

(1994) 06 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 5020 of 1985 and W.P. No. 3140 of 1990

Khandu Daulat Dangade

APPELLANT

Vs

Jaywantrao Yadavrao Kharade and others

RESPONDENT

Date of Decision : 22-06-1994

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 15, 15(2), 2, 2(6), 2(7A)

Citation : (1994) 06 BOM CK 0002

Hon'ble Judges : M.S. Vaidya, J

Bench : Single Bench

Advocate : V.D. Hon, for the Appellant; C.K. Shinde and S.B. Mhase, 7 and 8, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Vaidya, J.—The petitioner claims himself to be a tenant of an agricultural land bearing consolidated Survey No. 235 of village Balwandi-Kothar, Tq. Shrigonda, District Ahmednagar. He challenges in this Writ Petition, the decision dated 30-3-1985 of the Maharashtra Revenue Tribunal, Pune, in Revision Application No. MRT-H-VII-5/84 (Tcn.B. 185/84).

2. The facts giving rise to the litigation may be briefly stated, at the outset. One Yadavrao @ Yadu Kharade had three sons - Baburao, Jaywant and Shankar from his wife Anjanabai and, Balu from a predeceased wife. The family had several agricultural lands as well as some house properties. On or about 14th February, 1957 Baburao out of them, brought Regular Civil Suit No. 9/57 in the Court of Civil Judge, Jr. Dn., Shrigonda, for partition and possession of his share in the joint family property. It is relevant to note, some of the averments made in that Suit. They are apparent from a certified copy of the decree dated 6-4-1961 passed in that Suit. According to Baburao, the plaintiff in that Suit, though the family had several lands and house properties, they were never divided between the members of the family by effecting any formal partition; but, for the sake of convenience, different members in the family were cultivating different lands and

were occupying separately different house properties. It was averred in the plaint that, in course of time, some of the members had got their names mutated in the Village Record to the lands which were in their respective occupations and that plaintiff-Baburao was excluded from enjoying his due share in the family properties. He had averred that Survey Nos. 35 and 23 of villages Tandali and Balwandi-Kothar respectively, happened to be his separate properties but, they were also got mutated by the members of the family in their names. It was contended that when the plaintiff had asked for partition by metes and bounds in April, 1956, the other members had neglected to give him his share and had, ultimately, denied him his share. It was contended that on account of this refusal, he was obliged to bring a Suit for partition. He had, accordingly, prayed for separate partition and separate possession of his share.

3. Out of all those lands, the land which is relevant for the purposes of the present litigation is Survey No. 23 of the Balwandi-Kothar, which appears to have been since numbered as consolidated Survey No. 235. Admittedly, since before the tillers" day, the aforesaid land stood in the name of deceased-Anjanabai in the village records. She had applied, after the tillers" day, for a certificate of exemption u/s 88C of the Bombay Tenancy and Agricultural Lands Act, 1948 (in brief, BT & AL Act). The certificate u/s 88C was granted to her by the Tenancy Authorities below and the matter was carried to the High Court, in that context, in Civil Application No. 2685/1958. Under Orders dated 23-3-1972, the High Court had remanded the matter for hearing after setting aside the certificate. Anjanabai had died on 10-8-1969 during the pendency of that proceeding in the High Court and, therefore, the High Court had directed a fresh inquiry into the quantum of income of the legal heirs of deceased - Anjanabai. When the inquiry came before the Additional Tahsildar, Shrigonda in the year 1981, the legal representatives of Anjanabai did not press for it and, therefore, the said proceeding came to be disposed of under the orders dated 1-12-1981. A copy of that order is in the records.

4. Coming back to the main Suit for partition, namely, Regular Civil Suit No. 9/57 of Shrigonda Court, it is seen from a copy of the decree filed on the record that the Suit came to be disposed of on 6th April, 1961 on account of the compromise arrived at by the parties. It is seen from the copy of the decree that divisions by metes and bounds were effected by that Consent Decree and the plaintiff was put in possession of the lands and house properties of his share. The other members of the family were also given lands of their shares. As regards Survey No. 23, it was provided in the decree that the said land was given as a share to Anjanabai and that, after her death, defendants Nos. 1 to 3 in that Suit, were entitled to have the same equally distributed among themselves to the exclusion of the plaintiff in that Suit. By and large, this decree appears to have effected the partition by metes and bounds completely.

5. It is clear from the record that in pursuance of this decree, Anjanabai continued to be in possession of Survey No. 23, during her lifetime, and, had

instituted Suit bearing No. RCS 1/1961 in the Court of Civil Judge, Jr. Dn. Shrigonda, for recovery of arrears of rent from the present petitioner. A copy of that plaint is on record.

6. After the death of Anjanabai, a dispute arose between her legal representatives as regards the property at consolidated Survey No. 235 (Survey No. 23) which belonged to Anjanabai and some other properties and, a suit for partition bearing Suit No. 140/1979 came to be filed in the Court of Civil Judge, Jr. Dn. at Shrigonda. The said Suit also ended in a Compromise Decree. It is pertinent to note for the purposes of present litigation that, consolidated Survey No. 235 went to the share of plaintiff No. 1 - Heerabai and plaintiff No. 7 - Draupadabai, and the remaining properties were distributed among other defendants. Thus, under this decree dated 12-3-1979, Heerabai and Draupadabai, became the owners of the land which are. now, in dispute.

7. After this decree, Heerabai and Draupadabai issued notice dated 5-3-1979 for terminating the tenancy of the present petitioner and, thereafter, filed on 24-3-1979 a proceeding u/s 32F read with section 32P of the BT & AL Act. It is out of this proceeding that the present Writ Petition has arisen.

