

(1951) 01 BOM CK 0004
In the Bombay High Court
Case No : First Appeal No. 108 of 1948

Soniram Raghushet and Others

APPELLANT

Vs

Dwarkabai Shridharshet and Another

RESPONDENT

Date of Decision : 24-01-1951

Acts Referred:

Bombay Hindu Womens Right to Property (Extension to Agricultural Land) Act, 1942 —
Section 2
Transfer of Property Act, 1882 — Section 5

Citation : AIR 1951 Bom 94 : (1951) 53 BOMLR 325 : (1951) ILR (Bom) 679

Hon'ble Judges : Chainani, J; Bhagwati, J

Bench : Division Bench

Advocate : V.S. Desai, for the Appellant; S.G. Patwardhan, (for No. 1), B.G. Padhye and P.G. Kher, (for No. 2), for the Respondent

Final Decision : Partly Allowed

Judgement

Bhagwati, J.—His Lordship set out the facts & rejected the first contention of the defts. The judgment then proceeded;] The next contention urged by him was that in any event the partition in regard to the agricultural lands was saved by the proviso to S. 2, Bombay Act XVII [17] of 1942. We have already adverted to the circumstances under which the Bombay Act XVII [17] of 1942 came to be passed. The Hindu Women's Right to Property Act, 1937, & the Hindu Women's Right to Property (Amendment) Act, 1938, purported to give better rights to women to property in general. But the F. G. held that the said Acts did not operate to give them better rights in respect of agricultural lands. Several transactions had already taken place in the Province of Bombay on the basis that women had acquired better rights under the said Acts in the case of agricultural lands as well as other kinds of properties & these transactions were invalidated by reason of the judgment of the P. G. Necessity, therefore, arose to validate those transactions as well as to give women in future those better rights. For that purpose as well as for other purposes it was deemed expedient to extend the said Act to agricultural lands with retrospective effect but with certain

savings. Therefore the Bombay Legislature passed Bombay Act XVII [17] of 1942. The preamble to that Act showed that the main purpose of the Act was to validate the transactions which had been effected on the basis that women had acquired better rights in respect of agricultural lands also, & that was really the background of the passing of the Act. It was with that end in view that u/s 2 of the Act the term "property" so far as the Province of Bombay was concerned, was declared to include & was deemed always to have included agricultural lands. The result of the substantive enactment, therefore, was that all the transactions that had already taken place in the Province of Bombay on the basis that women had acquired better rights in respect of agricultural lands also were thereby validated with retrospective effect. The Legislature then had to consider the situation which would arise by reason of certain persons having been in possession of property having been entitled thereto under the law as it was laid down by the F. C. judgment or those persons having made transfers of such property before Bombay Act XVII [17] of 1942 was enacted. As a corollary to the F. C. judgment such possession would be unlawful or without any vestige of title & the transfers also would be void, the transferor having no right, title & interest in the property so transferred by him. This possession & these transfers had got to be saved from the operation of Section 2 of the Act & the proviso was, therefore, enacted that :

"Where any person who, but for this Act, would have been entitled to any property has been in possession or has made a transfer thereof, his possession till the commencement of this Act shall be deemed to be as lawful, & the transfer made by him shall be deemed to be as valid, as if this Act had not been passed."

The possession of such persons & the transfers made by them were thus declared to be valid & they were not to be affected by the enactment of Section 2 of the Act. The person who had been thus in possession would not be liable to any rendition of accounts or for the mesne profits in regard to the possession which he thitherto enjoyed, The transferees under the various transfers which might have been made before the commencement of the Act were entitled to the properties which they had thus acquired and those transfers were not to be set aside. The transferees were not to be deprived of the properties which they had acquired by such transfers.

