

GUJARAT HIGH COURT

Gulamrasool Sarfuddin

Vs.

Dulhanbibi

A.F.O. No. 3 of 1978

(M.P. Thakkar, Mankad and Bedarkar, JJ.)

17.10.1979

JUDGMENT

M.P. Thakkar, J.

1. A very serious problem which can make an atheist turn to God in desperation, and demands immediate attention has crossed our path in the course of our search for a solution to the question of law which has been referred to this Full Bench viz. whether in order to avail of the right conferred by Section 4 of the Partition Act of 1893 it is an essential pre-condition that the claimant must be arraigned as plaintiff and not as a defendant. The problem highlighted is whether the concept of National Integrity notwithstanding, and the constitutional command of equality before law notwithstanding, can the right conferred on a citizen by the very same provision of an All India enactment. It be availed of only provided he is in the Indian soil at Calcutta but not if he is on the Indian soil at Bombay ? Can the meaning and content of an All India statute depend on whether it is being interpreted in one State of India or in another ? Can the conscience of India countenance a situation where law means one thing in Bombay and just the contrary in Calcutta ? We will be utterly failing in our duty if we did not underscore the compulsion to remedy this situation which has been tolerated too long. We will, therefore, return to this problem when we have dealt with the question referred to us which must engage our immediate attention.

2. We must address ourselves right now to the question referred to us in regard to the interpretation of Section 4 of the Partition Act which reads thus :-

"4. (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it

thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in Sub-Section (i) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by Sub-Section (2) of the last foregoing Section."

Two High Courts, namely, High Courts of Bombay and Allahabad broadly speaking hold the view that the right conferred by Section 4 of the Partition Act to compel a stranger transferee of an interest of a member of a joint family in a dwelling house can be availed of provided and only provided he is arraigned as a plaintiff in the proceeding and 'sues' for partition. A diametrically opposite opinion is held by four High Courts, namely, Calcutta, Patna, Orissa and the former High Court of Nagpur; which have taken the view that such a right vis-a-vis a stranger transferee can be asserted irrespective of the fact whether he is arraigned as a plaintiff or a defendant. It may be stated that the Madras High Court has cast its lot in favor of both the opposing views in the sense that a learned single Judge has in 1950 taken the view propounded by the Bombay High Court whereas another learned single Judge has subsequently in 1967 taken the opposite view though on the premise that the earlier judgment was distinguishable on facts. It is this conflict of opinion between two schools of interpretation- one represented by, the Allahabad and Bombay High Courts and the other represented by the Calcutta, Patna, Orissa and Nagpur High Courts which has given rise to the present reference. It is a matter of vital significance for this High Court in view of the fact that the Bombay view reflected in *Khanderao v. Balkrishna*¹, being the view of a Division Bench of the then High Court of Bombay prior to the reorganization of States is binding to this High Court and it may be necessary to overrule the earlier decision if the other view prevails.

3. The Calcutta, Patna and the Orissa High Courts as also the former High Court of Nagpur and the learned single Judge of the Madras High Court who has distinguished the view propounded by the same High Court in an earlier judgment have reached the conclusion that the right conferred by Section 4 on a member of an undivided family in respect of a dwelling house to compel a stranger transferee from another member of the family to sell his interest at a valuation made in accordance with the provisions therein can be exercised irrespective of whether the stranger transferee is arraigned as a plaintiff or a defendant principally on the basis of four reasons viz :-

(1) The object of the provision would be wholly fulfilled by adopting this view whereas it would be partly frustrated if the Bombay view is accepted.

(2) The protection afforded by Section 44 of the Transfer of Property Act to secure that a stranger did not force his way into a way dwelling house and cause the resultant disruption or hardship would be defeated by taking the Bombay view.

(3) The expression 'to sue' occurring in Section 4 is capable of interpretation which would fulfil rather than frustrate the object underlying Section 4, for the expression 'to sue' signifies not only 'to prosecute' but also 'to defend' or to do something which the law

requires for the better prosecution or defense of the case.

(4) In a suit for partition every party is in the position of a plaintiff.

The earliest decision which has subscribed to this point of view is that of the Calcutta High Court in *Satyabhama v. Jatindra Mohan*², The matter came up before a Division Bench consisting of Suhrawardhy and Jack, JJ. The Division Bench sought support from the well-known principle that a party in a partition suit whether a plaintiff or a defendant, is at the same time the plaintiff as well as the defendant. The Division Bench proceeded to observe that this dual capacity of a party in a partition suit does not preclude even a

