partition Deed. There was, thus, no occasion for them to file an appeal, nor did they so file an appeal. Other members of the family, who filed the appeal, did not implead them as parties. Once again, naturally so, as they would not be the interested parties, or even pro forma parties in that behalf. However, once the State decided to file cross-objections and, in that, impugned even that portion of the order of the SDO which held in favour of the two elder daughters, there is no hesitation in stating that they were necessary parties to those proceedings. It is no answer to say that since the effect of the land ceiling would be to restrict the area of their father, late Vithaldas, it is for Vithaldas to see how he can benefit his daughters. This fundamental defect cannot be cured in the subsequent proceedings, as the right of appeal is a statutory right and an important one. This aforesaid view is reinforced by a catena of judicial pronouncements. It has been held that the Code of Civil Procedure, 1908 does not contemplate filing of cross-objections against a party who is not a party to the appeal11. In case such objections have to be filed two distinct operations are necessary. He must implead the persons as parties qua whom he intends to file cross-objections then he must file the memorandum of cross-objections12. The position would be no different qua a judicial or quasi-judicial authority as a party to be effected must get a right of hearing13. Thus, unqualified imprimatur can be lent to this view.

29. Thus, for the aforesaid reason also the cross-objection could not have disturbed the status of the two elder daughters. Unmarried daughters' claim in HUF property:

30. It has already been observed that non-impleadment of the two elder daughters would be fatal to the appellate proceedings. But, they are fatal for more than that reason. In fact, the view taken by both the learned Single Judge and the Division Bench would equally fall foul of the legal treatise, enunciating the rights of an unmarried daughter. The view taken Rajendra Nath Chatterjee v. Moheshata Debi AIR 1926 Cal 533 Venkatapathi v. Veerayya AIR (30) 1943 Madras 609 Udit Narayan Singh Malpharia v. Additional Member, Board of Revenue, Bihar AIR 1963 SC 786 (WS) is

that since these lands were given to minor unmarried daughters, they having no share in the HUF property, such grant is contrary to law at that point of time.

31. It may be noticed, of course, that the lis has been pending, and the current scenario is one where even daughters have been given rights in the ancestral/HUF property, in terms of the amendment made to Section 6 of the Hindu Succession Act, 1956. The State of Maharashtra, where the land is located was a step ahead inasmuch as vide Maharashtra Act 39 of 1994, which was brought into force on 22.6.1994, such rights were conferred on women by making them also a coparcener by birth. However, even on the date when the Partition Deed was executed, the legal position was not as has been enunciated.

32. It has been observed that a father can make a gift within reasonable limits of ancestral immovable property to his daughter as part of his moral obligations, at the time of her marriage or even thereafter. In fact, there is an observation made that gift made of 1/6 th of the total holding of the ancestral property is valid14. This is in view of the fact that such gifts made are for pious purposes, but the alienation must be by an act inter vivos15.

Pugalia Vettorammal and Anr. v. Vettor Goundan (1912) 22 MLJ 321 R. Kuppayee v. Raja Gounder (2004) 1 SCC 295

33. In Guramma Bhratar Chanbasappa Deshmukh v. Mallappa Chanbasappa & Ors.16, the legal position has been summarized as under:

> "15... In Madhaviya, pp. 41 and 42, a text of Katyayana is cited authorizing the gift of immovable property by a father to his daughters besides a gift of movables up to the amount of 2000 phanams a year... ...Manu says "To the unmarried daughters by the same mother let their brothers give portions out of their allotments respectively, according to the class of their several mothers. Let each give one-fourth part of his own distinct share and those who refuse to give it shall be degraded." These and similar other texts indicate that Hindu law texts not only sanction the giving of property to daughters at the time of partition or at the time of their marriage, as the case may be, but also condemn the dereliction of the said duty in unequivocal terms. It is true that these Hindu law texts have become obsolete. The daughter has lost her right to a share in the family property at the time of its partition. But though the right has been crystallized into a moral obligation on the part of the father to provide for the daughter either by way of marriage provision or subsequently... ...The decision in Kudutamma v. Narasimhacharyalu [(1907) 17 MLJ 528] is rather instructive. There, it was held that a Hindu father was entitled to make gifts by way of marriage portions to his daughters out of the family property to a reasonable extent... ...Wallis, J. in his judgment pointed out that unmarried daughters were formerly entitled to share on partition and that right fell into (1964) 4 SCR 497 desuetude, a gift made to a daughter was sustained by courts as a provision for the married couple. The learned Judge summarised the position thus, at p. 532:

"... although the joint family and its representative, the father or other managing member, may no longer be legally bound to provide an endowment for the bride on the occasion of her marriage, they are still morally bound to do so, at any rate when the circumstances of the case make it reasonably necessary."... ...Another Division Bench of the Madras High Court considered the question in Sundaramya v. Seethamma [(1911) 21 MLJ 695, 699] and declared the validity of a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land. The marriage took place about forty years before the gift. There was no evidence that the father then had any intention to give any property to the daughter. The legal position was thus expounded by the learned Judges. Munro and Sankran Nair, JJ.:

"The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of the marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage but only some time later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899."... ...Venkataramana Rao, J. in Sithamahalakshmamma v. Kotayya [(1936) 71 MLJ 259] had to deal with the question of validity of a gift made by a Hindu father of a reasonable portion of ancestral immovable property to his daughter without reference to his son. Therein, the learned Judge observed at p. 262:

"There can be no doubt that the father is under a moral obligation to make a gift of a reasonable portion of the family property as a marriage portion to his daughters on the occasion of their marriages. It has also been held that it is a continuing obligation till it is discharged by fulfilment thereof. It is on this principle a gift of a small portion of immovable property by a father has been held to be binding on the members of the joint family." Adverting to the question of the extent of property he can gift, the learned Judge proceeded to State:

"The question whether a particular gift is reasonable or not will have to be judged according to the State of the family at the time of the gift, the extent of the family immovable property, the indebtedness of the family, and the paramount charges which the family was under an obligation to provide for, and after having regard to these circumstances if the gift can be held to be reasonable, such a gift will be binding on the joint family members irrespective of the consent of the members of the family." This decision was followed by Chandra Reddy, J. of the Madras High Court in Annamalai v. Sundarathammal [(1952) II MLJ 782, 784]... 16... The legal position may be summarized thus: the Hindu law tests conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But, it became, crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter regard being had to the

> financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a normal obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances..."... In the aforesaid case, a discussion took place in respect of a Gift Deed executed with respect to a daughter. The acceptability of gifting of a reasonable part of the ancestral property, in favour of daughters, for marriage purposes, was held to be valid, and in accordance with Mitakshara law. There is a discussion of even the Manusmriti to conclude that, though it may not reflect the current legal position, but consistently, the Hindu texts not only sanction the giving of properties to daughters at the time of partition, or at the time of marriage, but even provisions can be made in advance, for the same.

34. The judicial pronouncement in Annamalai Ammal v. Sundarathammal & Ors.17 may also be noticed, where it has been observed as under:

> AIR 1953 Mad 404 "5. If the obligation is moral and continuing one and could be made long after the marriage, could it be said that it is not within the competence of a father to make such a gift before the marriage? In my opinion, there is not much difference in principle between a gift after the marriage, and a gift before the marriage, the object of such a gift being to make a future provision for the bridal couple.
>
> 6. This leads me to the next question whether the circumstance that a gift is not described as a marriage provision under the document renders it an invalid one? To my mind, it appears it does not affect the validity of the gift. When a father makes a gift of a reasonable portion of the property to an unmarried daughter it may be assumed that it was meant to be a marriage provision. It is to be observed in this case that under Ex. P. 1 the plaintiff was given only a vested remainder and the gift in her favour would take effect only after the lifetime of the first defendant."

35. The aforesaid judgment received the imprimatur of this Court in Guramma Bhratar Chanbasappa Deshmukh & Ors. v. Mallappa Chanbasappa & Ors.18.

36. The legal view, thus, is very clear:

> a. A provision for marriage of unmarried daughters can be made out of ancestral property.

b. Such provision can be made before, at the time, or even after the marriage.

c. The provision is being made out of pious obligation, though the right of women got diluted over a period of time. However, (supra) with the amendment to the Hindu Succession Act, in 2005, a specific right is now conferred on women to get a share on partition of ancestral property, including the right to claim partition. As mentioned above this change was brought about in Maharashtra in 1994, itself.

37. If the facts of the present case are averted to, the aforesaid is exactly what has been done under the Partition Deed. A provision was made for the marriage of the daughters. In fact, the provision is for education and marriage purposes. In the context of where the society is today, such an endeavour should be commended as salutary, rather than be frowned upon. It was sustainable in law then, and it is more than just merely sustainable in law now. Thus, there is no doubt that there was nothing prohibiting such a provision from being made. If the law permits so, it can hardly be called fraudulent. Thus, the very premise of allowing the cross-objection has no sustenance in law.

38. It may also be noticed the fact that the two elder daughters, whose rights have been debated actually, even attained majority before the commencement date, i.e., they were major unmarried daughters on the date when the amendments came into force. They were, thus, not included even in the family unit in terms of the definition contained under Section 4, which reads as under:

> “Section 4 - Land held by family unit (1) All land held by each member of a family unit, whether jointly or separately, shall for the purposes of determining the ceiling area of the family unit, be deemed to be held by the family unit.

Explanation :- A "family unit" means,-

(a) a person and his spouse (or more than one spouse) and their minor sons and minor unmarried daughters, if any; or

(b) where any spouse is dead, the surviving spouse or spouses, and the minor sons and minor unmarried daughters; or

(c) where the spouses are dead, the minor sons and minor unmarried daughters of such deceased spouses. (2) For the purposes of this section, all declarations of dissolution of marriage made by a Court after the 26th day of September, 1970, and all dissolutions of marriage by custom, or duly made, pronounced or declared on or after that date shall, for the purposes of determining the ceiling area to be held by a family unit, be ignored; and accordingly, the land held by each spouse shall be taken into consideration for that purpose, as if no dissolution had taken place. But, if a proceeding for dissolution of marriage has commenced before any Court before the aforesaid date, then the dissolution of marriage shall have full effect (whether the marriage is dissolved before or after that date), and shall be taken into consideration in determining the ceiling area of a family unit.” The question of including the daughters would only arise if the document of partition deed was found to be fraudulent. Thus, for this reason also, the property cannot be included and clubbed with the land

of late Vithaldas.

39. As observed above, the form of the document is not important in this behalf. Such provision can be made in a partition deed. It may be in the nature of a gift. So what? None of the members of the family have ever sought to assail or challenge the same. It is with the consensus of the family, apart from the legality of the same. The judgment of the Kerala High Court in Ponnu & Anr. v. Taluk Land Board, Chittur & Ors.,19may also be referred to, where, while dealing with the issue of a ceiling case, the conferring of rights on the son, under a partition deed, was held to be valid as being capable of being construed as a gift. The provisions of Section 122 of the Transfer of Property Act, 1882 (hereinafter referred to as the 'TP Act'), read with Section 123, were discussed. A gift, being a transfer of property made voluntarily and without consideration, has to be made by a registered instrument. A gift is essentially a transfer. Thus, even if there were no pre-existing rights, it (1981) KLT 780 could be a valid gift, so long as the said requirements are met. In the facts of that case, the partition deed was not even between the joint owners or co-owners, but between the persons who owned the land exclusively and another person who held no existing title or right. It was held that a tribunal could go behind and look at the real nature of the transaction. Reliance was placed on Made Gouda v. Chenne Gowda,20 where a person who was not a co-owner was also a party to a transaction, and it was held that the transaction in regard to that particular item of property was really a gift and, thus, the requirements of a valid gift deed should be met. Similarly, in Ramaswami Pattamali v. Lakshmi21, on a proper understanding of a transaction, the document was construed as a composite deed of partition and assignment. Also, in Namburi Basava Subrahmanyam v. Alapati Hymavathi & Ors.22, while deciding whether the document in question was a will or a settlement, it was held held that the nomenclature of the document is not conclusive, and instead its substance would be determinative . In a nutshell, the view is that too much importance should not be attached to the nomenclature of a document and one can look behind the façade of the document to AIR 1925 Mad 1174 AIR 1962 Ker 313 (1996) 9 SCC 388 decipher the true nature of the transaction.

40. The aforesaid enunciation of the law reflects the correct legal position. In the given facts of the case it is not in dispute that the Deed was a registered document. Thus, even if one construes it as a partition- cum-gift deed, it would make no difference as the requirements of a gift deed, under Sections 122 & 123 of the TP Act stand satisfied.

41. Legal position in the context of the facts of the present case, thus, show that even if the document is effectively a gift deed, and Hindu Law permits the making of a provision for the daughter for her marriage, the execution of a partition deed, which has the effect of such a gift would not nullify the effect of the deed. This is so as a provision made for the daughter out of the ancestral property would be in compliance of the pious obligation.

42. In the end, it may be noted that the only aspect on which the debate occurred was the share of the two elder daughters, and the right to retain the land as their separate land, without it being adjusted with the lands of late Vithaldas. The findings above, thus, lead to the conclusion that the view taken by the SDO vide order dated 7.5.1984, regarding the land of the two elder daughters, is the correct view, and the subsequent view by the appellate authority faulted on more than one reason, as mentioned aforesaid. The further imprimatur of that view by the learned Single Judge

and the Division Bench of the High Court, thus, also cannot be sustained.