8. During the pendency of that proceeding, the petitioner issued notice dated 2-2-1982 to the landlords u/s 32F(1A) of the BT & AL Act, conveying them his intention to purchase the land. His Written Statement in the aforesaid Tenancy proceeding initiated by the landlord, came to be filed on 1-3-1982. The only contention raised in the proceeding was that as the proceeding u/s 88C was dropped by the Legal Representatives of Anjanabai, their application u/s 33F was not sustainable. It was denied that Anjanabai had got the disputed land as the result of RCS 9/57 and that, therefore, he had not become the owner of the suit land (presumably on the tiller's day).

9. Negating the contention raised by the tenant in the proceeding u/s 32R the Additional Tehsildar and the Agricultural Lands Tribunal directed on 30-3-1982 that the tenant in question should be summarily vacated from the suit land and the land be surrendered to the land ladies (the then applicants Nos. 7 and 8) u/s 32P(2)(A), 32P(2)(b) read with section 15 of the BT & AL Act, 1948. An appeal was carried before the Deputy Collector in Tenancy Appeal No. 29/82. The said appeal came to be dismissed on 11-4-1983. The matter was, then, carried to the Maharashtra Revenue Tribunal and, under the impugned order dated 30-3-1985, the MRT had dismissed the Revision Application.

10. Having felt aggrieved by this decision, the tenant has approached this Court, contending that the decisions of the Revenue Authorities and the Tribunal were not according to law, particularly because, the tenant had informed his option to purchase the land u/s 32F(1A) of the BT & AL Act, under notice dated 2-2-1982 and that the bar of limitation could not affect the right of the tenant, particularly because, the 88C proceeding which was remanded by the High Court had continued till 1-12-1981. It was also contended that by contesting the

proceeding, the intention of the tenant to exercise his option to purchase the land was very clear to the landladies as well as to the authorities concerned and that, therefore, the right of the tenant could not be defeated merely on a technical ground that the option to purchase was not communicated within two years of the date of death of Anjanabai or, that it was not in a prescribed form. It was sought to be contended, for the first time, in this Petition that the Consent Decree passed in Regular Civil Suit No. 9/57 was a collusive decree on the face of it and that, as such, the tenant had become the owner of the land on 1-4-1957 i.e. tillers" day itself. It was also contended that the certificate granted to deceased-Anjanabai u/s 88C had continued to subsist till 23-3-1972 when the High Court had set it aside and that, therefore, till then the provisions contained in sections 32 to 32R of the BT & AL Act, had no application to the facts of the case and that, therefore, omission on the part of the tenant to give a formal notice to the landladies and to the Tribunal informing his option to purchase the land would not be a default. It was maintained that the tenant had acted diligently immediately in 1982. after the proceeding u/s 88C of the BT & AL Act, was dropped by the legal representatives of Anjanabai.

11. It was next contended that though proviso to section 32F(I)(a) required the Tahsildar to hold an inquiry into the genuineness of the partition, no such inquiry was held and the land was ordered to be delivered to the landladies straightway, despite the fact that the land is required to be surrendered to the landladies, subject to section 15 read with section 31-A(a) of the BT & AL Act, either wholly or partly and, then, to be disposed of by the Government. It was submitted that such a course was not permissible at law. It was also contended, as the property of the family of Anjanabai and her sons was not separated in a partition by metes and bounds on the tillers" day, the proviso to section 32F(I)(a) would operate and title of Anjanabai to the property would not stand protected as on the tillers" day. Reliance was placed in this context on observations in *Anant Dattatraya Mali vs. Chintaman*, 1969 Mh.L.J. 35 = 70 BLR 689, and *Nagodutt vs. Smt. Nagobai*, 78 BLR 427. It was also pointed out that the view taken in *Anant Dattatraya Mali's* case, referred to above, was confirmed by the Supreme Court in *Balkrishna Somnath Vs. Sadu Devram Koli and Another*, , in which three matters were disposed of by the Supreme Court by a common judgment. A reference was also made to the decision of the Supreme Court in *Chandrakant Madhavrav Dhaibar and Another Vs. Patel Parshottamdas Shamalbhai and Others*, .

12. In reply to these arguments, Mr. Mhase, the learned Counsel for the contesting respondents, contended that the point regarding the genuineness of the partitions effected by the decree in Civil Suit No. 9/57 was never factually raised by the petitioner-tenant at any point of time till this Writ Petition was being argued and that the same cannot be allowed to be taken up now. It was also pointed out that the point regarding surplus land was also not raised so far and that the same could not be allowed to be taken up now. It was also submitted that the tenant had no locus standi to raise the aforesaid point once he was ordered to be summarily vacated by the Tenancy Authorities in the