¹ AIR 1922 Bom 121

² AIR 1929 Cal 269

defendant who claims a share into a dwelling house from being treated as plaintiff for the purposes of Section 4 of the Partition Act. The decision rendered by the Bombay High Court earlier in Rhanderao's case which was decided in 1922 was cited before the Division Bench of the Calcutta High Court but the learned Judges distinguished the said decision on two grounds which are not relevant for the purpose of the present discussion. They, however, did not follow the Bombay view to the contrary. In 1937 this question arose before Stone, C.J. in the Nagpur High Court in *Laxman v. Mt. Lahana Bai*³, The learned Judge apart from placing reliance on Satyabhama's case decided by the Calcutta High Court concurred with the said view on an additional ground based on the interpretation of the expression 'to sue'. Reliance was placed on the interpretation of the expression 'to sue' quoted in Stroud's Judicial Dictionary on the basis of *Hesketh v. Lee*⁴, to wit :

"These words 'to sue' may be applied indifferently either to the defendant or plaintiff, or to the tenant or defendant, for the suit of one party or of the other must be followed, and the words 'to sue' not only signify 'to prosecute' but also 'to defend' or to do something which the law requires for the better prosecution or defense of the cause."

It may be stated that the decision of the Bombay High Court in Khanderao's case was not cited before Stone, C.J. In 1953 the Allahabad High Court took the same view in *Rukini Sewak v. Munesari*⁵, But it is unnecessary to discuss the reasoning which appealed to the Court in view of the fact that this view has in terms been overruled by the Allahabad High Court itself subsequently in *Sakhawat Ali v. Ali Husain*⁶, In 1955 a similar question again arose before the Calcutta High Court and its earlier view of 1929 in Satyabhama's case was re-affirmed in *Haradhone Haldar v. Usha Charan*⁷, Reliance was mainly placed on the interpretation of the expression 'to sue' vide Stroud's Judicial Dictionary (to which a reference was made by Stone, C.J. in *Laxman v. Mt. Lahana Bai*⁸), by Mookerjee, J. In paragraph (11) it was observed that the wider interpretation sufficiently satisfies the plain literal test as well and the rule of strict grammatical construction does not necessarily exclude it. Khanderao's case decided by the Bombay High Court was considered by the learned Judge but he expressed the opinion that the

said view was opposed to the Calcutta view reflected in Satysbhama's case decided in 1929 by a Division Bench of the Calcutta High Court which was not inclined accept the Bombay view as to the limited scope of the Section. The learned Judge also highlighted in paragraph (9) of the judgement the need for a broader view and emphasized that judicial opinion had definitely favoured a wider and liberal construction which was necessary. He also emphasized the object of the statutory provision, namely, to prevent the intrusion or introduction of a stranger into family dwelling house which was liable to be frustrated if the narrow interpretation was adopted. It was observed that a liberal construction would result in the object of the provision being fully achieved. Thus, he added one more ground in support of this school of thought over and above the grounds which had already been articulated in the Nagpur case of *Laxman v. Mt. Lahana Bai* (supra). In 1967 this question arose before the Madras High Court before Natesan, J.

³ AIR 1937 Nag 4

⁵ AIR 1953 All 332

⁷ AIR 1955 Cal292

⁴(1866-73) 2 WMS Sound 84(94)

⁶ AIR 1957 All 356 (FB)

⁸ AIR 1937 Nag 4

in *Rama-swami v. Subramania*⁹, The learned Judge did not agree with the Bombay view and opted for the liberal construction of the Section as accepted by the Calcutta High Court. He was faced with a difficulty because the same High Court in *B. Ramayya v. Venkata Subbarao*¹⁰, had expressed the view which on the face of it supported the Bombay view. The learned Judge, however, distinguished the aforesaid judgement in B. Ramayya's case and opted for the Calcutta and Nagpur view. He relied on the reasons already articulated, namely, (1) in the context of the frustration of the object, (2) the interpretation of the expression 'to sue' and (3) the reasoning in the context of the nature of the partition suit wherein even a defendant was in the position of a plaintiff. He added one more ground based on Section 44 of the Transfer of Property Act which reads as under :-

44. Where one or two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this Section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

He emphasized that in view of Section 44 of the Transfer of Property Act a stranger transferee of a share of a dwelling house belonging to an undivided family would not be entitled to joint possession and that unless Section 4 was interpreted so as to enable a member of the undivided family to exercise his right to compel the stranger to self his interest, the protection afforded by Section 44 would be rendered nugatory. The Bombay decision to the contrary was discussed in paragraph (13) of the judgement and was sought to be explained on the ground that on the facts of the case the Court itself had held that it was not Section 4 of the Partition Act but Section 2 thereof which was attracted. Four years later the question came up before a Division Bench of

the Orissa High Court in *Alakha v. Jagabandhu*¹¹, The Orissa High Court overruled its earlier view which was in line with the Bombay view reflected in Khanderao's case and cast its lot with the Calcutta and Nagpur High Courts. Reliance was placed on the grounds which had already been articulated. It is, therefore, not necessary to refer to the reasoning which prevailed with the Orissa High Court. Lastly we may refer to a Division Bench judgement rendered by the Patna High Court in *H.N. Mukharjee v. Shyam Sunder Kuer*¹², which is in complete accord with the Calcutta view. Thus, there is a consensus evolved by Calcutta, Orissa and Patna High Courts which have established rapport with the earliest view propounded by Stone, C.J. in Laxman's case in 1937. The reasoning which has found favour with this school of interpretation by and large is as under :-