43. The impugned orders of the appellate authority, the learned single Judge and the Division Bench are, thus, liable to be set aside and the view taken by the SDO, restored, qua the lands located in Survey Nos.12 & 14 of Babhulgaon, giving rights to the two elder daughters, who are the appellants in the present proceedings.

44. If any consequential orders are to be passed by the competent authority, arising from the aforesaid finding, the needful be done within a period of two months of the order being placed before the said authority.

45. The appeal is accordingly allowed. The parties are left to bear their own costs.

.....J. [Sanjay Kishan Kaul] New Delhi.

August 29, 2019.

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 6006 OF 2009 VITHALDAS JAGANNATH KHATRI (DEAD)THROUGH SHAKUNTALA ALIAS SUSHMA & ORS. ...APPELLANTS(S) VERSUS STATE OF MAHARASHTRA & ORS ...RESPONDENT(S) JUDGMENT K. M. JOSEPH, J.

1. Having perused the judgment authored by Brother Justice Sanjay Kishan Kaul, notwithstanding the highest respect that I maintain for him, I express my inability to concur with his judgment.

2. This appeal is filed by the appellants against the judgment of the High Court of Bombay, dismissing the appeal filed by their father, Late Shri Vithaldas and their mother and confirming the judgment of the Learned Single Judge in the Writ Petition filed by their parents and also the order of the Tribunal under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 hereinafter referred to as the Act.

3. Late Shri Vithaldas was married and had three daughters and a son. He purported to enter into a partition which was registered on 31.01.1970. At the heart of the controversy in this case, is the allotment of shares to his two elder daughters, namely, Smt. Shakuntala and Smt. Durga Devi. They are hereinafter referred to as the elder daughters. They are appellant 1 and 2 in this Court. Both of them were minors at the time of partition, and the question is whether 31 acres and 29 guntas of land allotted to them is to be excluded from the account of the family unit of Shri Vithaldas in determining the surplus land under the Act. Appellants 3 and 4 before this Court are the son and the third daughter of Late Shri Vithaldas.

4. Vithaldas filed a return under Section 12 of the Act on 02.10.1975. The authority passed an order declaring the total holdings of Vithaldas to be 118 acres and 17 guntas. 60 acres and 27 guntas were held to be surplus land and in excess of the ceiling area. The Tribunal dismissed the appeal filed by Vithaldas as also cross objections by the State. By order dated 02.03.1982, the writ petition filed by

Shri Vithaldas came to be allowed on the score that principles of natural justice were violated. Thereafter, the Sub- Divisional Officer passed order dated 07.05.1984 whereunder he excluded the land given to his elder daughters, viz., Shakuntala and Durga Devi, under the partition deed. The land which is allotted to the elder daughters by the partition deed, was comprised in village Babulgaon. It comprised of a total 31 acres and 29 guntas. In Survey No. 12, the area is 17 acres 23 guntas and in Survey No. 14, the area is 14 acres and 6 guntas. He further found that the family unit was entitled to retain 60 acres and 15 guntas. 6 acres 15 guntas were found to be Pot kharab lands and adding the same to 54 acres, (the limit for the lands in question) the family unit was found entitled to hold 60 acres and 15 guntas. It was further found that 59 acres and 35 guntas were deemed to be surplus land under Section 3(2) of the Act. The land gifted to his wife Kamla Devi by Shri Jagannath Khatri (fathr of Vithaldas) was found as having remained with him (the donor) and his name appeared in the record of rights. Thus, after excluding the 31 acres and 29 guntas of land, allotted to the elder daughters and the land which was gifted to the wife of Vithaldas but continued to be in possession of the donor, the total land was 119 acres and 50 guntas.

5. Ceiling Appeal No. 59 of 1984 came to be filed by Vithaldas, his wife and appellants 3 and 4 who are the son and youngest daughter of Vithaldas.

6. The State of Maharashtra, on the other hand, filed cross objections. The subject matter of the cross objection was as follows:

> Land gifted to Kamla Devi, wife of Vithaldas was wrongly excluded from the account of the family.

Thereafter, in regard to the partition deed which is the subject matter of the controversy before us, the following is stated in the cross-objections:-

> The State objects to the partition deed at the record page No. 71 on following counts-
>
> i.The unnatural partition of minor sister is resorted to when the natural guardians are alive and nothing untowards is proved against them.
>
> ii.That instead of the present appellants who is the father of the minors and major and de facto guardian; the present partition deed shows the guardianship with Jagnnath Khatri who is the grandfather of the minors.
>
> iii.The female child although gets the right to inherit the succession “opens” for her only on the death of the parents. Thus the partition deed is un-natural and against the sequence of Hindu Act of Maintenance.

> These are the national Acts passed by Parliament. The unnaturally therefore needs to be done away with.
>
> The entire area with the appellants, wife and appellants are to be clubbed together as per the definition of the family unit.

7. In the reply filed by Shri Vithaldas and his wife to the cross-objections, in so far as it is related to the partition, it was stated as follows:

> The appellants further denied the contention raised by the Respondent State so far as the partition or allotment of share to the daughters is concerned. The nomenclature is immaterial one. The factum of possession and cultivation is material one. The learned Sub Divisional Officer has rightly excluded the Survey Nos. 13 and 14 of Babalgaon from counting in the holding and the said finding need not any interference from this Tribunal.
>
> The contention raised in this ground are denied.

8. The Tribunal dismissed the appeal filed by the appellants and allowed the cross objections. Resultantly, the land, which is the subject matter of partition deed and which stood allotted to the elder daughters and the property which was the subject matter of gift deed in favour of his wife came to be included in total land holding of the family. The total extent of land was found to be 181 acres and 26 guntas. 111 acres and 39 guntas were declared surplus land.

9. Shri Vithaldas and his wife challenged the order before the High Court. Therein, appellants 1 and 2 before us were respondents 6 and 7. Appellants 3 and 4 before this Court were respondents 4 and 5. The learned Single Judge, by judgment, upheld the order of the Tribunal, in regard to viz., the property, which was subject matter of the gift in favour of the second appellant (wife) and the properties which were set apart for the two elder daughters. On the basis of an error determined by the learned Single Judge, the surplus land was held to be 103 acres and 36 guntas. It was Shri Vithaldas and his wife who preferred the Letters Patent Appeal No. 3 of 1991. By judgment dated 27.11.2007, which is impugned in this appeal, the Division Bench upheld the view taken by the learned Single Judge. His wife Smt. Kamladevi, though the 2nd appellant before the High Court is made a proforma respondent.

10. It is relevant to consider the findings of the Tribunal:

> In regard to the partition deed dated 31.01.1970, the contention of the State was that the daughters were not coparceners.

They had no right to share in partition of ancestral property. Their right opened only upon the death of the father. The partition was attacked as unnatural. His wife, who was entitled to a share, was not given any share. The grandfather was shown as the guardian of the minor children though both the parents were living. The contention of the appellants was noted that what is material is the factual

position as to cultivation. The Ceiling Authorities are not entitled to go behind the partition which took place before 26.09.1970. If the appellants-Vithaldas was not holding these lands on 26.09.1970 and thereafter, they could not be included.

11. Reliance was placed on the judgment of the Bombay High Court:

> "In the first place it is contended that Kiran the major unmarried daughter who is not included in the concept of "Family unit" under Section 4 of the Act was entitled to share on partition of the ancestral and joint family property and therefore, land to the extent of her share should be excluded in "terms of Section 3(3)(i) read with section 4 of the Act. This point has merely to be stated to be rejected. Hindu Law is clear what only certain females such as wife, widow, widow mother, grand mother only are entitled to share on partition. Unmarried daughters major or minor, married or unmarried does not belongs to that category of females."

12. Reliance was also placed on judgment in Writ Petition No. 2791 of 1976 by the Nagpur Bench of the Bombay High Court. Therein it was found that the High Court had ignored a partition with the declarant's mother, by registered partition deed dated 09.01.1970.

13. The appellants-elder daughters, who were allowed shares in partition, were found to be minors. Shankuntala, whose date of birth was 03.11.1955 was 14 years of age and Durga Devi, whose date of birth is 29.08.1957, was 12½ years old, when the partition was effected on 31.01.1970.

14. Vithaldas continued to be the owner as title had not passed to the two daughters by a legally valid instrument.

15. As far as the actual possession was concerned, the Crop Statement in respect of Survey No. 14 for the year 1970-1971 and 1971-1972, showed the cultivation by Vithaldas. For the years 1972-1973 to 1974-1975, it was shown as jointly cultivated by Vithaldas and daughter Durga Devi.

16. In respect of Survey No.12, the property allotted to daughter Shakuntala, it was found that it was being cultivated by Vithaldas along with daughter Shakuntala.

17. That crop statements for other years were not filed it was noted. Ludicrous it was found that the minor daughters had the necessary wherewithal to cultivate the land independently. It was found that Vithaldas continued to hold the lands.

18. The writ petition was filed, viz., [Writ Petition No. 111 of 1985] by Vithaldas and his wife and wherein respondent 6 was Smt. Shakuntala and respondent 7 was Smt. Durga Devi, the elder daughters. Be it noted that the elder daughters did not challenge the order of the Tribunal. The learned Single Judge has proceeded to uphold the findings of the Tribunal except as we have noticed.

19. Learned Single Judge referred to Bhagwandas Heda and others v. State of Maharashtra and others1, and the decision in Writ Petition No. 2997 of 1976, and thereafter, proceeded to hold as follows:

> "8. Moreover, it may be seen that although the respondents 6 and 7 were major on the commencement date i.e. 2-10-1975, they were still minor being aged 14 and 12 and half years, respectively, on 31.01.1970, when the partition was affected. In fact, their father, was, therefore, in possession of their alleged shares in field S.No.14 of village Babhulgaon and the crop statements for the years 1970-71 and 1971-72 show his cultivation, while crop statements for the years 1972-73 to 1974-75 show the joint cultivation by him and his daughter Durgadevi. As regards field Survey No. 12, during the year 1974-75 the father Vithaldas along with his daughter 1 1983 Mh. L.J. 825 Shakuntala is shows as jointly cultivating the said filed. AS regards filed Survey No. 14 for the years 1970-71 and 1971-72 Vitthaldas is shown to have cultivated the said field. It is on the basis of these facts that the learned M.R.T. held that the petitioner Vithaldas was holding field survey no. 12 admeasuring 17 acres 28 gunthas and survey no. 14 admeasuring 14 acres 6 gunthas of village Babulgaon, which is alleged to be allotted to the shares of the respondents 6 and 7, respectively, in the alleged partition deed dated 31-1-1970.

In my view, the above finding is correct, or not any rate cannot be said to be perverse on the basis of the evidence on record in the instant case. It, therefore, deserves to be upheld." Though the appeal was filed before the Division Bench, by Shri Vithaldas (appellant No.1) and his wife, during the pendency of the appeal Vithaldas passed away. Thereafter, the impugned judgment would show Respondents 4 to 7 as LRs of appellant No.1.

20. Before the Division Bench, attention of the judgment in this regard in Uttar Chand (Dead) by Lrs. v. State of Maharashtra and another2, was invited. The said judgment will be referred to later on. The State 2 AIR 1980 SC 806 pointed out that the partition involved in the said case decided by this Court was among persons who had an existing interest in the property. The fact that wife of Vithaldas who had a right in the partition was not given a share, was taken note of. The argument of the State was that the partition deed did not effect any transfer in favour of the elder daughters, and therefore, there was no question of recognizing any transfer effected prior to 26.09.1970.

21. Thereafter, the findings are to be found in paragraphs 9, 10, 11, 12:

> "9. We have carefully considered the rival submissions. First, in 1970, there could be no question of daughters being entitled to a share of family properties in a partition during the life-time of their parents. Further, showing father of appellant No. 1, as their guardian in such a partition, would not result in severing them from the appellants' family. Had appellant No.1 so wished, he could have gifted the properties to respondent Nos.6 and 7, but that too would not have mattered so long as respondent Nos.6 and 7 continued to be a part of his family. The judgment of the Supreme Court in Uttar Chand v. State of Maharashtra, reported at AIR 1980 SC 806,

on which the learned Advocate for the appellants places reliance, does not help the appellants, since in that case, the Apex Court was considering actual transfers effected before the relevant date, whereas in the case at hand, there are no such actual transfers, but only attempted evasion, if we may so describe the partition dated 31-1-1970. Further, as rightly observed by the learned Single Judge, the 7/12 extracts of the fields in question show that they were in joint cultivation of appellant No.1 and his daughters right up to the year 1975.

10. It is not necessary to dissect the expression used by the Tribunal while discussing the effect of these transfers. As held in the judgment of this Court in Dadarao v. State of Maharashtra, reported at 1969 Mh.L.J. 813, on which the learned Advocate for the appellants has placed reliance, such partition may be valid or invalid as between the parties. The question is whether it is to be recognized for the purpose of determining the ceiling area or not. Herein, since there was no transfer by the instrument dated 31-1-

1970 in favour of respondent Nos.6 and 7, there was no question of recognizing and transfer for the purpose of determining surplus land of appellant No.1.