proceeding u/s 32F read with section 32P. As regards the nature of partitions effected by a Consent Decree in Regular Civil Suit No. 9/57, it was submitted that the severance of status in the family had occurred as far back as in 1956 and that there was no reason to suppose that the partitions were not genuine. It was pointed out that the pleadings in the plaint as well as the Consent Decree showed that the parties were already in possession of certain lands and, in any event, Anjanabai was, admittedly, in possession of the suit land which stood in her name as on 1-4-1957 i.e. the tillers" day. Therefore, when Anjanabai was a person under disability, being a widow, the tenant did not as a matter of law, become owner of the land as on tillers" day. It was contended that though Certificate u/s 88C was granted to Anjanabai, the same was sub judice in the High Court till 1972 and it was finally set aside by the High Court in 1972. The petitioner was not diligent, even then, to convey to the landladies his option to purchase the land u/s 32F and his contention that sections 32 to 32R did not operate till 1981. was not correct according to law. It was submitted that pendency of such a "proceeding was no bar to the tenant in exercising his option u/s 32F(I)(a) of the Act and, his failure to do so, could not justify him to contend, at a late stage, that his intention was clear to the landladies as well as to the Tenancy Authorities in question. Anjanabai's successors-in-title had terminated the tenancy of the petitioner, but no application was filed u/s 31 of the BT & AL Act. They had proceeded against the tenant u/s 32F and 32P. In connection with proviso to section 32F(I)(a), it was submitted that it did not operate in the cases of severance of status and reliance was placed, in that context, on the decision in *Vithoba Bira Kolekar vs. Khanderao* (Spl. C.A. 1161 of 1964 decided on 16-4-1965 by Chandrachud, J. - [as his Lordship then was] reported in *Tenancy Law Report*, Vol. XVI - No. 6 at page 78). He referred to various provisions of the Hindu Law and, in particular, Articles 322 and 328 of Mulla's Hindu Law. As regards the rulings pointed out by the learned Counsel for the petitioners, it was submitted that they all pertained to cases of partial partition and they had no application to the facts of the present case. It was, therefore, prayed that the Writ Petition be dismissed.

13. The averments made in the plaint in Regular Civil Suit No. 9/57 in so far as they are reproduced in the copy of the decree and to the extent to which they are mentioned above while narrating the facts, indicate that prior to 1956 Anjanabai was a widow, that she had three sons of her own from deceased-Yadavrao and one son (defendant No. 2 in that Suit) who was the son of the second wife of Yadavrao. The family had a number of lands which are listed in the decree itself. It was not that the dispute regarding the partition had arisen only in respect of the suit land, namely, the then Survey No. 23. According to the plaintiff, other coparceners in the family had taken possession of other lands and had manipulated the Village Records so as to show that they were owners of the respective lands. The contention of the plaintiff was that he was not given land and property of his share though he had asked for it in April, 1956. It was on this background that the suit for partition was brought on 14-2-1957. The suit was,

thus, instituted prior to 1-4-1957 which was the tillers" day. The suit was pending on the tillers" day and the same came to be disposed of, on the basis of the consent decree on 6-4-1961. The Consent Decree pervades all the family properties and it was not even the contention of the tenant that it was a partial partition. Indeed, Mr. Mhase was right in contending that the petitioner was diligent, at least in appeal, in challenging the decree passed later on in Civil Suit No. 140/1979, on the ground that it was false and bogus, but he had never challenged the decree passed in RCS No. 9/57, on the ground that it was a collusive decree, or, that it was a decree brought about for the purposes of defeating the alleged rights of the petitioner-tenant. Indeed, the land in question stood in the name of Anjanabai in the Village Records even as on 1/4/1957 and, in that capacity, she had applied for a certificate u/s 88C, seeking the exemption of the land from certain provisions of the Act. She had succeeded in getting it and the certificate subsisted even after her death till it was formally set aside by the High Court on 23-3-1972 and, that too, in view of the consideration that Anjanabai had since died and that inquiry into the income of all her legal representatives was necessary for the purposes of determining, whether or not, a certificate u/s 88C of the BT and AL Act, could be granted for exempting the suit land from the operation of sections 32 to 32R. Indeed in law, the Certificate u/s 88C granted in favour of deceased-Anjanabai had ceased to have its legal effect on the date of her death i.e. 10-6-1969. The land was without any protection of section 88C of the BT and AL Act, from that date. It is not the contention of the petitioner-tenant that he was not aware of the death of Anjanabai. The legal representatives of deceased-Anjanabai could sue for possession u/s 31 of the BT and AL Act, but they had not done so. Therefore, one year after the death of Anjanabai, the petitioner could have asserted his right to the land in question, in pursuance of the provisions of the BT and AL Act. For no explicable reason, he failed to do so. The remanded matter u/s 88C lingered before the Agricultural Lands Tribunal till 1982 and, then, it came to be disposed of on account of non-prosecution by the legal representatives of deceased-Anjanabai. It was after that that the tenant came out of a deep slumber and asserted his alleged right under" section 32F(I)(a) of the BT and AL Act. by issuing a notice dated 2-2-1982. The Courts below were right in considering the relevant provision, which required a notice by a tenant within the prescribed time and in a prescribed form. In the present case, liberal construction in that behalf on the provision contained in section 32F(I)(a) would not be justified.

14. The other point urged by Shri Hon. the learned Counsel for the petitioner, was in connection with the provisos to section 32F{1). Section 32F(I)(a) reads thus:?

"32F(I)(a) Where the landlord is a minor, or a widow, or a person subject to any mental or physical disability the tenant shall have the right to purchase such land u/s 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy u/s 31 (and for enabling the tenant to exercise the right of purchase, the landlord shall send an intimation to the tenant

of the fact that he has attained majority, before the expiry of the period during which such landlord is entitled to terminate the tenancy u/s 31) :

Provided that where a person of such category is a member of a joint family the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated, having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property and not in a larger proportion."

The submission was that where a person of "disabled category" happened to be a member of a joint family, the provisions of the sub-section would not apply if, at least one member of the joint family was outside the category of persons under disability. It was submitted that partitions by metes and bounds under the decree in Regular Civil Suit No. 9/57 came to be made in 1961. Therefore, on 1-4-1957, Anjanabai herself was a member of the joint family of which one or more than one members were not the persons under legal disability . Therefore, it was submitted that the petitioner-tenant had right to purchase the land u/s 32 as on 1-4-1957 itself.

