Anant Kibe and Others

Vs

Purushottam Rao and Others

Civil Appeal No 497 of 1971

(D. A. Desai, A. P. Sen, V. B. Eradi, JJ)

17.04.1984

JUDGMENT

A. P. SEN, J. -

1. This appeal on certificate is directed against a judgment and decree of the Madhya Pradesh High Court dated May 2, 1969 substantially reversing the judgment and decree passed by the Third Additional District Judge, Indore date June 18/19, 1962 and dismissing the plaintiffs' suit for partition and separate possession of their half share of the suit properties detailed in Schedule 'A' appended to the plaint except with respect to a house and the agricultural lands at Ujjain. During the course of the hearing the parties have come to a settlement and the terms of the compromise have been recorded. Nevertheless, the correctness of the judgment delivered by the High Court is open to serious doubt and as it involves a question of general importance, we proceed to record our views.

2. The facts giving rise to the appeal are as follows. The report of the Inam Commissioner discloses that in 1837 the late Maharaja Harihar Rao Holkar made a grant of an inam of a garden known as Rambag in Kasba Indore admeasuring 15.62 acres to Abaji Ballal, the priest of the Holkar family on his representation that he was in service of the Huzur Durbar for a long period but had no garden at Kasba Indore and was therefore finding it difficult in getting tulsi leaves and flowers for making offering to the deities. The grant of inam to him was on Putra Pautradi Vansh Parampara condition by way of parvarish. It appears from the report that Abaji Ballal had only one son named Laxman and he also had only one son named Raghunath Rao. After the death of Abaji Ballal he was succeeded by Laxman. It appears that Laxman represented in the year 1886 that he was entitled to hold as inam an area of 15.62 acres in Kasba Indore while the land in his possession was only 5.91 acres, the remaining area having been acquired by the Durbar and prayed for a grant of an area of 9.72 acres in exchange. An inquiry was thereupon held and the claim was found to be true. By Durbar Order No. 9 dated December 14, 1888 the inamdar was given 9.72 acres of land in Mauja Palashiya Hana. It also appears that the family built residential houses at Indore presumably out of the income of the inam and also acquired immovable properties at Ujjain consisting of a house and some agricultural lands. After the death of Laxman Rao, his son Raghunath Rao was recognized to be the inamdar.

3. The common ancestor Raghunath Rao had three sons, Madhav Rao, Sadashiv Rao and Gopal Rao. Of these, Madhav Rao and Sadashiv Rao had pre-deceased their father Raghunath Rao. Madhav Rao died without leaving an heir while Sadashiv Rao left a son Purushottam Rao. The third son Gopal Rao disappeared about a year before the death of his father Raghunath Rao and his whereabouts were not known till the news of his death in 1932 at Secunderabad was received, after the death of Raghunath Rao in 1928. On the death of Raghunath Rao, Purushottam Rao being the

sole survivor of the elders male line of the last holder became the inamdar and also the karta of the joint Hindu family.

4. The suit out of which this appeal arises was instituted by the three appellants Anant, Govind and their mother Smt Laxmi Bai being the legal heirs and successors of Gopal Rao, as plaintiffs on December 12, 1955 for partition and separate possession of their half share in the joint family property described in Schedule 'A' appended to the plaint against respondents 1 and 2 Purushottam Rao and his mother Smt Rama Bai being defendants 1 and 2, impleading Krishna Rao, the eldest son of Gopal Rao as defendant 3 because he failed to join them as a plaintiff in the suit. The case of the plaintiffs was that defendant 1 Purushottam Rao in his capacity as the karta of the joint Hindu family was in possession and management of the joint family property, including the inam lands at Kasba Indore and Mauja Palashiya Hana. The plaintiffs' claim was contested by defendants 1 and 2 Purushottam Rao and Smt Rama Bai. They pleaded inter alia that the plaintiffs' predecessor-in-interest Gopal Rao had separated from the family by taking his share in the year 1917-18 and therefore the plaintiffs had no king of right or title in the suit properties; that the inam lands and the properties acquired from out of the inam being impartible in nature, the succession to which was governed by the rule of lineal primogeniture, the properties exclusively belonged to defendants 1 Purushottam Rao; and that the conferral of bhumiswami rights on respondent 1 under Section 158(1)(b) of the Madhya Pradesh Land Revenue Code, 1959 made the suit lands his separate and exclusive property and it was not part of the joint estate of the undivided family. Incidentally, the Madhya Pradesh Land Revenue Code, 1959 was brought into force w.e.f. October 1, 1959 which had the effect of changing the nature of the tenure.