11. The learned Advocate for the appellants submitted that the partition had not been questioned by the concerned members of the family and, therefore, there was no reason whatsoever for ignoring such partition. He submitted that the question whether respondent Nos.6 and 7 were entitled to a share in such partition, could have been agitated only by respondent No.4 Anilkumar and appellant No.2 Kamladevi and it was not open for the State to question the rights created in favour of respondent Nos.6 and 7 by a document dated 31-1-1970.

12. This fallacious contention was rightly repelled by the learned AGP by pointing out that the State was as much an interested party as the family members, because operation of the provisions of the Act entitled the State to secure the surplus land for the purpose of their distribution. If the argument of the learned Advocate for the appellants were to be accepted, fictitious transfer, in which the transferor or the transferee had no dispute, would have taken out the entire surplus land out of the provisions of the Act. Therefore, this contention of the learned Advocate for the appellants has to be rejected."

22. As regards the flaw in entertaining the cross objection filed by the State, it came to be dealt with by the High Court on the footing that under Section 33 of the Act, the Code of Civil Procedure, 1908 was to be followed. It was found that the observation of the Tribunal about State not being required to pay court fee, was not proper but non-payment of court fee was not a matter over which a litigant could take advantage. State could approach the Tribunal to make the deficiency good. Thereafter, the question was posed whether the Tribunal could have entertained the cross objection which affected the rights of the elder daughters without their presence in the party array before the Tribunal.

23. The High Court dealt with the judgments of the High Court of Judicature at Allahabad in Kundomal Ganga Ram v. Topamal Chotamal3 and Malireddi Venkatapathi and others v. Malireddi Veerayya and others4 for the principle that a respondent maintaining cross objection could do so after a person affected by the cross objection was brought on the party array and proceeded to hold as follows in paragraphs 21 and 23:

> "21. We have carefully considered these submissions. Apart from the question whether respondent Nos.6 and 7 had any right in the concerned fields, it seems to us that there was absolutely no possibility of their rights, if any, being prejudicially affected by inclusion of concerned lands in the holding of appellant No.1. It would be appellant No.1, who would stand to lose corresponding acreage after 3 AIR 1953 Allahabd 710 4 AIR 1943 Madras 609 adjusting the claims of respondent Nos.6 and 7, if he was so keen to ensure that they got what he desired to give them. The order passed by the Tribunal was not one directed against respondent Nos.6 and 7, but was one which affected the rights of the appellant. There is no similarity with the facts of the unreported judgment in the case of Balkrishna Maharaj Mandir, referred to above, because in that case, Tarasingh was a tenant, who was also a party before the Surplus Land Determination Tribunal.

Therefore, we do not find any force in the submissions made on behalf of the appellants as the proxy of respondent Nos.6 and 7.

xxx xxx xxx

23. To sum up, we hold that validity of the partition dated 31-1-1970 has not been questioned by the Tribunal. All that the Tribunal and the learned Single Judge did was to take into account the fact that lands continued to be with appellants as there was no severance of respondent Nos.6 and 7 from appellants' family. As for court-fees on cross-objection, though we disapprove observations of the Tribunal, the defect is curable and cannot help appellants in pocketing a chunk of land, which should become available to the State were not necessary parties to the cross- objection, first, because of absence of subsisting interest in the properties, and secondly, because appellants could be trusted to take care of their daughters' interests from their own property, rather than resorting to what may be proverbially described as "Robbing Peter to pay Paul". Lastly, claim for exclusion of field survey no.106 of Sawangi, contending that the gift dated 20-1-1955 was not actually received, while at the same time taking a diametrically opposite stand about document dated 30-1-1970, amounts to blowing hot and cold in the same breath." And on this basis the appeal came to be dismissed.
CONTENTION OF THE APPELLANTS

24. The arguments addressed by the learned senior counsel for the appellants run thus:

> There was a partition entered into and registered on 31.01.1970. Thereunder, certain lands have been set apart to the daughters of Shri Vithaldas. Shri Vithaldas had three daughters and one son besides his wife. All the three daughters were minors as on 31.01.1970. The commencement day is 02.10.1975. The elder daughters turned major

> prior to the appointed day. Therefore, having regard to the meaning of the words "family unit", as contained in Section 4 of the Act, the property held by the elder daughters, which were acquired under the registered partition deed dated 31.01.1970, must be excluded in calculating the land holding by the family unit. He seeks to buttress his position by pointing out that the Legislature has fixed the cut off date after which partition deed would be ignored for the purpose of calculation of the ceiling limit. Indeed, Section 11 of the Act, declares that any partition after the 26th Day of September, 1970 shall be deemed unless the contrary is proved to have been made in anticipation or in order to avoid or defeat the objective of the Amending Act, 1972 and shall accordingly be ignored. Consequently, the land covered by such partition shall, for the purpose of this Act, be the land held by the family. The appellants placed further store by Section (10) of the Act which again contemplates 26.09.1970 as the date beyond which transfers would be held to be infirm as executed for defeating the object of the Amending Act, 1972. Section 10 of the Act further proceeds to declare that the ceiling account will be determined ignoring such transfers. As far as Section 8 of the Act is concerned, it is directed against transfer made on or after the commencement date, viz., 02.10.1975. The explanation supplies the meaning of the word "transfer" for the purpose of this Section in a most wide manner and I need not be detained further by the contours of the said definition.

The argument of the appellants is that the Legislation in question is expropriatory. Therefore, such a Statue must be interpreted, no doubt, by giving full play to the express provisions but it cannot go beyond the same. In other words, having regard to the fact that the partition deed, at the heart of the controversy in this case, is executed and registered on 31.01.1970 much before even 26.09.1970 and many years before the commencement day, the partition deed must be given full operation resultantly. Properties, which stood allotted to elder daughters under the partition deed, must be excluded from the account of the family unit as by the said day, the elder daughters had become major, and could no longer be members of the family unit.

25. It is contended by the learned senior counsel for the appellants that there is no case for the respondent-State that the partition was a collusive one. The further contention raised by the learned senior counsel for the appellants is that the Tribunal acted illegally in allowing the cross objection of the respondent-State and thereafter holding that the partition deed dated 31.01.1970 is to be ignored.

26. The learned counsel for the appellants has contended that a legal fiction should not be extended beyond the purpose for which it was created. In this regard, appellants relied on the following case law – Bihar Immunity Company Ltd. v. State of Bihar and Others5; Commissioner of Income-Tax v. Bombay City I, Bombay v. Amarchand N. Shroff by his heirs and legal Representatives6; Commissioner of Income Tax, Kanpur v. Mother India Refrigeration Industries (P)Ltd.7; Bijender Singh v. State of Haryana and another8.

27. It is also sought to be contended that the purpose of the legal fiction is to be ascertained from the 5 (1955) 2 SCR 603 6 AIR 1963 SC 1448 7 (1985) 4 SCC 1 8 (2005) 3 SCC 685 plain language of the

provisions that creates it (See Commissioner of Income-Tax, Delhi v. S. Teja Singh9).

28. Irrespective of how beneficial the object of the Statute may be, the deeming fiction cannot be extended beyond the purpose of creating the fiction (See Mancheri Puthusseri Ahmed and Others v. Kuthiravattam Estate Receiver10).

29. Still further, it is contended that while interpreting the deeming fiction, recourse to the object of the Statute would be permissible only where the language is ambiguous (See (2009) 1 SCC 540). There can be no quarrel with these principles. CONTENTIONS OF THE STATE

30. Per contra, the learned counsel for the respondent- State would seek to support the order of the High Court. He would point out that despite and notwithstanding the so-called partition deed dated 31.01.1970, it was the father who continued to be in possession and to take the income. He was equally carrying out the 9 AIR 1959 SC 352 10 (1996) 6 SCC 185 cultivation. Partition deed, therefore, was a ruse and it is not to be taken into account for determining the extent of the land and the land seemingly allotted to the elder daughters must also be taken into consideration which is what has been done by the Tribunal and approved of by the High Court. He would point out that the court must lose sight of the fact that the Legislation is a beneficial Legislation intended to empower the landless by endowing them with property rights over land and the judgment of the High Court does not warrant interference.

THE 'ACT': SINCE ITS ENACTMENT AND CHANGES RELEVANT TO THE CONTROVERSY

31. It is necessary to appreciate the scheme of the Act. The Act was enacted in the year 1961. Section 2(4) defined the appointed day as meaning "the day on which this Act comes into force". The Act as such came into force on 26.01.1962. It is relevant to note that drastic changes have been brought about subsequent to the enactment in 1961. To understand its impact, the provisions of Sections 3, 4 and 5 as originally enacted are referred to here under: -

> Section 3 read as follows: -
>
> "In order to provide for the more equitable distribution of agricultural land amongst the peasantry of the State of Maharashtra (and in particular, to provide that landless persons are given land for personal cultivation), on the commencement of this Act, there shall be imposed to the extent, and in the manner hereinafter provided, a maximum limit (or ceiling) on the holding of agricultural land throughout the State."
> Section 4 read as follows:-
>
> "4(1) Subject to the provisions of this Act, no person shall hold land in excess of the ceiling area, as determined in the manner hereinafter provided.
>
> Explanation.- A person may hold exempted land to any extent.

(2) Subject to the provisions of this Act, all land held by a person in excess of the ceiling area, shall be deemed to be surplus land, and shall be dealt with in the manner hereinafter provided for surplus land." Section 5 provided for the ceiling area Chapter III in which Sections 8 and 9 11 fell, is to be noticed.

"8. No person who, on or after the appointed day, holds land in excess of the ceiling area, shall on or after that day transfer or partition any land until the land in excess of the ceiling is determined under the Act;

Explanation.- In this Section "transfer" means transfer by act of parties (whether by sale, gift, mortgage with possession, exchange, lease or any other disposition) made inter-vivos; and "partition" means any division of land by act of parties made inter-vivos." The appointed day, it has been noticed was the 26th day of January, 1962.

"9. No person shall, at any time on or after the appointed day, acquire by transfer or partition any land, if he already has land in excess of the ceiling area, or land which together with any other land already held by him will exceed in the total the ceiling area.

Explanation.- In this section, "transfer" and "partition" have the same meaning as in Section 8." Section 12 fell under Chapter IV under Chapter Heading Surplus Land and it provided for filing returns.

Reference is made to the far-reaching changes which were brought out by the Maharashtra Act No. XXI of 1975. The preamble reads as follows:

> "WHEREAS, in the State of Maharashtra, the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 imposed for the first time, in the public interest the maximum limit (or ceiling) on the holding of agricultural land, and provided for the acquisition of land held in excess of the ceiling for distribution thereof amongst the peasantry of the State, and in particular, among landless persons; and for other purposes therein stated;
>
> AND WHEREAS, it is now expedient to lower, in the public interest, the maximum limit (or ceiling) on the holding of agricultural land in the State for making available additional land as surplus, so as to secure a still more equitable distribution of land, and for the purpose of removing economic disparities, and thereby for assisting more effectively landless and other persons; and generally for the purpose of so distributing the agricultural resources of the community as best to subserve the common good, and also to prevent the concentration of the means of agricultural production and wealth to the common detriment." (Emphasis supplied) It was to come into force on such day, as it was notified. It came into force from 19/09/1975.

32. Section 2(6A) of the Act defines the "commencement date" to mean the 2nd Day of October, 1975.

33. “Family” is defined in Section 2 (11) of the Act:

> “2(11) “family” includes, a Hindu undivided family, and in the case of other persons, a group or unit the members of which by custom or usage, are joint in estate or possession or residence;”

34. Section 2(14) is relied upon by the learned counsel for the State and it defines the words “to hold land”:

> “2(14)“to hold land”, with its grammatical variations and cognate expressions, means to be lawfully in actual possession of land as owner or as tenant; and “holding” shall be construed accordingly;

35. Section 2(21) also relied on by the State defines the word “owner”:

> “2(21)“owner”, in relation to any land, includes the person holding the land as occupant, 4[or superior holder as defined in the Code], or as lessee of Government, a mortgagee-in-possession, and a person holding land for his maintenance;”

36. Section 3(1) contains the actual prohibition in the matter of holding land and it reads as follows:

> “3(1)Subject to the provisions of this Chapter and Chapter III, no person or family unit shall, after the commencement date, hold land in excess of the ceiling area, as determined in the manner hereinafter provided.
>
> Explanation.–A person or family unit may hold exempted land to any extent.”

37. Section 3(3) may also shed light:

> “(3) Where any land–
>
> (a) is held by a family of which a person is a member,
>
> (b) is held in or operated by a co-

operative society of which a person is a member,

(c) is held by a person jointly with others,

(d) is held by a person as a partner in a firm and the holding of such person or of a family unit of which such person is a member[including the extent of share of such person, if any, in the land answering to any of the descriptions in clauses (a), (b), (c) or (d) above] exceeds the ceiling area on or before he commencement date or on any date thereafter (hereinafter referred to as the relevant date), then for the purpose of determining the ceiling area and the surplus land in respect of that

holding, the share of such person in the land aforesaid shall be calculated in the following manner :–

(i) in the land held by a family of which the person is a member, the share of each member of the family shall be determined so that each member who is entitled to a share on partition, shall be taken to be holding separately land to the extent of his share, as if the land had been so divided and separately held on the relevant date;

(ii) in the land held in or operated by a co-operative society or held jointly with others or held by a firm, the share of the person shall be taken to be the extent of land such person would hold in proportion of his share in the co-

operative society, or his share in the joint holding or his share as partner in the firm, as if the land had been so divided and separately held on the relevant date."