15. For appreciating the aforesaid contention, it is necessary to look to the other provisions of the Act, as well. u/s 31, the landlord was given a right to terminate¹ a tenancy for personal cultivation and non-agricultural purposes, provided the same was done on or before 31st day of December, 1956 and the application for possession was preferred on or before 31st March, 1957. Sub-section (3) of section 31 gave protection to persons under disability, such as, minor, widow etc. Section 32 declared that on tillers" day i.e. 1-4-1957, the tenant would be deemed to have purchased the land free from all encumbrances, subject to other provisions contained in the Act. Section 32F(I)(a) provided that notwithstanding anything contained in the preceding sections, a tenant or landlord under legal disability such as, a minor, a widow etc. would have the right to purchase the land u/s 32 within one year from the expiry of the period during which such landlady was entitled to terminate the tenancy u/s 31. The provisos added to sections 31(3) and 32F(I)(a) were added by Bombay Act 31 of 1957, but that was done with retrospective effect. By the same Act, sub-section (7A) of section 2 was added so as to define the expression "Joint Family". Under that sub-section "Joint Family" means an undivided Hindu family, and in the case of other persons a group of unit the members of which are by custom joint in estate or residence." As this definition was introduced by the same Act, which had introduced the provisos to sections 31(3) and 32F(I)(a), it goes without saying that the expression "Joint Family" used in those provisos will have the same connotation as is given by that definition and no other connotation of the expression can be considered in that context. On plain reading of this definition,

it is clear that the definition has two parts - the first part deals with Hindu family and it considers out of a Hindu family only the undivided family. The expression "undivided" is not defined in the Act, and, therefore, it will have the same connotation as it has in Hindu law. The first part of the definition excludes a divided Hindu family. It was a contention of Mr. Hon. on behalf of the petitioner, that a divided Hindu family could fall in the second part of the definition, in view of the expression "in the case of other persons". This contention is, however, not sustainable at all because, as the later portion of the second part of the definition explains, it speaks of a group of unit, the member of which are by custom joint in estate or residence. Obviously enough, this part of the definition refers to such other groups among whom there is a custom of family members living joint in estate or joint in residence. This part is not intended to cover a divided Hindu family.

16. The question, therefore, is what is meant by Undivided Hindu Family or, for that matter, a Divided Hindu Family. Article 322 of the Mulla's Hindu Law is relevant. It reads :

"322. What is Partition. - According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he - that particular member - has a certain definite share, one third or one fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property of metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common.

Article 325 elucidates the point further. :? It reads :

"325 How partition maybe affected? Partition is a severance of joint status, and as such it is a matter of individual volition. All that is necessary, therefore, to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. The Supreme Court pointed out in the under mentioned cases (*) that there should be an intimation, indication of representation of such intention and that what form that manifestation should take would depend upon the circumstances of each case. It is implicit in this principle that this manifestation or declaration of intention should be to the knowledge of the persons affected for a mere uncommunicated declaration may amount to no more than merely harbouring an intent to separate. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and

unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share in unimpeachable whether or not they agree to a separation, and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. It may be expressed by serving a notice on the other coparceners, and the severance of status takes place from the date when the communication was sent and not when it was received. Once a communication of the intention is made by a member which has resulted in the severance of the joint family status it would not thereafter be open to him to nullify its effect by revoking or withdrawing the notice. He cannot get back to the old position by mere revocation of the intention."

17. A reference may, then, be made to the leading decided cases on the point. Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, , it was observed that it was a settled law that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty. It was pointed out that one cannot, however, declare or manifest his mental state in a vacuum and, therefore, the intention must be communicated to the others who are concerned. When it was so informed, the knowledge of the members of the family of the manifested intention of one of them to separate from them constitutes severance of the family and the same relates back to the date when the intention was formed and expressed, subject to the consideration that the rights accrued to others in the joint family property between the said manifestation and the knowledge of it by other members would be saved on equitable considerations.

This case was relied upon by the Supreme Court in Puttarangamma and Others Vs. M.S. Ranganna and Others, , and the aforesaid propositions were confirmed and a further observation was made that it was not necessary that there should be an agreement between all the coparceners for the disruption of the joint status and it was also immaterial in such a case, whether or not, the other coparceners gave their consent to the separation. A reference is also made to the decision in Smt. Krishnabai Deshmukh vs. Appasaheb Nimbalkar, AIR 1979 SC 1880, and particularly, to the observations quoted below ;?

"The preliminary recital in the deed (as translated by the trial Court). with due emphasis on the word "recently" and "Vibhakta rahave" coupled with the surrounding circumstances and natural probabilities of the case, definitely raised the inference that sometime in the recent past, prior to the date of the deed Rameshchandrarao had clearly and persistently intimated to his coparcener, Narayanrao, his intention to sever the joint family status and to hold and enjoy his share of the joint family property in severalty. The immediate and inexorable consequence of this intimation was disruption or division of the joint status, which, in the eye of Hindu Law, amounted to "partition". From that date onwards, which preceded the date of the deed. Narayanrao and Ramchandrarao

ceased to be coparceners and held the former coparcenery property as tenants-in-common. Thus, at the time of execution of the deed, the joint family status did not exist; it had already been put an end to by Ramchandrarao's intimation to Narayanrao of his intention to divide, and separate."

The aforesaid quotation indicates that though the date of the deed of partition was subsequent to the declaration of" intention of separation by a coparcener, it was held that the partition had, in fact, taken place on the date when such intention was made clear to the others concerned.