5. The point in controversy in this appeal is now limited to the inam lands and the houses and other properties built from out of the income of the inam lands at Kasba Indore and Mauja Palashiya Hana. The learned Additional District Judge held that the inam lands together with the properties acquired from the income of the inam were ancestral impartible estate since the same had devolved by survivorship by the rule of lineal primogeniture and therefore constituted joint family property and that the rule of impartibility and the special mode of succession by the rule of lineal primogeniture were nothing but incidents of the inam which stood extinguished by Section 158(1)(b) of the Code by virtue of which the inam lands became bhumiswami, the succession to which was governed by the personal law of the parties. The learned Additional District Judge accordingly held that the inam lands at Kasba Indore and Mauja Palashiya Hana constituted joint family property of the parties and decreed the plaintiffs' claim for portion and separate possession to the extent of their half share in the properties described in Schedule 'A' to the plaint and to mesne profits thereof. On appeal, the High Court reversed the judgment of the learned Additional district Judge with regard to the inam lands and the houses and other property acquired at Indore out of the income of the inam holding that they constituted a special grant regulated by the Jagir Manual of the Holkar State. According to the High Court, the plaintiff who were the junior members of the family had no kind of right or title to the inam lands except perhaps the right of maintenance and that too up to a certain degree and subject to its determination by the State. Accordingly the High Court held that defendant 1 Purushottam Rao, the inamdar for the time being, became the bhumiswami of the suit lands under Section 158(1)(b) of the Code which constituted his separate property. The High Court however maintained the decree of the learned Additional district Judge with regard to partition and separation of the plaintiffs' share of immovable properties at Ujjain.

6. The short and narrow question involved in this appeal, is whether the inam lands which became bhumiswami lands under Section 158(1)(b) of the Code were the self-acquired property of the inamdar and defendant 1 Purushottam Rao was entitled to remain in full and exclusive possession

and enjoyment thereof, or the conferral of bhumiswami rights in respect of such inam lands on him must ensure to the benefit of the members of the joint Hindu family and therefore the bhumiswami lands were liable to be partitioned like any other coparcenary property.

7. It is common ground that the inam lands were impartible, the succession to which was governed by the rule of lineal primogeniture. That musty be so because the Jagir Manual of the Holkar State by Rule 134 provides that the rule which refers to jagir will apply to inams also except to the extent modified by any Durbar Order or circular. Chapter II, Rule 2 provides :

> 2. A Jagir grant shall be indivisible and impartible property. Rule 3 provides for the rule of lineal primogeniture and it follows :
>
> 3. Every Jagir grant, which is not a purely life-grant, shall descend in the order of primogeniture i.e. to the eldest male line of the last holder e.g. If a grantee has descendants as shown in the following pedigree table :
>
> # A (Grantee) |----------|----------| | | | B C D | | | |----------| |-------|----------| J | | | | | | E F G H I |----|-----| | | | | K N L M##

The Jagir will after A's death descend to B. After B it will descend to E to K.

Proviso to Rule 3 preserves the right of maintenance of the junior members of the family and it reads :

> Provided that the right of the members of the junior branches, claiming descent from the original grantee to a share in the income of the Jagir or maintenance according to the custom of the family or orders of the Government, shall not be affected thereby.

Although the original sanad granted to Abaji Ballal in 1837 is not forth coming, the report of the Inam Commissioner discloses that the grant of inam to him was on Putra Pautradi Vansh Parampara condition by way of parvarish i.e. maintenance. Thus the grant of the inam lands was for maintenance of the members of the joint family and was also heritable.

