
(1959) 12 BOM CK 0010

In the Bombay High Court

Case No : Special Civil Application No. 857 of 1959

Dayabhai Nathubhai

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 11-12-1959

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 15, 27, 6, 7, 8
Transfer of Property Act, 1882 — Section 5

Citation : (1960) 62 BOMLR 348

Hon'ble Judges : Shelat, J; Patwardhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shelat, J.—The petitioners are brothers and form a joint and undivided Hindu family. The said family owned Survey Nos. 91/2, 75/1, 60-P, 149/1, 153, 95-96, 110 and 136 of village Pardi in Taluka Olpad. These lands were managed by petitioner No. 1 as the Karta and the manager of the said family. Sometime back the petitioners partitioned these lands in accordance with their respective shares. As a result of the said partition, Survey Nos. 91/2, 75/1, 60-P, 61, 149/1 and 153 came to the share of petitioners Nos. 1 and 3 while the rest of the survey numbers came to the share of petitioners Nos. 2 and 4. It is not in dispute that the petitioners partitioned these lands at a time when a notice u/s 15 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the said Act) had already been served by the officer appointed under the Act. The Prant Officer, Surat, found that this partition had taken place during the continuance of the scheme of consolidation and was, therefore, contrary to the provisions of Section 27(6) and Section 9 of the said Act. The Prant Officer, by his order dated July 11, 1958, declared the partition to be illegal and void and u/s 9 of the Act imposed a fine of Rs. 50 upon petitioner No. 1 who was until the said partition acting as the Vahiwardar of these joint family properties. Dissatisfied with this order, the petitioners filed an appeal to

the Government of Bombay. That appeal was dismissed. The order of the Prant Officer and that of the Government of Bombay have been challenged in this petition.

2. Mr. Bhatt, who appears for the petitioner, has raised before us a two-fold contention, (i) that the partition of joint family properties amongst the members of that joint family is not a transfer and (ii) that, in any event, it is not a transfer within the meaning of Section 27(5) of the said Act. Mr. Bhatt urged that in the case of a joint and undivided Hindu family, all the members of the family jointly hold the co-parcenary property, that each of them has a joint interest in that property and when the property is partitioned amongst them, the only effect of that partition is that instead of a member of the family having an undivided interest in the whole of the property to the extent of his share in the property, he gets an interest in a distinct share in that property, Mr. Bhatt argued that, therefore, a partition of a joint Hindu family property amongst the co-parceners does not amount to a transfer within the meaning of Section 5 of the Transfer of Property Act.

3. The question whether a partition is transfer or not has been the subject matter of several decisions of this Court and other High Courts. In *Atrabannessa Bibi v. Safatullah Mia* I.L.R.(1915) Cal. 504, the High Court of Calcutta observed that the object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. A similar view was expressed by the High Court of Madras in *Rasa Goundan v. Arunachala Goundan* (1923) 44 M. L.J. 513. In *Waman Ramkrishna Ghotge Vs. Ganpat Mahadeo Nevagi*, , a Division Bench of this Court held that the partition of a joint family property between the members of the family operates as a transfer within the meaning of the word "Transfer" in Section 5 of the Transfer of Property Act. That view was reiterated in *Jivram Jagjivandas v. Kantilal* (1949) 52 Bom. L.R. 104. In *Soniram Baghushet v. Dwarkabai* (1950) 53 Bom L.R. 325, Mr. Justice Bhagwati and Mr. Justice Chainani, as he then was, held that a partition of joint property by metes and bounds effected between the members of a joint Hindu family amounts to a transfer within the meaning of the definition thereof contained in Section 5 of the Transfer of Property Act. Dealing with the observations made by the High Court of Calcutta in *Atrabannessa Bibi's* case, the Division Bench observed that the observations contained in that decision showed that even though there may be no acquisition of property as such by reason of a partition, the property having devolved upon the co-owners or the Cc-sharers by inheritance or having been held as joint family property by them by processes known to Hindu law, the effect of partition is that the property which was thitherto enjoyed by all the members of the joint family as co-owners or co-sharers, is, after the partition, so far as the shares allotted to the respective members of the joint family are concerned, enjoyed by them for their sole use and as their sole property. The co-ownership and the joint enjoyment no doubt come to an end and in its place and stead is substituted the sole