38. Section 5 provides for "ceiling area". Section 5(1) and 5(2) reads as follows:

"5. Ceiling Area.- (1) In each of the districts and talukas specified in column 1 of the First Schedule, for each class of land described in columns 2, 3, 4, 5 and 6 thereof, the ceiling area shall be the area mentioned under each such class of land against such district or taluka.

(2) If a person, or a family unit, holds land of only one class, the ceiling area for his or its holding shall be the ceiling area for that class of land."

39. I may now note Sections 8,9,10 and 11 of the Act, which substituted the earlier provisions:

> "8.Restrictions on transfer.- Where a person, or as the case may be, a family unit holds land in excess of the ceiling area on or after the commencement date, such person, or as the case may be, any member of the family unit shall not, on and after that date, transfer any land, until the land in excess of the ceiling area is determined under this Act.
>
> Explanation.–In this section, "transfer" means transfer, whether by way of sale, gift ,mortgage with possession, exchange, lease, assignment of land for maintenance, surrender of a tenancy or resumption of land by a landlord or any other disposition, whether by act of parties made inter vivos or by decree or order of a court, tribunal or authority(except where such decree or order is passed in a proceeding which is instituted in such court, tribunal or before such authority before the 26th day of September 1970), but does not include transfer by way of sale or otherwise of land for the recovery of land revenue or for sums recoverable as arrears of land revenue, or acquisition of land for a public purpose under any law for the time being in force.
>
> 9. Restrictions on acquisition of land in excess of ceiling area.-

No person or a member of a family unit shall at any time, on or after the commencement date, acquire by transfer any land if he, or as the case may be, the family unit already holds land in excess of the ceiling area or land which together with any other land already held by such person, or as the case may be, the family unit, will exceed in the total the ceiling area.

Explanation.–In this section, transfer has the same meaning as in section 8.

10. Consequences of certain transfers and acquisitions of land.- (1) If-

(a) any person or a member of a family unit, after the 26th day of September 1970 but before the commencement date, transfers any land in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972 or

(b) any land is transferred in contravention of section 8 then, in calculating the ceiling area which that person, or as the case may be, the family unit, is entitled to hold, the land so transferred shall be taken into consideration, and the land exceeding the ceiling area so calculated shall be deemed to be in excess of the ceiling area for that holding, notwithstanding that the land remaining with him or with the family unit may not in fact be in excess of the ceiling area.

If by reason of such transfer, the holding of a person, or as the case may be, of the family unit is less than the area so calculated to be in excess of the ceiling area, then all the land of the person, or as the case may be, the family unit shall be deemed to be surplus land; and out of the land so transferred and in possession of the transferee [unless such land is liable to forfeiture under the provisions of sub -section (3)], land to the extent of such deficiency shall, subject to rules made in that behalf, also be deemed to be surplus land, notwithstanding that the holding of the transferee may not in fact be in excess of the ceiling area.

Explanation. – For the purposes of clause

(a) ‘ transfer ‘ has the same meaning as in section 8.

All transfers made after the 26th day of September 1970 but before the commencement date, shall be deemed (unless the contrary is proved) to have been made in anticipation of or in order to avoid or defeat the object of the Amending Act,1972. Explanation. – For the purposes of this sub

-section, a transfer shall not be regarded as made on or before 26th September 1970 if the document evidencing the transfer is not registered on or before that date or where it is registered after that date, it is not presented for registration on or before the said date.

(2) If any land is possessed on or after the commencement date by a person, or as the case may be, a family unit in excess of the ceiling area, or if as a result of acquisition (by testamentary disposition, or devolution on death, or by operation of law) of any land on or after that date, the total area of land held by any person, or as the case may be, a family unit, exceeds the ceiling area, the land so in excess shall be surplus land.

(3) Where land is acquired in wilful contravention of section 9, then as a penalty therefor, the right, title and interest of the person, or as the case may be, the family unit or any member thereof in the land so acquired or obtained shall, subject to the provisions of Chapter IV, be forfeited, and shall vest without any further assurance in the State Government:

> Provided that, where such land is burdened with an encumbrance, the Collector may, after holding such inquiry as he thinks fit and after hearing the holder and the person in whose favour the encumbrance is made by him, direct that the right, title and interest of the holder in some other land of the holder equal in extent to the land acquired in wilful contravention of section 9, shall be forfeited to Government.

11. Restriction on partition:- Where any land held by a family is partitioned after the 26th day of September 1970, the partition so made shall be deemed (unless the contrary is proved) to have been made in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972, and shall accordingly be ignored, and any land covered by such partition shall, for the purposes of this Act, be deemed to be the land held by the family; and the extent of share of each person in the land held by the family shall be taken into consideration for calculating the ceiling area in accordance with the provision of section 3.

Explanation.- For the purposes of this section, ' partition ' means any division of land by act of parties made inter vivos, and includes also partition made by a decree or order of a court, tribunal or authority."

40. Section 12 falling in Chapter IV deals with submission of returns and provides for submission of returns. Section 12(1) reads as follows:

> "12: SUBMISSION OF RETURNS – [If any person or family unit -
>
> (1)(a) has at any time after the 26th day of September 1970 but before the commencement date held, or
>
> (b) on or after the commencement date acquires, holds or comes into possession of, any land (including any exempted land), in excess of the ceiling area, or"

41. Section 14 provides for the power of the Collector to hold inquiry:

> "14. Power of Collector to hold enquiry.-
>
> (1)As soon as may be after the expiry of the period referred to in section 12 or the further period referred to in sub-section (2) of section 13, the Collector shall either suo motu whether or not a return had been filed or] on the basis of the returns submitted to him under either of those sections, and such record as he may consider it necessary to refer to, hold an enquiry in respect of every person2[or family unit] holding and in excess of the ceiling area, and shall, subject to the provisions of this

Chapter, determine the surplus land held by such person2[or family unit.

(2) Where a person or family unit holds land in two or more talukas of the same district, the enquiry shall be held by such officer or authority exercising the powers of the Collector whom the Collector-in-

charge of the district may by order in writing designate.

(3) Where a person4[or family unit] holds land in two more districts of the same division, the enquiry shall be held by the Collector whom the Commissioner may, by order in writing, designate.

(4) Where a person4[or family unit] holds lands in different divisions, the enquiry shall be held by the Collector whom the State Government may, by order in writing, designate.5[(4A)Where a person holding land in an industrial undertaking, the enquiry may be held by the Collector whom the State Government may, by order in writing, designate].(5)The Collector so designated, shall for the purposes of the enquiry, be competent to exercise jurisdiction under this Act in respect of such person6[or family unit] and the lands held by him[or it]."

42. Section 18 is of vital importance to consider the question and it reads as follows:

"18. Collector to consider certain matters.-18.On the day fixed for hearing under section 14, or any other day or days to which the inquiry is adjourned, the Collector shall, after hearing the holder and other persons interested and who are present and any evidence adduced, consider the following matters, that is to say,–

(a) what is the total area of land which was held [by the holder on the 26th day of September, 1970;

(b) whether any land transferred between the period from the 26th day of September 1970 and the commencement date, or any land partitioned after the 26th day of September 1970, should be considered or ignored in calculating the ceiling area as provided by sub-section (1) of section 10 or section 11;

(bb) whether the holder has any share in the land held by a family or held or operated by any co-

operative society or held jointly with others or held as a partner in a firm; and the extent of such share;

(c) What is the total area of land held [by the holder on the commencement date?

(d) whether any transfer or partition of land is made by the[holder] in contravention of section 8 or 11 and if so, whether the land so transferred or partitioned should be considered or ignored] in calculating the ceiling area under the provisions of sub-section (1) of section [10 or section 11?]

(e) whether any land has been acquired or possessed on or after commencement date by transfer or by partition?

(f) whether any land has been acquired on or after the [commencement date] by testamentary disposition, devolution on death or by operation of law?

(g) what is the total area of land held at the time of the enquiry, and what is the area of land which10[the holder] is entitled to hold?

(h) whether any land is held by [the holder] as tenant, and if so, whether his landlord has a subsisting right of resumption of the land for personal cultivation, under the relevant tenancy law applicable thereto?

(i) whether any land held by[the holder] is to be forfeited to Government under sub-section (3) of section 10, or of section 13, or should be deemed to be surplus land under any of the provisions of this Act?

(j) whether the proposed retention of land by [the holder] is in conformity with the provisions of section 16?

(k) which particular lands out of the total land held by1[the holder] should be entitled as delimited as surplus land?

(l) any other matter which, in the opinion of the Collector, is necessary to be considered for the purpose of calculating the ceiling area, and delimiting any surplus land."

43. Section 21 provides that the Collector is to make a declaration regarding surplus land, etc., after the inquiry.

44. Section 22 provides for compensation for any land acquired. The Section provides for the procedure and method of payment.

45. Chapter VI comes under the Chapter heading "Distribution of Surplus Land".

46. Matters including the priority to be observed are indicated.

47. Chapter VII deals with provision of appeal.

48. Section 33 provides that an appeal lies against the order or award of the Collector, before the Maharashtra Revenue Tribunal. Since it may have a bearing on the argument based on the illegality committed by the Tribunal allegedly in allowing the cross objection, it is referred to and it reads as follows:

"33. Appeals.- (1)An appeal against an order or award of the Collector shall lie to theMaharashtra Revenue Tribunal in the following cases :– (1) an order under sub-sections (2) and (3) of section 131[not being an order underwhich a true and correct return complete in all particulars is required to be furnished;

(2) a declaration2[or any part thereof] under section 21;3[(2a) an order under section 21-A;

(3) an award under section 25;

(4) an order refusing sanction to transfer or divide land under section 29;

(5) an order of forfeiture under sub-

section (3) of section 29;

(6) an amendment of declaration or award under section 37; and (7) an order of summary eviction under section 40.

(1A) Any respondent, though he may not have appealed from any part of the decision, order, declaration or award, may not only support the decision, order, declaration or award, as the case may be, on any of the grounds decided against him but take cross-

objection to the decision, order, declaration or award which he could have taken by way of an appeal:

Provided that, he has filed the objection in the Maharashtra Revenue Tribunal within thirty days from the date of service on him of notice of the day fixed for hearing the appeal, or such further time as the Tribunal may see fit to allow and thereupon, the provisions of Order 41, rule 22 of the First Schedule to the Code of Civil Procedure,1908, shall apply in relation to the cross-objection as they apply in relation to the cross-

objection under that rule (2) Every petition of appeal under sub-section (1), shall be accompanied by a copy of the decision, order, declaration or award, as the case may be, against which the appeal is made.

(3) In deciding such appeal the Maharashtra Revenue Tribunal shall exercise all the powers which a court has and follow the same procedure which a court follows, in deciding appeals from the decree or order of an original court, under the Code of Civil Procedure, 1908. (V of 1908)."

49. The power of the Tribunal is provided under Section 34, which reads as follows:

"34. Power of Maharashtra Revenue Tribunal to confirm, etc.-.The Maharashtra Revenue Tribunal, in deciding an appeal under section 33,may confirm, modify or rescind the decision, order, declaration or award or the amended declaration or award, as the case may be."

50. Section 41 bars the jurisdiction of Civil Court and it reads as follows:

"41. Bar of jurisdiction.- No civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Commissioner, Collector, Tribunal, the officer 40uthorized under section 27, the Maharashtra Revenue Tribunal or the State Government.

Explanation.–For the purpose of this section a civil court shall include a Mamlatdar's Court constituted under the Mamlatdar's Court Act, 1906.(Bom.II of 1906)"

51. No doubt, Section 44(B) excludes pleaders, etc.. It reads as follow:

"SECTION 44B: PLEADERS, ETC. EXCLUDED FROM APPEARANCE.-Notwithstanding anything contained in this Act or any law for the time being in force, no pleader shall be entitled to appear on behalf of any party in any proceedings under this Act before the Authorised Officer, the Tribunal, the Collector, the Commissioner, the State Government or the Maharashtra Revenue Tribunal:

Provided that, where a party is a minor or lunatic, his guardian may appear, and in the case of any other person under disability, his authorised agent may appear.

Explanation. - For the purposes of this section, the expression "pleader " includes an advocate, attorney, vakil or any other legal practitioner."

52. Among the changes that have been ushered in the definition clause, the following are noted: -

In section 2, sub-Section(5A) was added and it defined 'Code' to mean Maharashtra Land Revenue Code, 1966 and sub-section 6A, which was added as the 'commencement date' means date on which the Amending Act, 1972, comes into force. Section 2 (11A) was inserted and it purported to define 'family unit' to mean family unit as explained in Section 4.

In Section 2(20), definition of 'member of a family' was substituted and it reads as follows:-

"(20) 'member of a family' means father, mother, spouse, brother, unmarried dependent sister, divorced and dependent sister, son, son's wife, unmarried daughter, divorced and dependent daughter, sons's son, son's unmarried daughter,

son's divorced and dependent daughter." A completely different Chapter came to be inserted as Chapter II. This was done by way of substitution of the earlier Chapter, the Chapter contained in the Act prior to the amendment.

53. The following questions would arise for consideration by the Court:-

1. Whether the authorities under the Act have the power to find that the partition entered into before 26.9.1970, was sham or collusive and thereby ignore the same?