2. Relying upon this proviso to s. 2 of the Act it was urged- by Mr. V. S. Desai for the applts. that prior to 13-10-1942, when Bombay Act XVII [17] of 1942 came into operation a partition had already been effected between the three branches of the family on 18-9-1942, that that partition was a transfer within the meaning of the proviso to S. 2 of the Act & was therefore saved so far as agricultural lands were concerned. It lies, therefore, to be determined whether the partition thus effected comes within the description of a transfer within the meaning of the proviso to S. 2 of the Act. There is no definition of "transfer" to be had in either the Hindu Women's Right to Property Act, 1937, or the Hindu Women's Right to Property (Amendment) Act, 1938, or the Bombay Hindu Women's Right to

Property (Extension to Agricultural Land) Act, 1942. This being a transfer of Immovable property, even though it may be agricultural land, the definition of "transfer" which applies is to be found in Section 5, T. P. Act. In Section 5 of that Act transfer of property is denoted to mean an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself & one or more other living persons. Even though in Section 5 of that Act the definition of "transfer of property" is qualified by using the expression "In the following sections," we may safely take it to be the definition of "transfer of property" for the purposes of determining what is a transfer within the meaning of the term as used in the proviso to Section 2 of Bombay Act XVII [17] of 1942.

3. The T. P. Act does not deal with partition as such. It only deals with certain categories of transfers of property, viz., sales, mtges., leases, exchanges & gifts, & the Act provides for the various modes in which such transfers of property can be made. Whether a partition of Immovable property is a transfer of property within the definition contained in S. 6 of the Act came to be considered in various H. Cs. & the result of those decisions has been summarised as under by Sir Dinshah Mulla at p. 49 of his commentary on the T. P. Act:

"A partition has been said to be a surrender of a portion of the joint right in exchange for a similar right of a co-sharer. From this analogy it has been concluded in some cases that a partition amounts to a transfer of property. In some other cases, however, it has been held that a partition is not an exchange & is not a transfer of property."

These two different points of view have been urged before us by the learned advocates for the applts. as well as the contesting resps. Mr. V. S. Desai the learned counsel for the applts. has urged that the partition amounts to a transfer of property. Mr. S. G. Patwardhan on behalf of resp. 1 & Mr. Padhye on behalf of resp. 2 have urged that a partition is not a transfer of property. Reliance was placed on behalf of the applts. on two decisions of our Ct. here one reported in *Waman v. Ganpat* 37 B. L. R. 925 : A. I. R. 1936 Bom. 10 & the other reported in *Jivram Jagjivandas Dave Vs. Kantilal Keshavlal Trivedi and Others*, . In both these cases the question came to be considered with reference to the provisions of Section 53, T. P. Act, which deals with fraudulent transfers of property, & it was held that a partition amounts to a transfer of property for the purposes of Section 53 of the Act. In *Waman v. Ganpat* 37 Bom. L. B. 925 : A. I. R. 1936 Bom. 10 the D. B. consisting of Barlee & Sen JJ. held that a partition of joint family Immovable property between coparceners of the family operates as a transfer within the meaning of the term as defined in Section 5, T. P. Act, 1882, & if fraudulent, falls within Section 53 of the Act. Section 53 of the Act as aforesaid deals with fraudulent transfers of property & would not come into operation unless & until there was a transfer of property & the term "transfer of property" has been defined for the purposes of the sections including Section 53 by S. 5 in terms set out hereinabove. Unless & until there was a transfer of

property within the meaning of that definition contained in Section 5, there would be no occasion of considering whether it was a fraudulent transfer of property within the meaning of Section 53, T. P. Act. The learned Judges in this case discussed the question whether a partition in a Hindu family by which the joint family property was divided by metes & bounds can operate as a transfer within the meaning of Section 53, T. P. Act, at p. 929 of the judgment. They referred to the definition of "transfer of property" contained in S. 5 of the Act. They observed that there was no ruling of this Ct. specifically on this point. They considered the observations of Mookerjee J. in *Atrabannessa Bill v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645, viz., 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. They referred also to a Madras case reported in *Rasa Goundan v. Arunachala Goundan* 44 M. L. J. 513 : A. I. R. 1923 Mad. 577 adopting the argument in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645 set out above. They approved of the line of reasoning on which the view of the Calcutta H. C. was based & observed that for the purposes of Section 53, T. P. Act, "partition," where the Immovable property has been partitioned among the co-owners by metes & bounds, must be held to be "transfer." They recorded their own opinion also by stating that that view did not appear to be an unreasonable or far-fetched interpretation, & that partition could in fact be adequately described as a mixture of the surrender & the conveyance of rights in property. This was the ratio adopted in this judgment of our appeal Ct. in *Waman v. Ganpat* 37 Bom. L. R. 925 : AIR 1936 Bom. 10 . To a similar effect is the decision of our appellate Ct. reported in *Jivram Jagjivandas Dave Vs. Kantilal Keshavlal Trivedi and Others*, where the D. B. consisting of Bavdekar & Jahagirdar JJ. observed (p. 106) :