18. In the facts of the present case, it is to be noted from the copy of the decree in Regular Civil Suit No. 9/57 that Baburao, i.e. one of the sons of deceased - Anjanabai had brought the Suit for partition, with an averment that since before March, 1956 he had been asking for the partition and the cause of action for the partition had taken place in April, 1956 when the defendants in that Suit including Anjanabai had declined to make equitable partitions. Thus, it is clear that in the present case, the severance of status in the family had occurred prior to April, 1956 and it had become abundantly clear when the suit for partition with the aforesaid averment was instituted on R.F. 40 14th February, 1957. Thus on 1-4-1957 i.e. the tillers" day, the family in question was not a joint family at all because, there had already been a severance of status among the members of the family. True it is, that the Consent Decree came to be passed later on 6th April, 1961 but, according to the established principles of Hindu Law, this decree would relate back to the date of severance of status and parties will have to be considered as separated since the date of the severance of status. Again, it is important to note that the divisions made by this partition did not purport to be sub-dividing in particular land; certain specified survey numbers were allotted thereunder to the various coparceners who were entitled to shares. It was not even a contention that any property of the joint family was left out of the consideration while bringing the suit for partition. The landed properties as well as various house properties were subject-matter of the Suit. The family was a family of agriculturists. Therefore, there was hardly any question of any mentionable movable property. It was not anybody's contention in the present proceeding that there was any movable property worth the name and that the partition had become incomplete because of its non-inclusion in the Suit. Indeed, even the present petitioner had not contended at any point of time, till the point was agitated in the present proceeding in this Court, that the aforesaid decree was a bogus or a sham decree brought about for certain ulterior motives. The members of the family had never challenged the aforesaid partition at any subsequent point of time and the decree had subsisted all along as it was passed as far back as on 6-4-1961. On the other hand, the descendants of the members among whom the partitions had taken place in pursuance of the decree in RCS 9/57, had brought, in their own right, after the death of Anjanabai, another suit bearing Suit No. 140/79 in the Court of Civil Judge, Jr. Dn. Shrigonda. In that Suit, a consent decree came to be passed on 12-3-1979, a copy of which is on record. As per that decree, Anjanabai's lands at Survey No. 23 i.e. consolidated

Survey No. 235 came to be allotted to the present respondents Nos. 7 and 8 in the present proceeding. None of the parties to the aforesaid partition have ever challenged the aforesaid Consent Decree, on any ground. It is not the contention of the present petitioner that he had not known the aforesaid decrees. However, he had himself never initiated any action in any Court or before any authority for challenging the partitions as effected under the decrees passed in RCS Nos. 9/57 and 140/79. It appears that even before the A.L.T such a contention was never raised. The contention regarding decree in RCS 140/79 was, for the first time, raised in the Tenancy Appeal but, then there was no material to substantiate that contention. The Tenancy Authorities, right upto the Maharashtra Revenue Tribunal, have upheld both of the partitions. We do not see any reason to think, at this stage, that the aforesaid two Consent Decrees were bogus and sham, as was sought to be submitted before us. Indeed, such a contention could not be legally raised at all. for the first time, in the Writ Petition. But even on merits, there is no material to substantiate that contention.

19. While considering the provisions of the BT & AL Act, particularly in the context of Certificate u/s 88C of that Act, this Court had taken a view that even for the purposes of issuance of a Certificate u/s 88C of that Act. the date of severance of status in the joint family has got to be considered. In *Vithoba Bira Kolekar vs. Khanderao Spl.* CA No. 1161/1964 decided on 16-4-1965, the land in dispute belonged to a joint family of which, the respondent and his two sisters-in-law were members. One of those sisters-in-law had filed a Civil Suit against the members of the joint family for partition and separate possession of her 1/3rd share in the joint family properties. A decree declaring 1/3rd share each to the respondent and his two sisters-in-law came to be passed by the Civil Court on 13-10-1952 and, in 1959 the same was pending before the Collector for making partitions by metes and bounds. During the pendency of that proceeding, the respondent filed an application u/s 88C for obtaining a certificate in respect of his 1/3rd share, but the same came to be rejected at the hands of the Tenancy Authorities. While deciding the point, this Court observed :

"In this case, however, it must be borne in mind that not only has a decree for partition been passed, but proceedings are pending before the Collector for a division of the different shares by metes and bounds. The proceedings have been pending before the Collector since the year 1959 which was long before the respondent filed his application u/s 88C. This, therefore, is not a case in which a certificate, if at all it can be granted, can be granted in respect of an undivided share only. The certificate shall of course have to accord with the actual partition which the Collector will effect in the darkhast which has been transferred to him for execution, but that is a matter of procedure."

Thus, the rights of the parties, as they prevailed on the date of severance of status in the joint family, were respected.

20. Mr. Hon, the learned Counsel for the petitioner, then, submitted that the respondents could not claim the benefit of section 32F(I)(a) because, there were