2. Notwithstanding the registered partition dated 31.01.1970, whether the property allotted to the elder daughters of Shri Vithaldas is liable to be included in the account of the family unit?

3. What is the effect of the cross-objections of the State being allowed in the absence of elder daughters, in the appeal before the Tribunal?

POWER OF AUTHORITIES UNDER THE ACT OVER TRANSACTION PRIOR TO 26.09.1970

54. In order to appreciate the intention of the Legislature in this regard, the word "transfer" and "partition" as employed in Section 10 and 11 of the Act must be understood as meaning a transfer and a partition which is genuine. In other words, a transfer, be it by any means, as defined under Section 8, must actually result in the divesting of rights of the previous owner and vesting of rights in the transferee. The word "transfer" must be understood, as describing, cases where under the law, by means of the devices mentioned in the Explanation to Section 8, the previous owner ceases to be the owner and the transferee acquires his rights. The legislative intention was that such transfers, which otherwise would pass muster as genuine transactions and therefore would have the effect of defeating the object of the Act as contained in particular in Section 3 and the Chapter relating to distribution of surplus land should be rendered ineffective. The same is the position in respect of the partition under Section 11 of the Act. Even if there is a genuine partition by which shares are in fact allotted to the parties and the parties enjoy the properties as separate owners of what was previously joint ownership, their rights will be subsumed and overwhelmed by the laudable object underlying Section 3 of the Act and the prohibition would have full sway.

55. I have noticed the matters to be considered by the Collector under Section 18 of the Act. Apart from clauses (a) and (b), he is duty bound to ascertain other matters. Clause (c) of Section 18 of the Act specifically mandates that the Officer must find out what is the total area of land held by the holder on the commencement date. Clause (l) of Section 18 of the Act also contemplates that the Collector may take into consideration any other matter which in his opinion is necessary for calculating the ceiling area inter alia. Section 3 of the Act read in conjunction with Section 18(c) and (l), inter alia, establishes that the Collector has power and it becomes his duty, in fact, to ascertain what is the area held on the appointed day, viz., 02.10.1975. I have noticed that the Legislature has defined the words "to hold" means, "to be lawfully in actual possession of land as owner or as tenant". Word "owner" is further defined to mean, "in relation to any land includes a person holding the land as occupant, superior holder as defined in the Code, lessee of Government, as it is

commonly understood". If the person is holding the land as occupant, he would be an owner. The word 'occupant' is defined with reference to its definition in the code. It is noteworthy that the word 'owner' includes the specified categories. If a person is owner as it is commonly understood, then he is comprehended. Therefore, if a person is in possession as an occupant as on the appointed day, the extent of land so held by him, would be considered for the purpose of calculating the ceiling limit. Equally, if the person is in possession as lessee of the Government, he would incur the wrath of Section 3 of the Act, should he have land in excess of the ceiling limit inclusive of the land which he holds as lessee of the Government. The same is the position with respect to a mortgagee in possession and a person who holds land for his maintenance.

56. The Collector, therefore, is duty bound in the course of the inquiry to enquire and ascertain as to what exactly is the holding (as defined in the Act) as on the commencement day. In the mater of gleaning the meaning of a Statute and demystifying the words of a Statute and discovering the intention of the legislation, the court must bear in mind certain presumptions. The court will presume that the Legislature has taken into consideration the felt necessities of the times. It will further assume that the Legislature was aware of the law as it exists. It will not begin with the assumption that the Legislature is ignorant of the opinions expressed by the courts on points of law. It will presume that the Legislature was aware of the decisions rendered by the courts on points of law.

57. In Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras11, this Court had occasion to consider what the word "benami" has come to denote:

> "30. Now, the assumption underlying this argument is that the Tribunal had 11 AIR 1957 SC 49 found in its order that the intermediaries were benamidars for the appellants, but there is no basis for this in the order. In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid. ..." (Emphasis supplied)

58. In Kalwa Devadattam and others v. The Union of India and others12, the matter arose under Sections 25A, 67 and 30 of the Income Tax Act, 1922. One of the questions which arose was whether the partition involved in the said case was sham. The High Court relied upon the circumstances to find out that the deed of partition involved in the said case, though registered, was nominal. The object of the partition, it was contended, was to protect the interest of the minor sons against the father who was not even living with the family and was acting to the detriment of his sons. Though the deed showed apparently an equal distribution of the property into four shares of the same value, the property allotted to the share of Nagappa was in reality not worth the amount shown. It was found that the intention of Nagappa was to make it appear to the Income Tax Department that no useful purpose will be served by taking steps. In the course, the Court proceeded to hold, inter alia, as follows:

> "14. … The deed of partition was

12 AIR 1964 SC 880

undoubtedly executed and was registered, but the mere execution of the deed is not decisive of the question whether it was intended to be effective. The circumstances disclosed by the evidence clearly show that there was no reason for arriving at a partition. Counsel for the plaintiffs practically conceded that fact, and submitted that Nagappa's desire to defeat his creditors, and to save the property for his sons, was the real cause for bringing the deed of partition into existence.

Counsel claimed however that Nagappa had adopted the expedient of effecting a partition with the object of putting the property out of the reach of his creditors and the genuineness of that partition should not be permitted to be blurred by the unmeritorious object of Nagappa. But the continued management of the property by Nagappa since the partition, and the interest shown by him in prosecuting the suits do clearly support the inference that the deed of partition was a nominal transaction which was never intended to be acted upon and was not given effect to. …" (Emphasis supplied)

59. The Legislature, when it enacted the Act, must be presumed to know the state of the law to be that a transfer deed by way of a sale or lease or a mortgage, may be nothing but a nominal and a sham transaction. In a sham transaction, be it a sale or a partition, though it has all the trappings of a transfer or a partition and it may be registered as such, in effect, the transferor continues to be the owner. The person who was the previous owner, would, in the case of the partition which is sham, continue to be the owner. A clever camouflage or a document ingenuously disguised as a sale or a partition, cannot be permitted to defeat the intention of the Legislature. If the surrounding circumstances and the actual reality behind the transaction is objectively probed and it is established that the transferor or the previous owner, as the case may be, in the case of a transfer or a partition, respectively, continued to hold the property as such on the appointed day, it must be ignored.

60. A sham transaction demonstrated to be one when the appointed day dawns must certainly be treated as such, and the consequences, that are well-established in law, must afflict such a pretense of a transfer or a partition. Such a power must indeed vest with the Collector under Section 18 read with Section 3 of the Act. To deny the Collector such power as the appellants would attempt to persuade the court to hold, would involve asking the court to take leave of its commonsense and to place an interpretation on the Statute which will result in an absurd, besides an unjust situation. The interpretation canvassed by the appellants would result in defeating the object of the Statute. The interpretation that the Legislature knows the existing law and that the Legislature does not waste words and further that an interpretation which, while on the one hand, furthers the object of the Statue, and equally importantly, is one, which the plain language of the Statute is capable of bearing, would persuade this Court to hold that the Collector, when in the course of an inquiry under Section 18 of the Act, has before it, materials to show that an ostensible transfer or a partition is nothing but a sham and a person or a member of the family continues to hold the land as on the commencement day, it would be well within his powers to act as per the mandate of the Act and include the land for the purpose of calculating the ceiling limit.

61. Section 30 of the Act sets out the powers of the Collector when he holds that inquiry under the Act. It declares that the Collector shall have same powers as are vested in the courts under the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') in trying a suit in respect of the following matters:

(i) Proof of facts by affidavit;

(ii) Summoning and enforcing attendance of any person and examining him on oath;

(iii) Compelling the production of documents.

Under Section 31 of the Act, the Collector is obliged to set down reasons for his decision. Thus, the Collector is endowed with the powers of the civil court in the matter of both summoning and enforcing attendance of any person. The person summoned can be examined on oath. He has power also to compel production of any document. For the purpose of determining whether a document is a collusive, a fraudulent or a sham transaction, it would indeed be argued that the Authority to so decide must be in a position to consider relevant evidence in the form of deposition of witnesses as also evaluate documentary evidence which may throw light on the matter. Such powers are expressly conferred on the Collector and the powers are the same as that which the civil court enjoys in this regard.

62. The argument of the appellants that the remedy open to the State would be to have a suit instituted and invite a civil court to adjudicate and pronounce a decree declaring a transaction as sham, does not commend to me. The Legislature has indeed clothed the Collector with jurisdiction and the power to determine such questions. It would indeed amount to placing an interpretation which would render the Statute unworkable. On the other hand, the interpretation that if materials

exist in the form of oral or documentary evidence, which clearly shows that the purported transfer or partition prior to 26.09.1970 was a sham transaction, the object of the Statute would be furthered by allowing the Collector or other authorities to decide the matter accordingly.

63. In Uttar Chand (supra), this Court in fact was considering the provisions of the Act where at a time when Sections 8, 10 and 12 had not been amended into its present avtar. The Act itself exempted lands which were acquired or transferred prior to 04.08.1959. This was provided in Sections 8, 9 and 12 of the Act, as it stood. In the said case, the High Court has found the transfer to be collusive. So also, was a decree involved in the said case under which a large extent of land was given to his mother by the adopted son. This Court held "there was neither any pleading nor any case made out either before the Deputy Collector or before the Commissioner to indicate that the transfer of the lands in favour of the adopted son and the transfer by Nemichand in favour of his mother, were collusive or tainted by fraud". The transaction had been entered into five years before the Act was brought into force. Thereafter, no doubt, this Court went on to hold as follows:

> "3. ... Even the Act clearly exempts lands which may have been acquired or transferred prior to 4-8-1959. Ss. 8, 10 and 12 which deal with the subject clearly enjoin that only those transfers would be hit by the Act which are made at any time on or after 4-8-1959. As both the transfers mentioned above were prior to 4-8-1959, it is obvious that they fell completely outside the ambit of the provisions of the Act. The High Court was thus not justified in presuming that the transfer made by the appellant in favour of his adopted son and the transfer by the adopted son Nemi Chand to his mother were either collusive or fraudulent. There was neither any foundation in the pleadings nor any evidence to support this conjecture of the High Court." (Emphasis supplied)

64. This was in fact a case where the finding of the court is based on there being no foundation in the pleadings nor any evidence to support the finding that the transactions were collusive or tainted by fraud. The transactions had taken place a good five years before the Act came into force. On a proper appreciation of the decision, though it may be contended that the decision should be understood as declaring that a transaction, even if it is collusive, having been entered into prior to the cut off date, it cannot be impeached, it may not be the correct way of looking at the decision. If there were pleadings or material to support the finding that it was collusive, the decision of this Court may not have been the same. There being no material to find that the transaction was either collusive or fraudulent, necessarily the transfer being genuine, there was no provision in the Act which extended to invalidate the transaction entered into five years prior to the Act.

65. Section 41 of the Act bars the jurisdiction of a civil court with respect to any matter which is to be settled, decided or dealt with by the authorities under the Act including the Collector and the Tribunal. In this view, the bar under Section 44(B) would be insufficient to deprive the authority of power to declare a sham transfer as such.

66. Another argument raised by the appellants is that the partition cannot be impeached on the ground that properties are allotted to the daughters when under the prevalent law the daughters did

not have any right to a share. If at all, anybody could impeach the said partition, it would be only the affected parties, viz., the persons who are legitimately entitled to a share in partition. This would be for the reason that they would be affected parties as their legitimate share would be illegally reduced as a result of giving properties by way of a share to those who are not legally entitled to the same, viz., the unmarried daughters. The persons who would be entitled to share in a partition would be the father and the son besides, no doubt, the wife. Strangely, the wife is not given any share in the partition. Therefore, the argument is that those sharers whose share would suffer diminution by the partition alone could possibly question it. This argument is liable to be rejected. It is one thing to say that a sharer whose shares may be affected, could question it in the appropriate forum. It is, however, a far cry from maintaining that the Competent Authority under the Act, when it has before it, evidence which points to the transaction being a sham or collusive affair, is disabled from finding it to be so. If one proceeds on the basis that the transaction was sham, the persons who would benefit from the sham transaction would be the other sharers. In the facts of this case, viz., the father, the wife and the son.

67. This is for the reason that it is implicit in the finding that in the transaction of sham that there is no effective transfer. The properties would continue to be held by the father. The daughters would not get any effective share. The other sharers, who would ordinarily have challenged the transaction, viz., the wife and the son, would be themselves beneficiaries under the transaction and they cannot be expected to challenge the transaction. Acceptance of the argument of the appellants would result in parties defeating the Act by setting up a pretense and wearing a cloak and this cannot be permitted.

68. Thus, it can be concluded as follows:

> i. A transfer or a partition entered into before 26.09.1970, if it is not genuine and is collusive or is a sham transaction, can, in a given case, on materials being present, be found to be so by the Authority under the Act;

ii. What is contemplated under Sections 10 and 11 of the Act read with Section 8, undoubtedly, is a transfer as defined in Section 8, being a genuine transaction. A fraudulent transaction or a sham transaction if entered into before 26.09.1970, would incur the wrath of Section (3), and a farce of a partition likewise, bringing about a mock division of property among the sharers, would also incur wrath of Section (3) of the Act. No doubt, even if the transaction is a sham transaction, be it a transfer or a partition, needless to say, it would incur the wrath of Sections 10 and 11 and it would not be necessary to justify the invalidity with any materials if entered into or effected after 26.09.1970.

iii. It does not mean that a transaction which is entered into, particularly after the Act came into force, be it a transfer or a partition, and if there are materials and circumstances brought out, which persuades Authorities to hold that it is collusive or a sham transaction and the property did not change the hands, the property would not be liable to be treated as held by the previous owner as on the commencement day and included in the account despite the purported transfer or partition.