"Now, members of a coparcenary family under the Mitakshara law are entitled, at any time they so choose, to put an end to the joint status among themselves, & a partition does not become fraudulent merely because it is effected even pending a creditor's suit. It is, however, a transfer, & in case it is shown that the partition, for 1951 Bom./13 & 14 example, was unfair to the creditor inasmuch as where the debt was due only from one member it assigned to that member property which was of less value than his proper share in the joint family property, then the transfer could be said to be in fraud of that particular creditor."

Here also the partition by metes & bounds arrived at between the members of a coparcenary under the Mitakshara law was treated as a transfer & the allotment of certain properties out of the joint family properties to a particular coparcener was treated by them as a transfer & if the conditions of Section 53 were satisfied, a fraudulent transfer in fraud of that particular creditor. Our attention was also drawn to the passage from *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 501 : A. I. R. 1916 Cal. 645 which was relied upon by the learned Judges of our appellate Cb. in *Waman v. Ganpat* 37 Bom. L. R. 925 : AIR 1936 Bom. 10. That was a case of a benamidar maintaining a suit for partition of joint & Immovable

property, but in the course of his judgment the learned Judges, Mookerjee & Newbould JJ,, observed at p. 509 the following :

"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. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty & one of such estates is assigned to each of the former occupants for his sole use and as his sole property."

4. These observations do really show 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 of the co-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 & the joint enjoyment no doubt come to an end & in its place & stead is substituted the sole enjoyment & 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 allowed 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 & 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-ownera & 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 & he acquires in that particular property not only his own share, right, title & interest therein which he erstwhile enjoyed but also the shares, right, title & interest of the other co. owners or co-sharers of his in that property. This certainly would be a transfer of property within the meaning of Section 5, T. P. Act. A partition need not necessarily be in writing. At p. 89 in the commentary on the T. P. Act Sir Dinshah Mulla has observed :

"Where no writing ia required by the Act the transfer may be made orally. Thus a

partition of joint family property may be made orally, & so also a surrender of a lease.....In *Imperial Bank of India Vs. Bengal National Bank Ltd.*, Rankin C. J., said that partition, release & surrender are all forms of transfer but that so far as the T. P. Act is concerned they come under no restriction."

These observations of Rankin C. J. quoted by Sir Dinshah Mulla from *Imperial Bank of India Vs. Bengal National Bank Ltd.*, go to support the reasoning which we have adopted above. The case in *Masa Goundan v. Arunachala Goundan* 44 M.L.J 513: AIR 1923 Mad. 577 adopted this reasoning which was contained in the observations of the learned Judges of the Calcutta H. C. in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504; A. I. R. 1916 Cal. 645 & the same reasoning was also adopted by the D. B. of our H. C. in *Waman v. Ganpat* 37 Bom. L.R. 925 : AIR 1936 Bom. 10. We are in perfect accord with that reasoning & we are of the opinion that a partition by metes & bounds between the members of a joint Hindu family amounts to a transfer within the meaning of the definition thereof contained in Section 5, T. P. Act.