8. There is ample evidence on record to show that the inam lands although impartible were always treated by members of the family as part of the joint family properties and the succession to the inam was by the rule of survivorship as modified by the rule of lineal primogeniture. It is also clear that the junior members were in joint enjoyment of the inam lands and that was because the proviso to Rule 3 expressly recognized their right of maintenance. Further, the evidence shows that the properties acquired by the inamdar for the time being from out of the income of the inam such as the two houses at Indore and other properties were always dealt with as apart of the joint family property. There is on record, an application for mutation made by defendant 1 Purushottam Rao on December 15, 1928 (Ex. P-6) wherein he had stated that his grandfather had died on August 8, 1928 and therefore he prayed for substitution of the names of the legal heirs in the inam register, the material portion of which reads :

> I am his son's son i.e. grandson and as such his heir :
>
> (A) Besides me the sons of my uncle i.e. (1) Krishna Rao (2) Anant Rao and (3) Govind Rao are also his heirs. Besides us no other person is his heir (A).

The prayer was that the names of all these heirs be substituted. There is also an affidavit of Purushottam Rao dated December 7, 1928 (Ex. P-5) regarding the death of his grandfather Raghunath Rao and it mentions that he had three sons viz. Madhav Rao, Sadashiv Rao and Gopal Rao. It was averred that Madhav Rao who was the eldest had already expired leaving no issue and his wife had also dies and that the whereabouts of Gopal Rao were not known since 3 1/2 or 4 years. It was stated that Gopal Rao had three sons viz. Krishna, Anant and Govind and all the three of them were minors. It then recites : "All the three minor sons of Gopal Rao were living jointly with me". Purushottam Rao examined as DW 24 has stated that the whereabouts of Gopal Rao were not known when his grandfather Raghunath Rao was operated upon resulting in his death in the hospital. When confronted with portion marked 'AA' in Ex. P-6 he unequivocally admitted that he could not deny the statement made therein. He however went on to assert that the expenditure incurred by him on the plaintiffs by way of maintenance was not incurred by reason of their being the members of the joint family but because they had no resources of their own and it was necessary to give them maintenance allowance under the Inam Rules. It is quite apparent from the course of dealings that the inam lands at Kasba Indore and Mauja Palashiya Hana and other inam properties in the hands of the common ancestor Raghunath in Rao which devolved upon defendant 1 Purushottam Rao were nothing but an ancestral impartible estate.

9. Under the scheme of the Code there was a drastic change brought about not only in the nature of the tenure of inam lands but also in the mode of succession. Section 158(1)(b) of the Code provides :

> 158. Bhumiswami. - (1) Every person who at the time of coming into force of this Code, belongs to any of the following classes shall be called a Bhumiswami and shall have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumiswami by or under this Code, namely :
>
> #(a) * * * *##
>
> (b) every person in respect of land held by him in the Madhya Bharat region as a Pakka Tenant or as a Muafidar, Inamdar, or Concessional Holder, as defined in the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 (66 of 1950).

10. The plain language of Section 158(1)(b) effected a complete extinction of the main rights following by simultaneous conferral of bhumiswami rights. Every person, in respect of the land held by him in the Madhya Bharat region, as an inamdar, at the time of the coming into force of the Code, became a bhumiswami thereof, and acquired all the rights and became subject to all the liabilities of a bhumiswami under the Code. The words "in respect of land held by him" appearing in Section 158(1)(b) refer to the status and character of the tenure holder in relation to the holding on the appointed day. The accrual of the status of bhumiswami by such person was automatic and he acquired all the rights and became subject to all the liabilities conferred or imposed upon a bhumiswami by or under the Code. As a necessary corollary, he became subject to the provisions of Section 164. Section 164 provides that subject to his personal law, the interest of a bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be. On a combined reading of Sections 158(1)(b) and 164, the legal consequence that ensued was that the incident of impartibility and the special mode of succession by the rule of primogeniture which were terms of the grant of inam lands under the Jagir Manual of the Holkar State, stood extinguished. After the conferment of bhumiswami rights, the incidents and character of the tenure became transformed and the restrictions placed thereon disappeared, and such lands became capable of being held in joint

ownership like any other coparcenary property. It must logically follow that the conferral of bhumiswami rights on the holder for the time being under Section 158(1)(b) of the Code in respect of ancestral inam lands must necessarily ensure to the benefit of all the members of the joint family.