WHETHER THE PARTITION ALLOTTING SHARES TO THE DAUGHTERS WAS UNNATURAL AND SHAM

69. The further question which arises for consideration is whether in the facts of this case, any interference is called for proceeding on the basis that there is power to find that the transaction is a sham. This question resolves itself into two further questions. Firstly, what is the effect of the Tribunal entertaining the cross-objection by the State when the two elder daughters of Vithaldas, to whom properties were allotted in the partition, were not parties? Secondly, whether the circumstances in which the partition was entered into and the material were sufficient for the High Court to uphold the findings by the Tribunal.

Taking the second question first, the very first aspect which stands out is the finding that the partition is unnatural. It is dubbed unnatural for the reason that under the extant Hindu Law, daughters were not entitled to a share. No doubt, in Maharashtra, Section 29A has been inserted in the Hindu Succession Act, 1956 with effect from 1994. It reads as follows:

> "29A Equal rights to daughter in coparcenary property. — Notwithstanding anything contained in section 6 of this Act—
>
> (i) in a joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth, become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship;

and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son:

> Provided that the share which a pre- deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter:
>
> Provided further that the share allotable to the pre-deceased child of a pre-
>
> deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-
>
> deceased child of the pre-deceased son or of the pre-deceased daughter as the case may be;
>
> (iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary

> ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;
>
> (iv) Nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

The next aspect considered relevant for holding the partition unnatural is that the wife of Shri Vithaldas was entitled in law upon a partition to a share but she is not given any share. The further finding is that Vithaldas continued to be in effective cultivation of the land, and in this regard, the record of rights was relied upon.

70. The further aspect, which has been enlisted in support of its finding, is the fact that the minors were represented by their grandfather though the natural guardian, viz., Vithaldas, was very much alive. It is the case of the appellants that giving a share to the daughter cannot be impugned as done. Under the Hindu Law, daughters were entitled to maintenance and if the share is set apart to the daughters in lieu of same, it could not be questioned.

The appellants further contended that the two elder daughters were minors at the time of partition. They attained majority only in the year 1973 and 1975 but before the commencement day.

71. There is nothing unnatural if the father cultivates the property on behalf of the daughters. The finding by the Authorities, approved by the High Court, that the daughters did not have the resources to cultivate the land, not only pales into insignificance, but the Authorities/Courts have not appreciated the law correctly.

A BRIEF SURVEY OF CERTAIN ASPECTS OF HINDU LAW

72. In State of Maharashtra v. Narayan Rao Sham Rao Deshmukh and others13 the case arose under the very Act the Court is concerned with, and therein upon the death of a male leaving behind him his widow, mother and his son [the respondent therein], the High court held that after the death of the Karta the joint family continued but each one of the three were entitled to a separate unit of ceiling area. This Court took the view that a female member who inherited the interest under Section 6 of the Hindu Succession Act did not cease to be a member of the family. The Court inter alia held as follows:

> "7. As observed in Mayne on Hindu Law and Usage (1953 Edn.) the joint and undivided 13 AIR 1985 SC 716 family is the normal condition of a Hindu society. An undivided Hindu family is ordinarily joint not only in estate but in food and worship but it is not necessary that a joint family should own joint family property. There can be a joint family without a joint family property. At para 264 of the above treatise it is observed thus:

> "264. It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu coparcenary is a much narrower body... For, coparcenary in the Mitakshara law is not identical with coparcenary as understood in English law: when a member of a joint family dies, 'his right accresces to the other members by survivorship, but if a coparcener dies, his or her right does not accresce to the other coparceners, but goes to his or her own heirs'. When we speak of a Hindu joint family as constituting a coparcenary, we refer not to the entire number of persons who can trace descent from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons who, by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce its partition. Outside this body, there is a fringe of persons possessing only inferior rights such as that of maintenance, which however tend to diminish as the result of reforms in Hindu law by legislation."
>
> 8. A Hindu coparcenary is, however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners.

A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary, A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener. A joint family, however, may consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters. The property of a joint family does not cease to belong to the family merely because there is only a single male member in the family. (See Gowli Buddanna v. CIT [(1966) 3 SCR 224 : AIR 1966 SC 1523 : (1966) 60 ITR 293] and Sitabai v. Ram Chandra [(1969) 2 SCC 544 : AIR 1970 SC 343 : (1970) 2 SCR 1] .) A joint family may consist of a single male member and his wife and daughters. It is not necessary that there should be two male members to constitute a joint family. (See N.V. Narendranath v. CWT [(1969) 1 SCC 748 : AIR 1970 SC 14 : (1969) 3 SCR 882 : (1969) 74 ITR 190]....." (Emphasis supplied) Women were not co-parceners under the extant law. In this regard, the following discussion in Mayne's Hindu Law and usage, sheds light.

"Women not coparceners.- It is obvious that, on the twin principles of a right vested by birth in the male issue only and of unobstructed heritage, the conception of a Mitakshara coparcenary is a common male ancestor with his lineal descendants in the male line, and that the female members of the family who have no vested right by birth and come in only as heirs to obstructed heritage (Sapratibandha Daya) cannot be copaceners, with the male members though, along with the males, or in exceptional cases by themselves, they are members of the undivided family as a corporate body."

73. It is to be noticed that partition can be of property which is previously held jointly. Mayne's of Hindu Law states as follows:

> "436.Coparcenary property alone divisible.- First the property to be

divided by ex vi termini the property which has been previously held as joint property in coparcenary".

COPARCENARY PROPERTY ALONE IS PARTIBLE.

74. In para 442 the learned author has dealt with the persons entitled to a share under the heading Share for women. The following is the discussion in regard to wives.

"453.Shares for women.-The interest of the women of the family, whether wives, widows, mothers or daughters, where a partition took place at the will of others were specially safeguarded by the Sanskrit writers.

Wife.-Yajnavalkya says: "If he(father) makes the allotments equal, his wives to whom stridhana has been given by the husband or the father-in-law must be made partakers of equal portions". Explaining this text, the Mitakshara says: "When the father, by his own choice, makes all his sons partakers of equal portions, his wives to whom peculiar property had not been given by their husband or by their father- in-law, must be made participants of shares equal to those of sons. But if separate property have been given to a woman, the author subsequently directs half a share to be allotted to her: "Or if any had been given, let him assign the half"."

75. A wife however could not demand a partition. The share of the wife under the Mitakshra law has been dealt with as follows in Mayne's Hindu Law:

> "455. Wife – A wife however could never demand a partition during the life of her husband, since, from the time of marriage, she and he are united in religious ceremonies. This is in accordance with the fundamental rule of Hindu law as stated in the text of Harita as quoted by the writers:
>
> "There can be no partition between husband and wife".
>
> Wife's share under the Mitakshara law.- According to the Mitakshara law prevailing in States other than Madras, a wife is entitled on a partition between her husband and his sons to a share equal to that of a son; but she cannot enforce a partition. She may either be the mother or the step- mother of the sons. She can sue for her share where there has been a partition and she has not been assigned any share, provided

there was no waiver of her rights or acquiescence on her part." Women could not enforce partition. This was a right which was conferred upon the males "458. Women cannot enforce partition.-

Neither the wife, nor mother nor grandmother is entitled to enforce a partition; the sons have a perfect right to remain undivided as long as they choose. Any alienation of property made by the coparceners without their consent will therefore bind the wife, mother or grandmother as they do not become owners of any shares till an actual division of the joint estate."

76. Regarding the rights of daughters, in Mayne's Hindu Law, it is stated as follows:

"461. Rights of daughters. -Where a partition takes place during the life of the father, the daughter has no right to any special apportionment. She continues under his protection till her marriage; he is bound to maintain her and to pay her marriage expenses, and the expenditure he is to incur is wholly in his discretion. But where the division takes place after the death of the father, the same texts which direct that the mother should receive a share equal to that of a son, direct that the mother should receive a share equal to that of a son, direct that the mother should receive a fourth share."

77. The father, no doubt had the power under the Mitakshra Law to effect a partition even if the sons did not agree to the same.

"471.Father's power to effect a partition.- A Hindu father under the Mitakshara law can, it has been held, effect a partition between himself and his sons without their consent and this is rested on the Mitakshara I,ii,2. This text has been held to apply not only to property acquired by the father himself but also to ancestral property. The father has power to effect a division not only between himself and his sons but also between the sons inter se. So also it would seem that he has the power to make a division when the sons are dead and his grandsons along are living.

The power extends not only to effecting a division by metes and bounds, but also to a division of status. In all these cases, the father's power must be exercised bona fide and in accordance with law; the division must not be unfair and the allotments must be equal." THE LAW RELATING TO GIFTS BY A HINDU TO HIS DAUGHTER

78. In the decision in Annivillah Sundaramya v. Cherla Seethamma and others14, the Court was concerned with the gift of 8 acres of ancestral land by a Hindu father to his daughter after her marriage when the family possessed 200 acres. The gift of 8 acres was not unreasonable. In the above scenario it was found that if the father had enforced a partition, he would have admittedly got not less than 100 acres. In Pugaria Vettoramal and another v. Vettor Gounder, Minor, by his 14 1911 (21) MLJ 695 next friend and mother Poochammal and another15, a Division Bench of the Madras High court elaborately considered the matter relating to gifts in favour of daughter of a coparcener. In the said case, in fact, the gift was made by paternal uncle in favour of his niece (brother's

daughter). In the course of its discussion, the court held as follows:

> "We have however, no doubt that a gift made by a father to his own daughter or a daughter of an uncle, provided it be of a reasonable amount is valid as against his son and that the question is really covered by authority." Thereafter, the question arose about the quantum of the gift involved in the said case. It be noted that the gift was of land worth Rs.400 and the family property at the time of gift was worth Rs.2400/-. Therefore, it constituted one-
>
> sixth of the property in the hands of the donor.
>
> The Court proceeded to hold as follows:
>
> "The question whether the gift should be set aside on the ground of its being excessive presents more practical

15 1912 (22) MLJ 321 difficulty. The text of Yajnavalkya in Chapter I, Section 7, PI. 5, .of the Mitakshara as interpreted by Vignaneswara defines the share of a daughter as one-fourth of what she would be entitled to if she were a son. The Smrithi Chandrika, in Chapter IV, cites a text of Katyayana which says: "For the unmarried daughters a quarter is allowed and three parts for the sons, but where the property is small, the portion is considered to be equal. The author of the Smriti Chandrika says (Placituin 28): " The meaning of the fourth or last portion of the above text, para 26, is that where the estate is small the share of each sister is considered by Vishnu and others as being equal to that of a son. Reference has already been made to the observation of Vignaneswara in his commentary on slokas 175 and 176 of Yajnavalkya that it is the duty of a father to provide for his daughters as well as for his sons. The text of Yajnavalkya defining the share of the daughter is no longer legally in force though it would afford a guide in determining whether any particular gift which is impeached is reasonable or not. As observed in the Viramitrodaya in the text cited in Bachoo v. Mankorebai16 the gift should be guided by propriety but not by caprice. It would be hardly right to lay down the hard and fast rule that nothing more than a fourth share of what the daughter would get if she were a son can be given in any case as apparently attempted to be done in Damodar Misser v. Senabutty Misrain 17. The social (1904) 29 Bo.51 (1882) 8. Cal. 537 condition existing at the time of the gift would be a proper matter to be taken into account; and where the property is very small and the expenses of marriage heavy in the community of the parties, it may not be improper to allot a share equal to that of the son for the expenses of marriage and for dowry together. At the same time, where the property is very large, worth say several lakhs of rupees, the courts may not be prepared to uphold a gift of the share permissible according to the text of Yajnavalkya. The right of the daughter not being confined, as pointed out in Rantasami Ayyar v. Vengidusami Ayyar18 and Churamon Sahu v. Gopi Sahu I.L.R.19 to have the expenses of her marriage defrayed, it might be reasonable to allot something more than such expenses even where they are comparatively heavy. At the same time, it would not be fair to the sons that the father, after spending a large amount on the marriage of his daughter, should make a gift of any considerable property to her. It must also be borne in mind that it would be unfair to the daughter that she should be told that her claim has been absorbed by excessive expenditure on marriage contracted by

members of the family not for her benefit but to enable the co-parceners to maintain their social prestige. In Churamon Sahu v. Gopi Sahu (supra), the Calcutta High Court upheld the gift of one-third of the family property on the occasion of the dwiragaman ceremony.