5. Our attention was, however, drawn to certain cases which lay down a contrary proposition & which are also summarised in the passage from Sir Dinshah Mulla's commentary on the T.P. Act at p. 49 quoted above. The first case which was relied upon for this purpose was *Gyannessa v. Mobarakannessa* 25 Cal. 210 : 2 C.W.N. 91. That was a case where some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties, & the question that came to be considered by the learned Judges of the Calcutta H. C. there was whether the transaction was an exchange within the meaning of S. 118, T. P. Act or amounted to a partition which was not required by law to be effected by an instrument in writing. The learned Judges discussed the position on the construction of the document. They observed that in deciding a question such as that was raised, they must avoid getting involved in the intricacies of the law of England relating to real property. They came to the conclusion that the transaction was not an exchange within the meaning of S. 118, T. P. Act, but that the exchange was intended to & did effect a partition & a partition was not required by law to be effected by an instrument in writing & therefore there was no objection in regard to the admissibility of the document for want of registration. This case is, therefore, no authority for the proposition that a partition is not a transfer of property. If at all this case lays down anything, it lays down that a partition does not come within the category of the transfers of property which are provided for in the T. P. Act & that, therefore, there is no provision of the T.P. Act which prohibits a partition being effected without an instrument in writing. The observations at p. 213, para. 2, really support this conclusion :

"Treating, therefore, the transaction as a partition, although it may have been effected in a way which involved, as between the co-owners, a transfer of the ownership of parts of the undivided property amounting to an exchange, I hold that it does not come under S. 118, & that it was not necessary to complete it by

a registered instrument."

The Ct. there looked at the substance of the transaction which was a partition of the property between the co-owners thereof. Even though the terms of that partition involved as between the co-owners a transfer of the ownership of parts of the undivided property amounting to an exchange, they dealt with the matter as one of substance & held that it did not come under S. 118 & that it was not necessary to complete it by a registered instrument. It may be observed that even here it was recognised that a partition may be effected in a way which involves as between the co-owners transfer of property or parts of property amounting to an exchange. This really goes to support the reasoning which we have adopted above that when particular parts of the joint family property are allotted to the co-owners or co-sharers for their sole use & as their sole property, there may be an exchange as between the co-owners & the co-sharers of the property in regard to the rights of joint enjoyment which were thitherto enjoyed by them in regard to the parts of the property which are thus allotted to particular co-owners or co-sharers. This case reported in *Gyannessa v. Mobarakannessa* 25 Cal. 210 : 2 C. W. N. 91 therefore does not help the resps.

6. Our attention was further drawn to the case reported in *Pokhar Singh Vs. Mt. Dulari Kunwar* & the observations of Mukherji J. there at p. 727. In that case a widow & her four daughters entered into a family arrangement under which the widow surrendered her estate & by the process of acceleration the four daughters got the property for themselves & agreed to divide the properties which thus came to them in definite shares as if the same belonged to them absolutely. In the course of the judgment, Mukherji J. observed that if a partition of property may be regarded as a transfer within the meaning of Section 5, T. P. Act, the transaction may also be regarded aa transfer by all the four sisters. He then referred to the definition of "transfer" in Section 5, T. P. Act, set out above & observed that the definition excluded the idea of partition as falling within it. We fail to understand the reasoning behind this conclusion reached by the learned Judge, for, as we have already observed before, a partition by metes & bounds does involve a conveyance by co-owners or co-sharers of their right, title & interest & the right of enjoyment in common which they had in the portions of the joint family property allotted to a particular co-owner or co-sharer in favour of the latter & vice versa. We are therefore not impressed by the observations in *Pokhar Singh Vs. Mt. Dulari Kunwar* . The authorities which could be really relied upon by the reaps, in favour of their contention were the two casea reported in *Suhamni Poddar v. Sreenath* 49 C. W. N. 769 : AIR 1946 Cal. 129 and *Khirode Sundari v. Ghuni Lal* 49 C. w. N. 779. They were decisions of the D. Ba. of the Calcutta H. C. which considered the observations of Mookerjee J. in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645 and distinguished them. The observations of Eankin G. J. in *Imperial Bank of India Vs. Bengal National Bank Ltd.*, were not brought to the notice of the learned Judges in the course of the arguments advanced before them. But on a review of the various cases which were cited before them including *Atrabannessa Bibi v. Safatullah Mia*