enjoyment and the sole ownership of the property which falls to the share of each member of the joint family. But as a necessary corollary of this, there is an extinction of the right which the other co-owners or co-sharers of the property had of enjoying that property in common with the co-owner or co-sharer to whose share that particular property is allotted as a result of the partition. That extinction of the right is brought about by what may be described as the process of the exchange of similar rights between the various co-owners and co-sharers of the joint family property or by a renunciation of the right by the other co-owners or co-sharers in favour of the co-owner or co-sharer to whom the property is allotted as a result of the partition, or by a conveyance of these rights of enjoyment of the property in common by the other co-owners and co-sharers in favour of the co-owner or co-sharer to whom that property is allotted as a result of the partition. "Whatever be the process which may be said to bring about this result of the co-owner or co-sharer to whom the property is allotted by the partition getting the property for his sole use, the result is that the person who gets the property on partition is constituted the sole owner of that property and he acquires in that particular property not only his own share, right, title and interest therein which he erstwhile enjoyed but also the share, right, title and interest of the other co-owners or co-sharers in that property. This certainly would be a transfer of property within the meaning of Section 5 of the Transfer of Property Act.

4. The view that a partition by metes and bounds of coparcenary property amounts to transfer has thus been adopted consistently by this Court. But it was pointed out to us by Mr. Bhatt that in *Manabai Hari Bobde Vs. Ramchandra Dama Bobde*, , *Mudholkar and Kotval JJ.* have taken the view that the word "transfer" as used in Section 9(9) of the Berar Regulation of Agricultural Leases Act, 1951, does not include "partition". Section 9(1) of that Act provides that a landholder can terminate the lease of a protected lessee by giving him a notice in writing and by following the procedure laid down in Section 8 of that Act. Sub-section (9) of Section 9 of that Act lays down that:

Nothing in this section shall confer on a landholder who acquires any land by transfer after the 1st day" of August 1953 a right to terminate the lease of a protected lessee whose right as such had come into existence before the transfer.

The question that arose in *Manabai's* case was whether a partition between a mother and her son who were the petitioners in that case amounted to transfer within the meaning of Section 9(9) of the Berar Regulation of Agricultural Leases Act, 1951. From the observations made at p. 1433 of the report, it seems that the learned Judges held that (i) in *Soniram's* case, the Division Bench consisting of *Bhagwati and Chainani JJ.* had not considered the decision in *Kisarsing Mohansing Balwar and Others Vs. Vishnu Balkrishna Jogalekar*, , where a different view was said to have been taken by *Bavdekar and Vyas JJ.* and that (ii) the decision in *Soniram's* case being on a different statute was not an authority for the interpretation of the word "transfer" in Section 9(9) of the Berar

5. Turning now to the decision in *Kisansing Mohansing v. Vishnu Balkrishna*, the facts were that a suit was filed by the mortgagor's sons for a declaration that the mortgage was invalid inasmuch as the mortgagor had no title to the property. The property was the self-acquired property of the father of the mortgagor. A dispute arose between the sons of the mortgagor and the mortgagee as to whether the property was the ancestral property of the mortgagor's father, or whether it was the self-acquired property of the mortgagor's father. It was, however, held as a fact and the decision, proceeded on the basis that the property was the self-acquired property of the father of the mortgagor. The mortgagor's father had partitioned that property during his lifetime and as a result of the partition, he gave to the mortgagor the share which he mortgaged. The question that arose was whether, since the father purported to partition his self-acquired property between his sons, that transaction could be effected without a registered instrument. Mr. Justice Bavdekar, who delivered the judgment of the Bench, observed that there were two ways in which the transaction in question could be looked at. If a father were to effect partition between his sons and were to give them the share in his self-acquired property, whether there is ancestral property available for division at the time or not, such a transaction can be regarded as a partition in status accompanied by two transactions of gifts. But apart from this, there was, he said, another way also in which one can look at the transaction, and that was that the father at such time threw his self acquired property into the hotchpot and made a division. Mr. Justice Bavdekar added that in order that he should do so it was not necessary that there must be, as a matter of fact, any joint family property available for partition. The learned Judges on this view of the matter came to the conclusion that the transaction by which a father made a division of his self-acquired property between his sons was a transaction by which he, in the first instance, effected a severance of status between his sons; or in the second instance he notionally threw into hotchpot his self-acquired property and then divided it between his sons. They held that in that view of the matter "the transaction cannot be possibly regarded as one of the five transactions mentioned in the Transfer of Property Act, which requires registration, namely, sale, mortgage, exchange, lease for more than one year or a gift."