The learned Judges observe that the question must be determined with regard (1898) 22 Mad.113 (1909) ILR 37 Cal.1 to the circumstances of each particular disposition. They refer to a case reported in 2 Morley's Digest, 198, and cite the observation of Lord Gifford in that case that it was absolutely impossible to define the extent and limit of the power of disposition because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such dispositions. In Anivillah Sundararatnayd v. Cherla Sitamma another principle is indicated. The learned Judges say : "

> Here if the father had enforced a partition, he would have admittedly got not less than one hundred acres and it is impossible to say that a gift of 8 acres is unreasonable." We are unwilling to adopt this test based upon the father's right to dispose of what he gets for his own share on partition for deciding the question what disposition he might make while remaining a member of an undivided family. We think it must be left to the court in each case to decide whether the gift is reasonable in all the circumstances under which it is made. In this case, the donor, at the time of the gift, had only one son, and he was an infant. The share given to the 1st defendant was one-sixth of the whole. It was apparently considered by the donor that the property still left to the family would have time to increase before his son would have to support a family. He died undivided from his son, and apparently never wished to be divided from him. One eighth share of (1911) 21 MLJ 956 the property would be a suitable portion for the 1st defendant under such circumstances according to Yajnavalkya's text. What was given was one-sixth or one-twenty-fourth more, worth Rs. 100. We are not prepared to say that, an excessive portion of the property was given." (Emphasis supplied)
>
> 79. In Annamalai Ammal v. Sundarathammal and Others21, the High Court took note of the fact that there were concurrent findings that the property gifted was a very reasonable portion of the property and the gift was found valid.

The question fell for consideration of this Court in the decision reported in Guramma Bhratar Chanbasappa Deshmukh and others v. Mallappa Chanbasappa and another22. Therein, this Court after an elaborate survey of decisions including the decisions referred to by me, held as follows: -

> "18. The legal position may be summarized thus: the Hindu law tests conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of 21 AIR 1953 Madras 404 22 AIR 1964 SC 510 partition. That right was lost by efflux of time. But, it became, crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are

> made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a normal obligation and it continues to subsist till it is discharged.

Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one".

80. A Joint Hindu Family would consist of a large number of persons. A Joint Hindu Family could, however, be understood to be a narrower body of individuals that constitutes a coparcenary. The coparceners, at the relevant point of time, consisted of males, viz., son, grandson and the great grandson. They were persons who were entitled to demand partition. When a partition took place, however, certain other persons were also entitled to share in the property. It must be remembered that a partition involves separate enjoyment and what was previously jointly held property. A wife of a Hindu while not a coparcener was one such person who was entitled to a share in the partition. But even when a partition took place, the daughter of a person was not a person who was entitled to any share.

In order to appreciate the contentions, it is necessary to advert to the relevant portions of the partition deed dated 31.01.1970:

> "Partition deed of immovable property at Rs.500/-
>
> Partition deed of the land situated at Mangrul and Babhulagaon Executants: 1. Vitthaldas Jagannath Khathri, age 39 years,
>
> 2. Anilbabu Vitthaldas Khatri, age 4 years,
>
> 3. Ku. Shakuntala d/o.

Vitthaldas Khatri, age 14 years,

4. Ku. Durgadevi d/o.

Vitthaldas Khatri, age 11 years.

5. Ku. Beladevi d/o.

Vitthaldas Khatri, age 8 years.

Party No.2,3,4,5 being minors represented by Guardian grandfather Jagannath Ganeshdas Khatri, age 65 years.

Occu. Of all: Agriculture, all r/o. Mangrul Navghare, Tq.Chikhali, Dist. Buldhana.

We execute & kept the partition deed as under:-

We all are the members of the HUF and party No.2 to 5 are the issues of part No.1 and party No.3,4,5 are the sisters of the party No.2 and party No.2 is the brother of party No.3,4,5. We have been using our property jointly. Party No.2 to 5 have to take the education and to see that each of them take it freely and to provide for the expenses therefore and to see that each of them will meet the expenses out of their own property and that no dispute took place between them in future, therefore, we are executing and keeping with us this deed of partition. The property fall on the share of each party is shown in front of his name....

xxx xxx xxx xxx In this way we have partitioned over estate, the property fallen to the share of party have taken its possession and became the full owner thereof. Now nobody is concerned with the property of others. Out of us for the education and marriage purpose of party no.2 to 5 and for the benefits of our family and for the successful future, we of our free will and consideration executed and kept this deed of partition, on this 31st day of January, 1970.

xxx xxx xxx xxx"

81. To the share of party no.1, namely, late Vithaldas, an extent of 23.01 acres in Sy.No.9 of Bhabulgaon village is set apart. Further, in Sy.No.14 Bhabulgaon village 9 acres out of 35.12 acres is also allotted to Vithaldas. Thus, a total of 32.01 acres is given to him. In favour of his only son, who is aged 4 years and who is the third appellant before us, an extent of 30 acres 64 ares is seen set apart. The appellant no.1 (eldest daughter), who is the eldest child and who was aged 14 years, was given 17 acres and 23 ares. An extent of 14 acres and 6 ares is set apart to the second appellant before us from out of Sy.No.14 Babulgaon out of 35.12 acres who is again the other daughter of Vithaldas and aged 11 years at that time. The fifth party to the partition deed Kumari Beladevi aged 8 years is given 14 acres and 06 ares from Sy. No.14 Babulgaon out of 35.12 acres. Thus, it can be seen that from the partition deed itself that the extent of land made subject matter of partition was 106 acres. This is apart from the land which was the subject matter of the gift in favour of the wife of Vithaldas who is made a proforma respondent before this Court.

82. Vithaldas was the karta of a Hindu Undivided Family (HUF). The Coparceners were Vithaldas and his son. Vithaldas, as father, had the unilateral right to partition the joint family property. The law, however, attached a condition to the exercise of such unilateral power that the partition must be fair. Fairness cannot be present when it is made in complete derogation of the extant law relating

to share of parties on a partition.

83. The terms of the partition deed have been set out. The first thing that is a striking feature in the partition deed is the exclusion of the wife of Vithaldas. In fact, under the Act as it stood in 1970, Section (8) interdicted a partition by a person who on or after the appointed day (26-01-1962), had excess land till the matter was determined. The word 'person' was defined to include a family. Family included a HUF. If the property of 60 and odd acres found held by the wife was reckoned, on 31-1-1970, as the member of family as defined included the spouse, and as the family holding would have crossed 114 acres, the maximum limit in Buldana District, the partition may have been in the teeth of Section (8) as it stood before substitution by Act XXI of 1975. No doubt, I may notice that she was gifted 60 and odd acres by her father and husband from out of the joint property by gift deed dated 20.1.1955. However, when the family partition took place, her right may continue. If the wife under the Hindu Law, when a partition is effected, was entitled to a share, the fact that she is not given any share, does raise a suspicion. The father got 32 and odd acres. The son is given 30 acres. Most importantly the daughters who had no right are seen given a total of 45 acres and 35 ares. The daughters together got 1½ times the share of the son! Any property, which went to the wife, would have been liable to be included in the account of the family for the purpose of determining the ceiling limit. It is no doubt true that there was no concept of family unit at that time but family as a person was subject to the ceiling limit. I have noticed the age of both appellants nos. 1 and 2 before us. They were 14 years and 11 years, respectively. The son, in fact, was merely 4 years old and the youngest daughter 8 years. The statement in the partition deed that the parties have been using their properties jointly itself, is suspect as none of the daughters had any legal right in the properties. The circumstances which stand against the document namely the partition being a genuine transaction are:

1. The age of the children being 4, 8, 11 and 14 years.

2. The wife of the Vithaldas not being given any share.

3. The children being represented by their grandfather as a guardian when the parents are alive.

4. Allotment of shares to the daughters when daughters did not have any right to share in the partition of a Hindu Undivided Family at that point of time.

Out of a total of 106 acres, 45 acres and 35 ares can by no stretch of imagination be treated as 'small' or 'reasonable'. While it may be true that after 1994, a Hindu daughter in Maharashtra had been recognized as a coparcener vide Section 29A of the Hindu Succession Act, 1956 and entitled to a share as such, the question to be posed and answered is whether such right existed in 1970 when the partition was entered into. The answer can only be in the negative.

84. No doubt, as held by this Court in the decision supra, it was open to a Hindu to make a gift of a small portion or a reasonable portion of his daughter. In fact, there is a line of thought that though styled as partition it could be held to be a gift in the absence of a pre-existing right.

85. The question in this case is not whether a gift could have been validly made or not by Vithaldas to his elder daughters. It is to be noted that there is no such case expressly set up that what was the effected under the partition was a gift or that Vithaldas intended to make a gift of the properties in question to the elder daughters. Though it is stated in the reply to the cross objection that the nomenclature is immaterial one, what was intended therefrom is clear from the next sentence. "The factum of possession and cultivation is material one". No case of it being a gift is set up before the Tribunal or the High Court. It is to be remembered that definition of 'member of family' under the Act included dependent daughters. In the Special Leave Petition, in ground (I), it is stated as follows: -

> "Because the Hon'ble Division Bench has merely confused the whole issue where at Para 9 it has observed that the Vithaldas could have gifted the property to his two daughters i.e. Shakuntala and Durga but that too would not have mattered till the time the said daughters continued to be part of his family.
>
> It is submitted that the said observation clearly goes beyond the intention and nature behind the said transfer which, was merely a partition in the lines of a family settlement." By no yardstick can the circumstances be treated as either legal or natural. I may also notice that in the context of a family arrangement a Bench of 4 learned Judges in the decision reported in Potti Lakshmi Perumallu v. Potti Krishnavenamma23, inter alia, held as follows:
>
> "7. No doubt, a family arrangement which is for the benefit of the family generally can be enforced in a Court of law. But before the court would do so it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon. It is quite clear that there is complete absence of evidence to show that there was such an occasion or the 23 AIR 1965 SC 825 arrangement indicated in the will was acted upon."

86. I would also think that no acceptable reasons are forthcoming as occasion warranting such a partition apart from its illegal and unfair terms.

87. In Made Couda and Ors. v. Chenne Gouda and Ors.24, the appellant was the uncle of the second defendant who was his nephew (his sister's son). Under a partition, a share was purported to be allotted to the nephew. The District Munsif found that the nephew got a share as a gift or in consideration of surrender of part of the property to the appellant. The value of the property being more Rs.100/-, whether it was a gift or an exchange. It offended against, the provisions of Transfer of Property Act. The first appellate Court took the view that it was not a gift but a partition and the nephew was made a co-sharer. The learned Judge set aside the findings and remitted the matter back to consider whether any valid title has been acquired independent of the point decided in the judgment. The learned Court took the view that a 24 AIR 1925 Madras 1174 person could not by mere recognition as a co-sharer by another co-sharer acquire title without complying with the provisions of the Transfer of Property Act.

88. In Ponnu and another v. Taluk Land Board, Chittur and others25, though rights were purported to be conferred upon his son under a partition deed, it was contended before the authority that it may be treated as gift. It is to be noted that to be a valid gift not only there must be registration but there must be attestation by two witnesses. [See Section 123 of the Transfer of Property Act]. It is further relevant to notice that in the said judgment the property was the separate property of the father which undoubtedly, he could gift. The gift under the Kerala Land Reforms Act had the effect of reducing the extent of land from the account of the declarant. In the facts of this case however, apart from the fact that the question which arises is whether the partition was a sham?, It is to be noted that there is no case that the property 25 (1981) KLT 780 was the separate property of Vithaldas. There can no dispute that the property was an ancestral property which he acquired in terms of the earlier partition between him and his father. Even before this Court it is not maintained that the partition is to be construed as a gift.

89. The question, however, relevant to this case is this. Apart from the partition deed being unnatural, was it a sham transaction? The finding that the transaction is unnatural apart from raising serious suspicion effortlessly opens the doors to a finding of it being sham. Ordinarily, in the case of sham transaction its terms deceptively disguise the underlying truth. The task become uphill when the transaction appears natural, to prove it to be a sham transaction. But when the transaction itself is unnatural, the task of the court is made lighter.

90. It is true that there is no express pleading in the cross objection that the transaction is sham and that Vithaldas continued to hold the land as on 2.10.1975. In Uttar Chand (supra), this Court, in fact, has pointed out to the lack of pleading to support the finding that transaction involved in the said case was a collusive one. In fact, it may be noticed that under the Act what is contemplated is filing a return by the person or family unit having surplus land followed by an inquiry under Section 14 read with Section 18 and the declaration under Section 21. The earlier proceedings which has taken place in this case has not been produced. Be that as it may, the State has filed cross objection in the appeal. The contents of the said cross objection in relation to the partition deed has also been noticed.

91. I would think that in the facts of this case, the finding that there is no transfer of the interest of Vithaldas under the partition deed is what is essentially involved. In facilitating such a finding, the unnatural nature of the partition has played a large part. In the facts, the mere fact that it is not expressly stated that he continued to hold the land or that the transaction was a sham transaction by itself may not be fatal to the case of the State though ideally it should have been mentioned. The parties have proceeded before the Tribunal and the High Court understanding the purport of the pleadings in the cross objection to be that there is no effective transfer under the partition.