43 Cal. 504 : AIR 1916 Cal. 645 they came to the conclusion that a partition between members of a Dayabhaga family did not amount to an assignment in respect of the interest of the others. In *Suhashini Poddar v. Sreenath* 49 C. W. N. 769 : AIR 1946 Cal. 129 the judgment proceeded on a consideration of the observations of Mookerjee J. in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645. Certain other cases were also considered & the conclusion was reached as above. In *Ehirode Sundari v. Ghuni Lal* 49 C. W. N. 779 the same question again came to be considered & in this case besides *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645 the learned Judges had cited before them the decision of the Madras H. C. in *Easa Goundan v. Arunachala Goundan* 44 M. L. J. 513 : A. I. R. 1923 Mad. 577 & the decision of our Ct. in *Waman v. Ganpat* 37 Bom. L. R. 925 : A. I. R. 1936 Bom. 10. The observations of Mookerjee J. in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504 : A. I. R. 1916 Cal. 645 were thus explained away by the learned Judges (p. 783):

"The gist of that observation is in the opening sentence, namely, "The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners", "

& no stress was laid on what was laid down therein as the true effect of a partition & particularly the observations :

"The essence of partition is that the property is transformed into estates in severalty & one of such estates is assigned to each of the former occupants for his sole use & as his sole property."

We have already indicated above what is the true effect of this position of a co-owner or a co-sharer having allotted to him a particular part of the joint family properties for his sole use & as his sole property. The significance of these observations appears to have been lost upon the learned Judges who decided *Khirode Sundari v. Ghuni Lal* 49 C. W. N. 779. We may also observe that at p. 782 of the judgment the learned Judges started with the distinction which obtained between the Mitakshara school of Hindu law & the Dayabhaga school of Hindu law. They stated that under the Mitakshara law no individual member of the joint family could predicate of the joint property that he has a certain definite share therein & consequently partition under the Mitakshara law consists in ascertaining & defining the shares of the co-parceners; but that according to the Dayabhaga law, on the other hand, each member of the joint family has a certain definite share in the joint property of which he was the absolute owner, that the property was held in denned shares but the possession was the joint possession of the whole family, & that until partition each co-sharer, whatever his share might be, was entitled fco joint possession & enjoyment of the whole of the joint property, & that partition, according to Dayabhaga law, therefore, consisted in separating the shares of the members of the joint family & allotting fco them specific portions of the property. The stress was here laid on the question of the acquisition of proprietary rights or of a new property under an independent or new title derived from any other person & not on the question of the conveyance

of the rights of common enjoyment as also the rights, title & interest which the co-owners or co-sharers had in the particular part of the property which came to be allotted to the share of the particular co-owner or co-sharer. It may be that if the case of a partition between the members of a joint Hindu family governed by the Mitakshara school of Hindu law had come before the learned Judges of the Calcutta H. C. they might not have reached the decision which they did in the case of a partition between the members of a joint Hindu family governed by the Dayabhaga school of Hindu law. In so far, however, as the learned Judges there differed from the ratio adopted by our Ct. in *Waman v. Ganpat* 37 Bom. L. R. 925 : A. I. R. 1936 Bom 10 We feel that the decision of the learned Judges of the Calcutta H. C. in *Khirode Sundari v. Chuni Lal* 19 C. W. N. 779 in so far as it runs counter to the decision of our Ct. in *Waman v. Ganpat* 37 Bom. L. R. 925: A. I. R. 1936 Bom. 10 is incorrect & with great respect we beg to differ from the same.

8. We have under the circumstances come to the conclusion that the partition by metes & bounds effected between the three branches of the joint family here on 18-9-1942, was a transfer within the meaning of that term as used in the proviso to Section 2, Bombay Act XVII [17] of 1942 & was, therefore, saved in so far as the agricultural lands are concerned by the terms of that proviso. [His Lordship after dealing with points not material to this report concluded.] The result, therefore, is that the appeal will be allowed in part & the decree of the lower Ct. will be confirmed except in regard to the agricultural lands. The partition of the agricultural lands as recorded in the deed of partition dated 20-9-1942, will stand & the rest of the decree passed by the lower Ct. will be confirmed. The order as to mesne profits also will be confined only to such properties as are not agricultural lands. In view of the fact that the applts. have partly succeeded & partly failed, we think that the proper order for costs should be that each party should bear & pay its own costs of this appeal as also in the Ct. below.