no divisions by metes and bounds in the family property as on 1-4-1957 and that, the family did consist of at least one member, in the present case more than one, who were not under disability as on 1-4-1957, or, upto 31-3-1958; as contemplated by the proviso. This argument overlooks the fact that the proviso to that section had no application to the facts of the present case because, as required by the proviso, a person holding the land who is under physical or mental disability, must be a member of joint family and, the remaining two conditions should be fulfilled. In the present case, for the reasons discussed above, one has got to hold that the family in question was not a joint family at all as on 1-4-1957 or as on 31-3-1958 within the meaning of the term as defined in section 2(7A) of the BT & AL Act, which incorporated therein the concept of Hindu Law regarding the existence and non-existence of the joint Hindu family. If, according to law, Anjanabai and the other members of the coparcenary, who were parties to the Regular Civil Suit No. 9/57, had already severed before 1-4-1957, the family had ceased to be a joint since before 1-4-1957 and the rights of the parties to have the joint family properties divided by metes and bounds were being executed through the Court, according to the due procedure of law. For the purposes of the proviso to section 32F(I)(a) of the BT & AL Act, the family was not a joint family at all and, therefore, the exclusion of application of sub-section 32F(I)(a) could not operate in the case of land which had ultimately come to Anjanabai after the partition. The principle laid down in Vithoba Bira Kolekar's case (referred to above), would apply there also. There was, therefore, no question of ascertaining, whether or not, Anjanabai's family had any member - at least one member who was outside the categories mentioned in the sub-section, whether or not. there were divisions by metes and bounds on or before 31-3-1958 and. whether or not, the share to the person under physical disability in the entire joint family property was in the same proportion as his share in the entire joint family could not arise.

21. It may be pointed out here that a proviso similar to the aforesaid proviso, was incorporated in section 31(3) which enabled a person under mental or physical disability to give a notice for termination of tenancy by making an application u/s 29 at a postponed date. That sub-section does not contemplate the eventuality of a widow applying on any postponed date for possession of land from a tenant in her lifetime. The date stood postponed only in the context of the "successor-in-title of a widow" and not a widow herself. Now. if the contention of Mr. Hon was to be accepted in the same fashion as regards the aforesaid proviso to section 31(3), that would have meant that though there was a severance of status, though the members of the joint family were at daggers drawn and though a neglected widow in the family was a holder of a land as on tillers" day, she was not saved from the consequences if a member of such severed family was adult. True it is that Tenancy Act was meant for protection of the downtrodden tenants but at the same time, it is to be borne in mind that the said Act was intended to afford some protection to the persons under physical and mental disability as well and the legislature had to devise ways and means while

dealing with the conflict of interests and rights of the persons labouring under different categories of disabilities, such as, downtrodden tenants and neglected widows in the family. The construction which was sought to be put on the proviso by Mr. Hon posed to constitute a threat to the rights of the widow to the land for the protection of a tenant, a presumably downtrodden person, though de facto the tenant might be in a position stronger than that of the widow, in the context of the protection of the rights and interests. Such a consequent was certainly not intended by the legislature while introducing, and that too, with retrospective effect, the provisos to sections 31(3), 32F and the definition of joint family in section 2(7A) of the BT & AL Act.

22. Mr. Hon, then, relied upon two rulings in support of his proposition which may, now, be considered. The first ruling was *Anant Dattatraya Mali JJ. Chintaman Govind Patil*, 1969 Mh. L.J 35 = 1968 BLR 689, which was carried later on, to the Supreme Court and was decided by the Supreme Court in *Balkrishna Somnath Vs. Sadu Devram Koli and Another*, . The second ruling was the ruling in *Chandrakant Madhavrav Dhaibar and Another Vs. Patel Parshottamdas Shamalbhai and Others*, . Both these cases dealt with the question of a partial partition in a joint Hindu family.

In *Anant vs. Chintaman* (supra). Dattatraya was the owner of several agricultural lands besides several houses and a money lending business. He died in 1952 leaving behind him his widow - Laxmibai and two sons - Anant and Balwant. After the amendment to the BT & AL Act. under Act No. 13 of 1956 with effect from 1st August, 1956, a partition was effected between the widow and her two sons under a registered document dated 20th November, 1956. The lands which were in the possession of the respondent-tenant were allotted to the share of Laxmibai but, on the assumption that on the tillers' day, the tenant had become the owner of the land, a proceeding was initiated u/s 32G of the BT & AL Act, which was resisted by Anant. on the ground that as the land had fallen to the share of Laxmibai, who was a widow, the partition was covered by the proviso to clause (a) of Section 32F(1) and that the tenant had not become the owner of the land. The tenant had challenged in the proceeding, the genuineness of the partitions and the Agricultural Lands Tribunal had recorded a finding accordingly. In Appeal, the Deputy Collector had reversed the finding holding that the partitions were genuine. But the Revenue Tribunal had set aside the order of the Deputy Collector and restored the order of the Agricultural Lands Tribunal, on the ground that a partial partition of the joint family properties was not recognised by the proviso to clause (a) of section 32F(1). While considering the scope of the proviso, this Court noted that there was no finding of the Deputy Collector that even a notional partition had not taken place in the rest of the property and, that Laxmibai and her sons had continued to be the members of a joint family in regard to that property. But, then, this Court had pointed out that the proviso, referred to above, laid down two requirements of a family partition :

(i) that "the share of such person (i.e. the disabled person) in the joint family

has been separated by metes and bounds" and

(ii) That "the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated, having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property and not in a larger proportion."

It was, then, pointed out that the proviso is not satisfied unless the share of a disabled person is separated by metes and bounds in all the joint family property and unless the agricultural lands allotted to him correspond to his share in the entire property and are not in excess thereof. Holding virtually That it was not possible to decide the aforesaid point in the case of a partial partition, the case made out by petitioner-Anant before the High Court, came to be rejected and the decision of the Maharashtra Revenue Tribunal, was upheld. While dealing with the point with more emphasis in *Balkrishna Somnath Vs. Sadu Devram Koli and Another*, , the Supreme Court observed (in para 13 of the AIR report) that separation from the joint family means separation from all the joint family assets because otherwise, the sharer remained partly joint and, to that extent, it was not separate from the joint family. It was pointed out, in that context, that notional division or the division in status also might not be enough because, the Act insisted on separation by metes and bounds and the thrust of that expression was that the division must be more than notional but actual, concrete, clearly demarcated. The aforesaid observations of the Supreme Court are to be read in the context in which they were made and, in our humble opinion, they do not cover the case of the type that is presently in the hand, in this proceeding.