11. In our judgment, the view expressed by the High Court that the inam lands and the two houses constructed at Indore and other properties acquired from out of the income of the inam exclusively belonged to defendant 1 Purushottam Rao, the holder for the time being at the time when the Code was brought into force, can hardly be sustained. Since the decision of the Privy Council in Shiba Prasad Singh v. Rani Prayag Kumari Debi ((1932) 59 IA 331 : AIR 1932 PC 216 : 138 IC 861) it must be taken as well-settled that an estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. Where the property is ancestral and the holder has succeeded to it, it would be part of the joint estate of the undivided Hindu family. In the following illuminating passage Sir Dinshah Mulla observes :

> The keynote of the whole position, in their Lordship's view, is to be found in the following passage in the judgment in the Tipperah case (Neelkisto Deb Burmono v. Beerchunder Thakoor, (1867-69) 12 MIA 523 : 3 Beng LR 13 : 12 WR 21 : 2 Sar 467) :

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have : (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility, as laid down in Sartaj Kuari case (Rani Sartaj Kuari v. Rani Deoraj Kuari, (1888) 15 IA 51 : ILR (1888) 10 All 272 : 5 Sar 139) and the first Pittapur case (Sri Raja Rao Venkata Surya v. Court of Wards, (1899) 26 IA 83 : ILR (1899) 22 Mad 383 : 7 Sar 481); and so also the third, as held in the second Pittapur case (Raja Rama Rao v. Raja of Pittapur, (1918) 45 IA 148 : AIR 1918 PC 81 : 47 IC 354). To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in Baijnath case (Baijnath Prashad Singh v. Tej Bali Singh, (1921) 48 IA 195 : AIR 1921 PC 62 : 60 IC 537). To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior members to take by survivorship still remains. Nor is this right a mere spes succession is similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate.

12. The incidents of impartible estate laid down in Shiba Prasad Singh case ((1932) 59 IA 331 : AIR 1932 PC 216 : 138 IC 861) and the law there stated have been reaffirmed in the subsequent decisions of the Privy Council and of this Court. It is not necessary to refer to them as they have all

been dealt with in a recent judgment of this Court in Nagesh Bisto Desai v. Khando Tirmal Desai ((1982) 3 SCR 341 : (1982) 2 SCC 79 : AIR 1982 SC 887). Impartibility is essentially a creature of custom. Here it is a term of the grant. The junior members of a joint family in the case of ancient impartible joint family State take no right in the property by birth and therefore have no right of partition having regard to the very nature of the estate that it is impartible. The only incidence for joint property which still attaches to the joint family property is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. The incident of impartibility attached to inam lands no longer exists by reason of Section 158(1)(b) of the Code as they have now become bhumiswami lands. The right of junior members of the family for maintenance is governed by custom and not based upon any joint right or interest in the property as co-owners. In case of inams in the Holkar State such right was again a condition of the grant. In view of the authorities cited in Nagesh Bisto Desai case ((1982) 3 SCR 341 : (1982) 2 SCC 79 : AIR 1982 SC 887), it must be held that the inam lands though impartible were nevertheless joint family properties of the parties. The impartibility of the tenure governed by the Jagir Manual of the Holkar State and the rule of lineal primogeniture governed by the Jagir Manual, Chapter II, Rules 2 and 3 did not per se destroy it nature as joint family property of render it the separate property of the last holder so as to destroy the right of survivorship; the estate retained its character of joint family property and its devolution was governed by the rule of survivorship as modified by the rule of lineal primogeniture. To establish that a family governed by the Mitakshara in which there is an impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their succession to the estate. The learned Additional District Judge during the course of his judgment has held on consideration of the evidence that there was no partition in the joint family as alleged by defendants 1 and 2 and that finding has not been reversed by the High Court in appeal.