6. Now, with respect to the learned Judges who decided *Manabai's* case, the decision of Bavdekar and Vyas JJ. does not, in our view, lay down anywhere that a partition of a joint family property by metes and bounds amongst the members of that joint family does not amount to transfer within the meaning of that word used in Section 5 of the Transfer of Property Act. The only point that was decided there was that such a transfer would not fall under any of the five kinds of transactions referred to in Section 5 of the Transfer of Property Act, and, therefore, would not require registration as contended before them. A partition under Hindu law can be made orally and as Rankin C.J. in *Imperial Bank of India v. Bengal National Bank, Limited* ILR (1930) Cal. 136, quoted by Mulla in his

Commentary on Transfer of Property Act, 3rd edn. p. 89, held that partition, release or surrender are all forms of transfer but that so far as the Transfer of Property Act is concerned, they come under no restriction. With great respect, the decision of Bavdekar and Vyas JJ. in Kisansing's case cannot, therefore, be rightly said to have laid down anything different from what was laid down in Soniram's case. Following, therefore, the consistent view so far taken by this Court, we must hold that a partition of property belonging to a joint and undivided Hindu family by metes and bounds amongst the members of that family would amount to transfer within the meaning of the word "transfer" used in Section 5 of the Transfer of Property Act.

7. The next question that was raised by Mr. Bhatt was that even assuming that such a partition is "transfer" within the meaning of Section 5 of the Transfer of Property Act, it is not so, so far as Section 27(6) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, is concerned. Section 27(a) provides that:

When a Consolidation Officer proceeds to prepare a scheme u/s 15, during the continuance of the consolidation proceedings-

(a) no proceedings,-

(iv) for execution of any decree passed by a Civil Court, in respect of any land in respect of which a notification has been issued u/s 15 shall be commenced; and all such proceedings if commenced shall be stayed,

(v) for partitioning or sub-dividing in any manner,...

Sub-section (6) of Section 27 lays down that no person shall transfer any land in respect of which a notification u/s 15 has been issued. Mr. Bhatt urged that there are indications in some of the sections of this Act which go to show that the Legislature did not mean to include partition in transfer and that, therefore, the partition arrived at by the petitioners in this case would not fall under the mischief of Section 27(6) or Section 9 of the Act. Mr. Bhatt argued that the order of the Prant Officer declaring the partition to be invalid and imposing the fine of Rs. 50 on petitioner No. 1 would be bad and without jurisdiction.

8. Now, in order to appreciate the contention of Mr. Bhatt, it is well to remember that the object of the Legislature in passing this Act was two-fold. Indeed; the Act falls into two separate parts, dealing with (i) prevention of fragmentation of land and (ii) providing for a scheme of consolidation. But Mr. Bhatt urged that although Section 7(7) uses the word "transfer," the proviso thereof makes a distinction between a mortgage and a transfer and similarly Sub-section (2) thereof makes a distinction between the leasing of the land and a transfer. He also pointed out Section 8 of the Act in support of his plea that the Legislature has made there also a distinction between "transfer" and "partition" and for that reason in Section 8 the Legislature has provided that no land in any local area shall be transferred or partitioned so as to create a fragment.

9. Similarly "there are provisions as to partition of lands in Section 8AA and Section 9 of the Act. He, therefore, urged that these sections indicated that the Legislature did not include partition in the word "transfer" and, therefore, Section 27(6) was not a bar to a partition of agricultural lands belonging to a joint family, even though a notice had been issued and a scheme of consolidation was already in progress u/s 15 of the Act.

10. Now, the word "transfer" has not been denned in this Act. Ordinarily, therefore, we would construe the word "transfer" in the same manner in which as aforesaid it has been consistently construed by this Court in reference to Section 5 of the Transfer of Property Act. In that view, the transfer would include a partition, unless Mr. Bhatt is in a position to establish that the word "transfer" has been given a special or a restricted meaning by the Legislature in the statute before us. If one were to examine the various sections pointed out by Mr. Bhatt, it would appear that wherever the word "partition" has been used, the Legislature has done so for a special object and not with a view to give a restricted or a qualified meaning to the word "transfer." Thus, Section 7, which appears in Chap. II dealing with fragments, prohibits 4, person from transferring any fragment in respect of which a notice has been given under Sub-section (2) of Section 6 (except to the owner of) of a contiguous survey number or recognised sub-division of a survey number. The proviso to Section 7(1), however, provides an exception to the rule laid down in the section itself by providing that the holder of such a fragment may mortgage or transfer it to the State Government or a land-mortgage bank or any other co-operative society as security for any loan advanced to him by the State Government or such bank or society, as the case may be. The fact that the proviso mentions the word "mortgage" or "transfer" would not mean that a mortgage would not fall within the term "transfer" as used in that section. The Legislature used those words separately as it was laying down an exception to Section 7(7) whereunder the holder of a fragment is given liberty to mortgage or transfer that fragment to the persons mentioned in that proviso. Similarly in Sub-section (2) to Section 7 there is a complete ban against leasing out such a fragment to any person other than the person cultivating any land-which is contiguous to the fragment. Since the Legislature was laying down a prohibition against leasing it out and not any other mode of transfer which is already provided for in Sub-section (1) of that section, it had to specifically use the word "lease" in order to make the prohibition it was laying down specific and distinctive.