23. In *Chandrakant vs. Parshottamdas* (supra), the joint Hindu family consisting of the first appellant and his four sons, owned certain lands and the suit lands were in possession of the respondents as tenants. The father and the sons divided their lands on March 12, 1958 and 1/5th share of those lands including the suit lands, was given to the second appellant. At the time of partition, the second appellant was a minor. Presuming that the tenant had become owner thereof on the tillers' day, the Mamlatdar had taken steps for fixation of value of the suit lands and the said action was objected to, on the ground that the suit lands could not be deemed to have been purchased by the respondents/tenants, in view of section 32F(1)(a) of the BT & AL Act. The Mamlatdar rejected the contention and, finally, that order was confirmed by the Maharashtra Revenue Tribunal. A writ petition filed in the High Court of Gujarat was also dismissed. Therefore, the matter had gone to the Supreme Court. The Supreme Court pointed out that as per the finding of the Mamlatdar, there was only a partial partition, in view of the fact that the members had not divided the house that they had at Baroda as well as their other lands in Poona district. The Appellate Authority had held that a partial partition also came within the scope of section 32F(1)(a). But, this view was not agreed with by the M.R.T. Pointing out that it was not necessary for the Supreme Court to go into the factual contentions and that the share given to the second appellant, having regard to the area,

assessment, classification and value of the lands, was not in the same proportion as his share in the entire joint family property, the second appellant was not entitled to the benefit of section 32F(I)(a).

24. In essence, in both of the rulings, referred to above, the Court had come to the conclusion that as the partitions were partial, it was not possible to ascertain, whether or not. the share of the person under disability was in proportion to his share in the entire family property in the light of the considerations indicated in section 32F(I)(a). These rulings are not the rulings on the connotation of the expression "Joint Family" used in proviso of section 32F(I)(a) which was defined, as already discussed above, in section 2(7A) of the Act. a clause which was introduced by the same amending Act by which the proviso u/s 32F(I)(a) was introduced. It appears that the attention of the Supreme Court was not invited to the aforesaid definition even when the decision in Balkrishna Somnath Vs. Sadu Devram Koli and Another, came to be recorded and when the observations, as stated above, were made in para 13 of the AIR report of the judgment. This could be so because, the point at hand for decision in that case did not require a reference to the aforesaid definition. Therefore, in our humble opinion, the observations made in the aforesaid paragraph by the Supreme Court, were made in the context of the point pertaining to the partial partitions only.

25. In Nago Dattu Mahajan vs. Smt. Yashodahai Huna Mahajan, 78 BLR 427, which was also referred to by Mr. Hon. the respondent-landlady before the High Court was a widow since before the tillers" day and she had applied for possession of the suit lands for personal cultivation before 31st March 1957 u/s 31 read with section 29 of the BT & AL Act. The application came to be rejected and the order was confirmed finally by the Tribunal in Revision in 1964. The matter came to the High Court and. it was held that section 32F(I)(a) did not apply to every tenant of the "disabled" landlord. The occasion for its application could not arise unless the landlord's right of resumption is found to be subsisting. It was held that in the event of any such landlord exhausting his or her right of resumption u/s 31(1) before March 31. 1957, the question of his or her "subsisting right" to resume the land u/s 31(3) could not and did not arise and consequently, section 32F(I)(a) could have no application and the tenant's right to purchase was governed by section 32(1)(b) and not by section 31F(I)(a). It was pointed out, further, that it would be more so when the landlord happened to be a widow and she had availed of her right u/s 31(1). The facts as well as the point decided by this Court are distinguishable from the facts and the point to be decided in the present case.

26. We are of the view that in a case of the present type, where there was severance of status in the family prior to 1956 and a decree for partition came to be passed thereafter, sometimes in 1961, in a Civil Suit and there was no contention that the aforesaid decree was sham or bogus or made for defeating the rights of the tenant alone, the connotation to the expression "Joint family", as explained above and, as it was indicated in Vithoba Bira Kolekar vs.

Khanderao (supra), must prevail. In order to bring a case with the scope of proviso to section 32F(1)(a), it must be shown that the person in the "disabled" category was a member of joint family as on tillers" day. In the present case, when there was no such joint family on account of severance of status in the sense in which the term is understood in Hindu Law as explained above, the facts of the present case would not be covered by the proviso to section 32F(1)(a) and the main provision of that sub-section and section 32F(1)(b) would cover the facts of the case thereby, postponing the date of deemed purchase by the tenant.