13. The learned Additional District Judge has referred to several well-known decisions of the Privy Council dealing with the incidents of an impartible estate, including that of Shiba Prasad Singh case ((1932) 59 IA 331 : AIR 1932 PC 216 : 138 IC 861), but the High Court surprisingly did not refer to anyone of them. He has also particularly referred to the nature and incidence of a protected thekedari under Section 109 of the C.P. Land Revenue Act, 1917 and relied upon the decision of the Privy Council in Bhagwan Singh v. Dharbar Singh ((1928) 55 IA 150 : AIR 1928 PC 96 : 108 IC 365) and also to several decisions of the Nagpur and Madhya Pradesh High Courts and in particular to Maniram v. Ramdayal (AIR 1960 MP 7 : 1959 MPLJ 829 : 1959 Lab LJ 611) and Pilanoni Janakram v. Anandsingh Sakharam (1960 MPLJ 962) where a similar question arose. He further felt that the principles laid down by the Bombay High Court in Lingappa Rayappa Desai v. Kadappa Bapurao Desai (ILR 1940 Bom 721 : AIR 1940 Bom 345 : 42 Bom LR 832) dealing with the Bombay Hereditary Offices At, 1874 holding that watan lands stand in the same footing as ancestral impartible estate in a joint Hindu family passing by survivorship from one line to another according to primogeniture, must govern the case. The High Court declined to follow the long line of decisions of the Nagpur and Madhya Pradesh High Courts dealing with the protected thekedari tenure under Section 109 of the C.P. Land Revenue Code, 1977 saying that they were 'inapplicable' to the case of jagir and inam properties which at no time were considered to be joint family properties but constituted a "special kind of grant" regulated by the terms of the grant or the rules governing the same. It also declined to follow the decision of the Bombay High Court in Lingappa case (ILR 1940 Bom 721 : AIR 1940 Bom 345 : 42 Bom LR 832), because it did not 'appeal' to the Court as it distinguished the decision of the Madras High Court in Sri Ravu Janardhana Krishna Ranga Rao Bahadur v. State of Madras (AIR 1953 Mad 185 : ILR 1953 Mad 479 : (1952) 2 Mad LJ 243) "for reasons which did not appeal to be sound". It is difficult to sustain both on principle and

precedent the view of the High Court that inam lands being impartible in nature, the succession to which was governed by the rule of lineal primogeniture, the two houses constructed at Indore and other properties acquired from out of the income of the inam exclusively belonged to defendant 1 Purushottam Rao, the holder for the time being and constituted his separate property.

14. In the former State of Madhya Pradesh, the existence of such an impartible tenure was not unknown. The nature and incidence of a protected thekedari tenure under Section 109 of the C.P. Land Revenue Act, 1917 came up for consideration before the Privy Council in Bhagwan Singh case ((1928) 55 IA 150 : AIR 1928 PC 96 : 108 IC 365). The Privy Council observed that though the tenure of a protected thekedari was impartible and descended by primogeniture and was made inalienable, and it was provided that only one person at a time shall be entitled to succeed to such status, at the same time :

> ..... the Act recognizes that the leasehold interest, though impartible, may nevertheless be the joint property of the thekedar and his family;....

15. This was in consonance with the view expressed by Sir Bipin Krishna Bose, Addl. J.C. in Kaqwa v. Budhram ((1914) 10 Nag LR 64 : 24 IC 855) that the grant of a protected thekedari tenure to the eldest male member of a family did not make the property his separate property. In Narayan Prasad v. Laxmanprasad (1945 Nag LJ 291 : AIR 1945 Nag 229), J. Sen, J. held that where protected thekedari rights in respect of a village were acquired out of joint family funds, the village would be joint family property and a member of the joint family would be entitled to a share in the theka and to be maintained out of it. In Chandulal v. Pushkar Raj (ILR 1952 Nag 318 : AIR 1952 Nag 271 : 1952 Nag LJ 213), Kaushalendra Rao, J. speaking for the Court observed :

> It has always been the accepted view that the grant of protected status to 'thekedar' did not make the 'theka' the exclusive property of the person on whom the protected status is conferred.