THE MATERIALS RELIED ON IN THE ORDER OF THE TRIBUNAL IN REGARD TO THE FINDING ABOUT THE PARTITION DEED

92. The Tribunal notes that the eldest among the daughters Shakuntala Bai was born on 03.11.1955. The second of the elder daughters Durga Devi was born on 29.08.1957. They were 14 and 12½ years of age on the date of the partition in 1970. Vithaldas continued to be the owner as the title has not

passed by a legally valid instrument. As regards the actual possession in regard to Survey Nos.14 and 12 of Babul Gaon in which the elder daughters were allotted the shares, it was found as follows:

> "15. As regards the actual possession of S.Nos. 14 and 12 of Babulgaon, the crop-statements in respect of S.No.14 for the year 1970-71 and 71-72 shows the cultivation of Vithaldas, while during 1972-73 to 74-75 it is shown as jointly cultivated by Vithaldas and his daughter Durgadevi. S.No.12 of Babulgaon is shown as cultivated during 1974-75 by Vithaldas alongwith his daughter Shakultala. The crop statement for the other years have not been filed by the appellant. It is ludicrous to think that these minor daughters would possess the necessary where withal to cultivate the land independently. I have therefore no hesitation to hold that the appellant acres 23 Gs and S.No.14 area 14 As 6 Gs of Babulgaon, shown to have been transferred to his daughters Shakuntala and Durgadevi." THE ORDER DATED 23.11.2016 PASSED BY THIS COURT AND ADDITIONAL AFFIDAVIT BY THE SON OF VITHALDAS
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> 93. On 23.11.2016, this Court passed an order which reads as follows:
>
> "The legal representatives of the deceased appellant¬ Vithaldas Jagannath Khatri appear to have placed reliance upon a document purporting to be a deed of partition of certain agricultural land in support of their contention that they had acquired ownership over the disputed land long before the effective date under the provisions of the Maharashtra Agricultural Land (Ceilings on Holdings) Act, 1961. While a copy of the said document purporting to be a partition deed is on record and has been noticed by the authorities below it is not clear whether the alleged acquisition 2 of rights under the said document was ever reported to revenue authorities in terms of Sections 148 and 149 of the Maharashtra Land Revenue Code, 1966. It is also not clear as to whether the revenue authorities had upon receipt of such a report taken any steps to acknowledge the creation of the alleged rights in favour of the legal representatives of the deceased appellant. The orders under challenge on the contrary suggest that the ownership of the land had continued in the name of the deceased in the revenue records despite the alleged execution of the partition deed. Confronted with this position Ms. Indu Malhotra, learned senior counsel appearing for the appellants seeks a short adjournment to take instruction and place on record material to suggest that the execution of the so-called partition deed and the acquisition of the rights thereunder by her clients was duly reported and accepted in appropriate proceedings envisaged under the land revenue code mentioned above. Copies of the record of rights in relation to land in question with effect from 31.09.1970 till 02.10.1975 shall also be placed on record. Needful shall be done within six weeks."
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> 94. Pursuant to the same an additional affidavit by son of Late Vithaldas has been filed on 09.03.2017.

Thereunder it is inter alia stated that on an application to the concerned office, reply was received to the effect that with regard to the field Survey No.12 and 14 of village Babulgaon as well as field

Survey No.64 village Mangrul, that the record from 1970 to 1975 is in a mutilated condition and the mutation register for the period from 1964 to 1978 is not traceable.

"For Village Mangrul, the crop statement is not available for the period 1970- 1972, and for Village Babhulgaon crop statement is not available for the period 1970-1973 for Survey No.14, while crop statement is not available for Survey No.12 for the period 1971-1972."

95. It is stated further that the name of the son is recorded in the Crop Register for the period 1972 to 1975 as occupant. Certain copies of the Record of Rights from the register of crop prepared under Rule 29 of the Maharashtra Land Revenue Record of Rights and Registers (Preparation and Maintenance Rules)1971 have been produced. They show inter alia as follows:

> Therein, in the year 1973-74 under the column 'existing occupant', as regards Survey No.14 is concerned, for a total area of 35 acres and 12 guntas it is Vithaldas who is shown as the occupant. Durga Devi is also shown as occupant as against Sy.No.14 in respect of 14.29 H. Bela Devi, the youngest daughter is also shown as occupant. Both are shown as minor and their guardian, the grandfather. The same is the position in regard to the year 1974-1975. Still further it is shown likewise for the year 1975- 1976. The same position is shown both before and after the consolidation proceedings in regard to Survey No.12. For the year 1972-1973 in regard to 17 acres and 23 guntas.,Shankuntala Bai (the eldest daughter) was shown under the head 'Name of the existing occupant' along with Vithaldas Jagannath S.O.. Even in the Crop Register 1973- 1974, the name of the occupant is shown as Vithaldas Jagannath for minor Shakuntala Bai Vithaldas. It is to be noted that going by the date of birth of Shakuntala Bai as noted by the Tribunal as on 03.11.1955, she became major on 03.11.1973, Still she is shown as a minor and her father is shown as occupant on her behalf.

In regard to 17 acres and 23 guntas for 1974- 1975 under the name of existing occupant, the following is noticed-

1)Vithaldas Jagannath,

2)Shakuntala Bai Vithaldas through the guardian Jagannath.

Two features may be noted.

96. The first occupant is shown as the father. This is despite the fact that on 03.11.1973 itself Shakuntala Bai had even already become a major. For the earlier year it has been noticed that the entry was Vithaldas for Shakuntala Bai. For the year 1974- 1975, the next feature to be noticed is Shakuntala Bai is to shown along with her father as an occupant. However, she is so shown through her guardian who is shown as her grandfather. Taking the matter forward for the next year namely 1975-1976, the occupant is shown as Shakuntala Bai Rama Prasad through guardian Jagannath. It is to be noted that Shakuntala Bai had much earlier become major. The name of Vithaldas which was

there in the earlier year is seen removed.

97. In the Record of Rights, produced under the law relating to consolidation in Survey No.12, Shakuntala Bai is shown as minor through her grandfather both before and after the proceedings were conducted. In this connection as noticed by the Tribunal crops statements for the other years were not filed. They were not produced in the High Court also. No evidence has been tendered though it was open to adduce evidence as is permitted under the Act.

98. I would think on a conspectus of the material, I feel reinforced that the partition was indeed not only unnatural but it was not intended to have effect. THE EFFECT OF THE CROSS OBJECTION BEING ALLOWED IN THE ABSENCE OF THE TWO ELDER DAUGHTERS TO WHOM THE PROPERTY WAS ALLOTTED IN THE PARTITION.

99. It is undoubtedly true that the appeal before the Tribunal was filed by Late Vithaldas, his wife, son and youngest daughter. It is also true that there was no occasion for the elder daughters to challenge the order passed as the properties allotted to them in the partition deed dated 31.1.1970 stood excluded. It is in such an appeal that the Government filed a cross objection. Undoubtedly, the cross objection was maintainable both under the express provisions of Section 33 of the Act as also under Order 41 Rule 22 CPC which was also made applicable under Section 33 of the Act. In law it is true that if a cross objection is maintained, the person affected by an order in the cross objection must be on the party array. If he is not on the party array, it is incumbent upon the respondent in the appeal who seeks to maintain a cross objection against a non-party to implead such person as a party. This is a matter on which I need not dwell further.

100. The question which would however arise is, as is sought to be contended by the respondent-State the effect of the elder daughters not challenging the order of the Tribunal. The order of the Tribunal was challenged by Vithaldas and his wife only by filing a writ petition before the High Court. Appellants 3 and 4 in the appeal before the Tribunal were made respondents in such writ petition. It is true that elder daughters were also made respondents.

101. Shri Vithaldas and his wife did not prosecute the writ petition also as representatives of the elder daughters. At least the writ petition is not produced to support such a case. It is necessary to notice that the finding regarding the partition deed and gift deed by the Tribunal impacted both Vithaldas and his wife on the one hand and also the elders daughters on the other hand [the latter as regards the partition deed]. The Ceiling Account of the family unit was determined taking into consideration the 31 and odd acres allotted to the elder daughters. Vithaldas would been affected in two different capacities. One as head of the family unit and the other as father of the elder daughters.

102. It is relevant to notice that under the Hindu Minority and Guardianship Act, 1956 Section 6 declares who is to be the natural guardian of a Hindu minor. It reads as under:

> “6. Natural guardians of a Hindu minor.— The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding

his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expression “father” and “mother” do not include a step-father and a step-

mother.” (Emphasis supplied)

103. A perusal of Section 6 of the Hindu Minority and Guardianship Act would show that in the case of unmarried girl, the father and after the father the mother would be the natural guardian. This is in respect of both the person of the minor and the property of the minor. When the writ petition was filed, the eldest daughter was clearly major and married. Durga Devi was also a major.

104. The State would contend the partition dated 31.1.1970 was a sham and Vithaldas continued to hold the property. It is not unnatural that he would challenge the inclusion of such property in the ceiling account as property of the family unit on the basis that he continued to be the holder. Allowing the cross objection by the Tribunal if viewed in this perspective did affect Vithaldas. He could indeed question the inclusion of the lands allotted to his elder daughters in the account of the family unit. Vithaldas could support the partition deed but he could not challenge the order of the Tribunal allowing the cross objection on the ground that the cross objection was allowed without giving an opportunity to his daughters. Undoubtedly, Vithaldas was the first appellant before the Tribunal. He along with other appellants therein were heard by the Tribunal as parties before allowing the cross objection in relation to the partition. The ground that the cross objection was allowed without an opportunity to his elder daughters was not available to Vithaldas or his wife. Again, I would reiterate that the writ petition has been filed only by Vithaldas and his wife. Though the elder daughters were majors, they have not challenged the order of the Tribunal. Maybe it is true that they were respondents in the writ petition filed by their parents. Even after the learned Single Judge dismissed the writ petition, upholding the order of the Tribunal, no appeal was filed by the elder daughters.

105. If indeed the elder daughters had acquired possession and rights under the partition deed in respect of an extent of more than 31 and odd acres of land in between themselves, it passes one's comprehension that they would not challenge the order which purported to deprive them of their rights. This conduct on the part of the parties would appear to lend assurance to the case of the State that the partition was not a genuine transaction but a sham and the property continued with Vithaldas in which case it would be property held by Vithaldas even on the commencement date namely 2.10.1975 rendering it liable to be included in the account of the family unit. He accordingly challenged the order of the Tribunal along with his wife who was separately aggrieved by the inclusion of the property found gifted to her.

106. It is to be noted that a writ petition is not a partition suit. In a partition suit, apart from the plaintiff, the defendants also stand in the shoes of a plaintiff. Vithaldas passed away even when the appeal was pending in the High Court. Appeal was filed before this Court originally as a special leave petition. In the Special Leave Petition, it is shown Vithaldas(now deceased) through LRs and the petitioners names are shown. No doubt their position as respondents in the High Court is also shown. The elder daughters were petitioner No.1 and 2 in the special leave petition and upon leave being granted, they are in the party array as appellants 1 and 2. But they are before this Court only as legal representatives of Vithaldas who instituted the writ petition and appeal along with his wife. Be it noted that one out of the two appellants in the High Court, namely, Vithaldas passed away. His wife has not pursued the matter before this Court and she is a proforma respondent No.4 in this appeal. The appeal is prosecuted by the present appellants in their capacity as legal representatives of Vithaldas. Contentions which were available to Vithaldas alone, would therefore be available to them. In this Court, I may refer to the judgment of this Court reported in Jagdish Chander Chatterjee and Others v. Shri Sri Kishan and another26, reads as follows:

> "10. Under sub-clause (ii) of Rule 4 of Order XXII, Civil Procedure Code any person so made a party as a legal representative of the deceased, respondent was entitled to make any defence appropriate to his character as legal representative of the deceased- respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title".
>
> (Emphasis supplied)

107. As has been noted by me, the contention that the Tribunal should not have allowed the cross objection 26 (1972) 2 SCC 461 without the elder daughters on the party array was not available to Vitahaldas. If that is so, his legal representatives namely, the appellants cannot take contentions which were not available to their predecessor-in-interest.

108. It is true that this is a case where as regards the elder daughters, they were not parties in the appeal in which the cross-objection was filed.

109. Also, no doubt the elder daughters and others were respondents in the Writ Petition and Letter Patent Appeal. It may be true that a respondent and even a person who is not a party can with leave prefer an appeal. But when they have not challenged the order of the Tribunal and even the judgment of the learned Single Judge and as the Vithaldas had fully contested the matter and in view of my finding that the properties allotted to the elder daughters, are liable to be found held by Vithaldas, I would not be inclined to interfere, particularly, as I have noted above when the perusal of the Special Leave Petition would reveal that Vithaldas (now deceased) through the LRs-the petitioners is shown in the cause title. It must be remembered that the petitioners upon the passing away of Vithaldas during the pendency of the Latter Patent Appeal were recorded as his legal representatives.

110. I would also, at any rate, in this regard, in this case invoke the principles laid down in Taherakhatoon (D) By Lrs. v. Salambin Mohammad27 and refuse to interfere.

111. I would think, therefore, the appeal must fail and it stands dismissed.

.....J. (K.M. JOSEPH) NEW DELHI, AUGUST 29, 2019.

27 1999(2) SCC 635 Reportable IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NOS.6006 OF 2009 VITHALDAS JAGANNATH KHATRI (D) THROUGH SHAKUNTALA ALIAS SUSHMA & ORS. ...Appellants Vs. THE STATE OF MAHARASHTRA REVENUE AND FOREST DEPARTMENT & ORS. ...Respondents O R D E R In view of difference of opinions and the distinguishing judgments (Hon'ble Sanjay Kishan Kaul, J. allowed the appeal and Hon'ble K.M.Joseph, J. dismissed the appeal), the matter be placed before Hon'ble the Chief Justice of India for referring the matter to a Larger Bench.

.....J. [SANJAY KISHAN KAUL] .....J. [K.M.JOSEPH] New Delhi;

August 29, 2019.