27. Coming, then, to the next contention raised by Mr. Hon, it was submitted by him that the Special C.A. in which the Certificate u/s 88C granted in favour of Anjanabai was in question, had come to be disposed of by the High Court on 23rd March, 1972 and the main matter was, then, remanded to the Court below. It remained pending there for several years and. finally, the same came to be dropped on account of withdrawal of legal representatives of Anjanabai on 1-12-1981. Anjanabai had died on 10-1-1969. Mr. Hon's contention was that the very fact that the tenant had resisted all those proceedings itself, indicates his intention to purchase the land and. therefore, his application for purchase made on or after 2-2-1982 could not be said to be barred by limitation. It was also submitted that the very fact that the Certificate u/s 88C did subsist till it was set aside by the High Court on 27-3-1972. the operation of sections 32 to 32R had come to be suspended by virtue of provisos contained in section 88C of the BT & AL Act and that. therefore, the tenant could not have exercised his right to purchase in that period. This contention can hardly be sustained for the simple reason, first, that when the certificate itself was sub judice for several years, it would hardly be said that the provisions of sections 32 to 32R stood suspended till that certificate had become final on adjudication. Secondly, in any event, the certificate was pertaining to Anjanabai herself and her old lady It did not cover the legal representatives of Anjanabai. Therefore, when Anjanabai had died on 10-8-1969, the Certificate had ceased to have any effect whatsoever in law. Mr. Hon's contention could have gained, at least, some substance if the tenant had applied for exercising the right to purchase, at least within 2 years from the date of death of Anjanabai. Admittedly, that was never done by him within a period of two years. His application was made on 2-2-1982 by way of a notice dated 30th January. 1982. which was served on the respondent-landlords on 2-2-1982 and a copy of which was endorsed to Agricultural Lands Tribunal. His right to purchase under the suit had become ineffective as far back as on 10-8-1969 or. at the most, within a period of a year or two thereafter. He could hardly be said to have exercised the right in time, and that too. in a prescribed manner, as required by section 32F(1A). The form is prescribed in Rule 20 of the BT & AL Rules. While construing the provision of this type, though it is assumed that the suit was for the benefit of the downtrodden tenants, it would not be possible to construe the provision contrary to the explicit provisions in the Act and Rules made thereunder, on account of the sympathy for such tenants. The Act itself desired that an intelligent tenant or a tenant guilty of laches could not be considered for

certain benefits which fell on him on account of the special law. To that extent at least, the provision contained in section 32F(1A) will have to be construed strictly because, the right incorporated therein is a statutory right to be exercised within a period and in a manner prescribed by law, but not otherwise. The contention urged by Mr. Hon. in this behalf, must, therefore, fail.

28. The third contention urged by Mr. Hon. was that, in view of section 32B of the BT & AL Act. the land was ordered to be surrendered wholly or partly to the landlords subject to the provisions of section 15 of the Act read with section 31A(a). If the landlord has land in excess of ceiling, the land would have to be offered to several persons listed in the section and, if there was none prepared to purchase it then, it would vest in the Government. It was pointed out that, in the present case, the land was ordered to be surrendered to the landlord directly and the landlord was directed to put in possession of the land. He submitted that this was contrary to the law. Mr. Mhase, resisted this contention, on the ground that, at no point of time, in the Courts below or, even in the present Writ Petition, any contention was raised by the petitioner-tenant in the context of surplus land. He submitted that the aforesaid contention cannot, therefore, be allowed to be taken, for the first time, in the Writ Petition. Secondly, it was contended that even u/s 32P(2) the direction had to provide that the former tenant be summarily evicted and, then, such a direction being given, the land shall subject to the provisions of section 15, be surrendered to the former landlord. He submitted that the surrender which is contemplated here is, in a way a consequence of the statutory provision which had nothing to do with the volition of the tenant. Clause (c) of sub-section (2) of section 32P deals with the contingencies where it is found that the land could not be surrendered in accordance with the provisions of section 15. Mr. Mhase's contention was that, under such circumstances, as soon as the tenant was ordered to be evicted he ceased to have any locus standi in the matter because, he is not, then, listed among any of the categories of persons listed in clause (c) of sub-section (2) of section 32P. Both of these contentions urged by Mr. Mhase, have considerable force in them. True it is, that the vesting contemplated by clause (c) of sub-section (2) of section 32P was subject to the provisions of section 15 and section 15(2), in its turn, refers to section 31 and 31-A of the Act. Section 31-A contemplates an enquiry into the limits of ceiling area, all those questions are to be considered by the authority itself and the tenant has hardly any right to intervene in the proceedings initiated for that purpose. If in the present case, the inquiry contemplated in the law, in this context, is not already made by the authorities in question, there is nothing in the law to bar that inquiry to be instituted by the authorities hereafter. The petitioner-tenant would certainly have no right to resist the enforcement of the order for his eviction from the land and the statutory operation of surrender of that land under clause (c) of sub-section (2) of section 32P. Therefore, the aforesaid contention also, cannot be sustained.

29. Before concluding, certain factual references made by Mr. Mhase may also be noted. Admittedly on 1-4-1957 the disputed lands stood in the name of

Anjanabai and it was on that count that she was able to apply u/s 88C of the BT & AL Act. This mutation was challenged by the plaintiff in RCS 9/57 and even when the proceeding u/s 88C was pending in the High Court in the year 1958, Anjanabai was, admittedly, exclusive holder of that land. She being a widow on the tillers" day, the cultivation of the land through tenant was personal cultivation for the purposes of the Act. in view of the definition contained in section 2(6) Explanation-I. It was, therefore, pointed out with certain emphasis, that even by metes and bounds the land in question was in the possession of Anjanabai as on 1-4-1957 in pursuance of whatever arrangements the family had made even prior to the rising of the dispute which was subject matter of RCS 9/57. This was pointed out with a view to submitting that from that point of view also, the facts of the present case did not fall within the scope of the proviso to section 32F(I)(a). It is not necessary to decide the legal point involved in it, but the factual position indicated by him appears correct, on the basis of the record. It was also pointed out that there is no contention that the family had any property other than that which was subject-matter of RCS No. 9/57, so as to enable the petitioner to contend that the partition was neither genuine nor complete in itself.

30. In view of all these considerations, we do not find any reason to interfere with the impugned order passed by the Maharashtra Revenue Tribunal. The Writ Petition is, therefore, dismissed. Interim relief granted in the matter shall stand vacated. Rule discharged.