The learned Judge then referred to the decision of the Privy Council in Bhagwan Singh case ((1928) 55 IA 150 : AIR 1928 PC 96 : 108 IC 365) and rejected the contention that the conferral of the protected status on one of the members destroyed the pre-existing rights of the other members of the family.

16. In Sukhambai v. Ramsharan Sao (1951 Nag LJ 433 : AIR 1951 Nag 323), Mudholkar, J. tried to drawn a distinction between the present rights and future rights of the members of the family and held that while the junior members have future or contingent rights such as a right of survivorship, they have, apart from custom or relationship, no present rights as, for instance, a right to restrain alienation or to claim maintenance. The decision of Mudholkar, J. in Sukhambai case (1951 Nag LJ 433 : AIR 1951 Nag 323) taking a narrow and restricted view of the rights of the members of a joint Hindu family to participate in the present enjoyment and management of a protected thekedari tenure was however reversed on appeal by B. P. Sinha, C.J. and Hidayatullah, J. in Shiv Prasad Sao v. Sukhan Bai (Letters Patent Appeal No. 19 of 1949, decided on December 30, 1954) observing that if there was a family arrangement for the joint enjoyment of the theka in the past, it would bind not only the protected thekedar for the time being but the whole family and so long as the family arrangement is not rescinded by the family itself, it must continue. The learned Judges considering the implications of Section 109(1)(a) of the Act observed :

> The conferral of protected status does not disturb the rights of the members inter se

> though they may not be recognised by the State. As between members the rights of any particular member under the arrangement must continue.

As regards the validity of arrangement made by the co-shares in theka dividing the property between themselves for beneficial enjoyment of the thekedar, they said :

> From the year 1881 when all existing arrangements were to continue, down to this day when private partitions and family arrangements have been recognised as binding on the family, there is an underlying current or recognition of joint family status. Most of these villages, when they were acquired, belonged to a joint family and the intention in conferring protection was not to disturb arrangements but to recognise one member as a thekedar and to restrain transfers and impose impartibility and primogeniture. Even though the Act of 1977 enacted about private partitions and arrangements, the law was merely declaratory of family custom as is apparent from a perusal of the various Settlement Reports.

The learned Judges then added a word of caution :

> Under the C.P. Land Revenue Act, a protected status could be conferred not only upon Hindus but also upon Muslims and others. The rules of impartible estates as understood in Hindu law cannot, therefore, be made applicable and the analogy is apt to be misleading.

17. Similar question arose in Maniram v. Ramdayal (AIR 1960 MP 7 : 1959 MPLJ 829 : 1959 Lab LJ 611) and Pilanoni Janakram v. Anandsingh Sakharam (1960 MPLJ 962). The decision in Maniram case (AIR 1960 MP 7 : 1959 MPLJ 829 : 1959 Lab LJ 611) is of some importance. Hence, T. C. Shrivastava, J. had to consider the impact of Section 39(1) of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1951 which provided that where the proprietary rights held by a protected thekedar vest in the State under Section 3, the Deputy Commissioner may reserve to such proprietor the rights of an occupancy tenant in the whole or part of the home-farm land and shall determine the rent thereon. Section 39(2) thereof provided that any person becoming an occupancy tenant under sub-section (1) shall be a tenant of the State. The contention on behalf of the protected thekedar who brought the suit was that by virtue of such settlement he became the full and exclusive tenant thereof. The learned Judge after referring to the decision of the Privy Council in Bhagwan Singh case ((1928) 55 IA 150 : AIR 1928 PC 96 : 108 IC 365) and the aforesaid decision of the High Court in Shiv Prasad Sao case (Letters Patent Appeal No. 19 of 1949, decided on December 30, 1954) reiterated that although Section 109(1)(a) of the C.P. Land Revenue Act, 1917 provided that protected thekedari rights would descend by the rule of primogeniture and the theka was impartible in nature, the rights of the other members of the joint Hindu family in the theka continued though they could not obtain a partition of the lands in the theka or claim to be in possession of any lands pertaining to the theka. He referred to the observations made in Shiv Prasad Sao case (Letters Patent Appeal No. 19 of 1949, decided on December 30, 1954) set out above and observed that it was open to protected thekedar to come to an arrangement with his co-shares to divide the lands attached to the theka and such a family arrangement would be binding on the co-shares. Repelling the contention based on Section 39(1) of that Act he held that after the abolition of the proprietary rights in 1950, the rights of protected thekedars had completely disappeared and the statutory bar of impartibility and inalienability removed and therefore the lands which were joint family lands subjects to statutory restrictions assumed the character of normal joint family property free from the statutory restrictions. In