11. The other section relied upon by Mr. Bhatt was Section 8 which provides that:

No land in any local area shall be transferred or partitioned so as to create a fragment.

The Legislature was or must be deemed to be aware of the fact that there would be a number of agricultural lands jointly held by members of a joint and undivided Hindu family. Indeed, there are certain provisions in the Act which deal with a partition of such joint family properties which prescribe the manner in

which such a partition is to be carried out. But so far as a fragment was concerned, the Legislature wanted to lay down a complete prohibition against transfer or partition of land which would result in a fragment. Since the Legislature was aware that there would be lands held jointly by members of a joint family and in the course of time they might be partitioned amongst them, it had, consistently with the object of the Act, to provide" in Section 8 a ban, both against the transfer in general and against partition in particular, of which the consequence would be the creation of a fragment. It seems to us that it was for this reason that the Legislature used both the words "transfer" or "partition" in Section 8. Section 8AA which has been recently added lays down restrictions on partitions of lands. It provides that:

Where, by transfer, decree, succession or otherwise, two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed, and the land has to be partitioned among them, such partition shall be effected so as not to create a fragment.

It would thus appear from Section 8AA that the Legislature does not lay down an absolute ban against partition. The ban is a restricted one and that is against creating a fragment as a result of such partition. Section 9 then declares that the transfer or partition which is contrary to the provisions of the Act shall be void. Again it was necessary for the Legislature to use both the words "transfer" and "partition" in Section 9 as it wanted to lay down that a transfer or partition of property such as agricultural lands belonging to a joint Hindu family would be void if such a transfer or partition contravened the provisions of the Act. These sections, in our view, therefore, do not help Mr. Bhatt in his contention that because in Section 8AA and Section 9 the Legislature has used both the words "transfer" and "partition," it follows therefore that transfer does not include partition so far as the statute before us is concerned.

12. Mr. Bhatt, however, laid considerable stress on the recent insertion of Clause (v) in Sub-section (a) of Section 27 which provides for the stay of proceedings filed for partitioning or sub-dividing lands in any manner. Mr. Bhatt argued that if the Legislature meant that transfer should include partition, there was no necessity for it to have added as and by way of an amendment Clause (v) in Section 27(a). In our opinion, Mr. Bhatt's contention cannot stand. Section 27 falls into two parts. Sub-section (a) deals with the stay of proceedings set out therein whereas Sub-section (b) provides for a ban against transfer of land irrespective of any pending proceedings in respect of which a notification u/s 15 has been issued. Before Clause (v) was added in Sub-section (a) proceedings that were liable to be stayed were those that are set out therein including proceedings for execution of any decree passed by a civil Court. The result was that the only proceedings that were liable to be stayed u/s 27(a)(iv), as it stood then, were proceedings for execution of a decree passed by a civil Court; in other words, proceedings which had been taken out after a decree had been passed by a civil Court. Section 27(a)(iv), as it stood then, therefore, would not have

affected pending suits in which decrees had not yet been passed. It seems to us that the object of the Legislature in inducting Clause (v) in Section 27(a) was also to provide for a stay also of proceedings for partitioning or sub-dividing in any manner agricultural lands though such proceedings had not yet resulted in decrees or orders. This object having been in the mind of the Legislature, it had to specifically provide for a stay in respect of proceedings for partitioning or sub-dividing. A general term like the term "transfer" would not have been suitable where the Legislature wanted merely to provide for a Stay of proceedings which were for partitioning or sub-dividing land. Sub-section (&) to Section 27, however, has been enacted in general terms, for obviously the object of the Legislature was to prohibit transfer of any kind in respect of land in respect of which a notification u/s 15 had been issued. In our opinion, it would be unreasonable to construe the word "transfer" as meaning, all the forms contemplated in Section 5 except the form of partition. If a transfer by way of partition were to be taken out from Section 27(b), it would result in the frustration of the very object for which the Legislature has enacted Section 27 and Section 15 of the Act. We are of the view, on the considerations aforesaid, that the term "transfer" in Section 27(b) has not been given any meaning different from the word "transfer" in Section 5 of the Transfer of Property Act. The partition sought to be effected by the petitioners would fall within the mischief of Section 27(a), and the petitioners having effected that partition and also having had different survey numbers entered in their individual names in the record of rights, the partition was liable to be declared void u/s 9(7) of the Act. They were also liable to a fine under that section. Consequently, the petition fails and is dismissed with costs.