Pilanoni case (1960 MPLJ 962) K. L. Pandey, J. held that although under clause (5) of the Sarangarh State Wazib-ul-arz there was no right of partition given to a thekedar gaontia, but it permitted joint and divided management of the bhogra lands attached to the theka among the members of the family and though the State had reserved to itself under clause (15) the right to induct a new thekedar who became entitled to the entire bhogra lands in the village, the effect of the two provisions was that the State could not be bound by a partition effected among the members of the family by way of a family arrangement but it would be binding on the members of the family, including the new thekedar who may have succeeded to the status of a thekedar gaontia. As to the settlement of such bhogra lands with the thekedar in raiyati rights under Section 54(1) of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1951, the Court held that such settlement must enure to the benefit of the bhogra holders under a family arrangement since the lands continued to be impressed with the character of being joint family property.

18. The point in controversy really stands concluded by the recent decision of this Court in Nagesh Bisto Desai case ((1982) 3 SCR 341 : (1982) 2 SCC 79 : AIR 1982 SC 887). There, the question was whether the plaintiff being the holder for the time being of the Kundgol Deshgat estate which was an impartible estate, the succession to which was governed by the rule of lineal primogeniture, was entitled to remain in full and exclusive possession and enjoyment of the watan lands resumed under Section 3(4) of the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 and Section 4 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 which had been re-granted to him as an occupant thereof under Sections 4 and 7 of the Acts respectively. It was held that the plaintiff's contention ran counter to the scheme of the Bombay Hereditary Offices Act, 1874 and was against settled legal principles, and that the Watans Act was designed to preserve the pre-existing rights of the members of the joint Hindu family. The submission based on the alleged impartibility of watan property and the applicability of the rule of lineal primogeniture regulating succession to the estate was rejected on the ground that it could not prevail as these being nothing more than the incidents of the watans stood abrogated by Section 3(4) of the 1950 Act and Section 4 of the 1955 Act. It was held that the effect of the non obstante clause in Section 3(4) of the 1950 Act was to bring about a change in the tenure or character of the holding as watan lands but did not affect the other legal incidents of the property under the personal law and of the property belonged to the joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected and therefore the re-grant of the lands to the watandar under Section 4(1) of the 1950 Act and Section 7 of the 1955 Act must enure to the benefit of the entire joint Hindu family. That precisely is the position here. Although under the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 and the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 there was at first an abolition of watans and resumption of watan lands, following by re-grant of such lands to the watandar as an occupant under the Bombay Land Revenue Code, 1879, that hardly makes a difference in principle. The only difference is that under Section 158(1)(b) of the M.P. Land Revenue Code, there was a simultaneous extinction of the inams resulting in conferral of bhumiswami rights on every person holding inam lands on the date on which the Code was brought into force.

19. The result therefore is that the appeal must succeed and is allowed. The judgment and decree passed by the High Court are reversed and those of the learned Additional District Judge decreeing the plaintiffs suit for partition and separate possession of their half share in the properties descried in Schedule 'A' to the plaint are restored. The decree shall be drawn in terms of the compromise arrived at.

20. There shall be no order as to costs.

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