(1) The object of Section 4 would be partly defeated if Section 4 is so construed as to confer a right only provided the stranger transferee is arraigned as a plaintiff in the suit whereas the object would be completely fulfilled if the expression 'to sue'

⁹ AIR 1957 Mad 156

¹¹ AIR 1971 Oris 127

¹⁰ AIR 1950 Mad 214

¹² AIR 1973 Pat 142

is interpreted in a broad liberal manner which is in accord with the meaning assigned to the expression as stated in Stroud's Judicial Dictionary so as to construe it as applying even to a case where one defends an action.

(2) Reliance is also placed on the circumstance that protection afforded by Section 44 of the Transfer of Property Act would be rendered nugatory unless the expression 'to sue' occurring in Section 4 of the Partition Act was so interpreted.

(3) The peculiar nature of a partition suit wherein even a defendant is for all intents and purposes in the position of a plaintiff.

4. We may now turn to the Bombay reasoning articulated in Khanderao's case. We can do no better than to quote the relevant portion from the judgement of Macleod, C.J. and the concurring opinion of Shah, J. Macleod, C.J. has dealt with the question as under :-

"In this case a decree was passed in a partition suit instituted by one Phulambrikar asking for partition of him one third share of a certain house in Poona. The house is owned by the following persons in equal shares, Phulambrikar who had bought one-third from Bhikaji a member of the original family of owners, Balvant the 2nd defendant a member of that family, and Khanderao the 3rd defendant who derives his title through Gangadhar, a member of the original family. After the partition decree was passed, applications were made by the 2nd defendant under Section 4 of the Partition Act, asking the execution Court to take action under that action with regard to the shares of the plaintiff and the 3rd defendant.

The lower Court granted the application and an appeal against that decision was dismissed. Undoubtedly the 2nd defendant is entitled to have a valuation made of the share of the plaintiff who is a transferee from a member of the original family. But the lower Courts have also granted the application of the 2nd defendant with regard to the

share of the 3rd defendant. That could only be done if the 3rd defendant could be considered as a transferee from a member of the family suing for partition. He is a transferee from a member of the family but it certainly cannot be said that he is suing for partition."

(Emphasis added)

It will be seen that the judgment proceeds on the hypothesis that the transferee from a member of the family cannot be said to be suing for the partition if he is not arraigned as a plaintiff. The question has not been elaborately considered in the context of the aforesaid three reasons which have weighed with the other High Courts, namely, the argument in the context of frustration and fulfillment of the object, the arguments in the contract of Section 44 of the Transfer of Property Act and the argument in the context of the peculiar nature of the partition suit. Shah, J. in his concurring opinion has observed as under :-

"I agree. It is clear that defendant No. 2's application under Section 4 of the Partition Act could succeed only against the person who is a transferee from a member of an undivided family and who sues for partition. I do not desire to express any opinion as to what the effect of the application of defendant No. 2 being granted against the plaintiff under Section 4 would be upon the suit at the stage at which the right to buy out the plaintiff is asserted by the defendant No. 2. That question does not arise at present. But I feel quite clear that Section 4 is limited to the transferee who sues for partition. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may clear his share in a partition suit." (Emphasis added).

It will be seen that Shah J. has also proceeded on the assumption that it was self-evident that the right under Section could be availed of only provided that the stranger transferee was arraigned as a plaintiff or was the person who had initiated the proceedings. None of the aforesaid three dimensions of the matter, namely, the frustration of the object, the perspective from the standpoint of Section 41 of the Transfer of Property Act and the peculiar nature of the partition suit was highlighted before the Court. So also the interpretation of the expression 'to sue' occurring in Section 4 was not considered either by Macleod, C.J. or by Shah J. in view of the fact that it was not argued before the Court that the expression 'to sue' was capable of being used in the context of defending an action as well as adverted to in Stroud's Judicial Dictionary. The other proponent of the Bombay view is the Madras High Court. A learned single Judge of the Madras High Court in B. Ramayya's case has followed the Bombay view. Though the Calcutta and Nagpur decisions were cited before him, he preferred to subscribe to the Bombay view. The aforesaid three facets of the matter, namely, the frustration of the object, the meaning of the expression 'to sue', the nature of the partition suit were not considered by him. It may also be stated that a learned single Judge of the same High Court subsequently has opted for the Nagpur and Calcutta view as has been discussed earlier in the context of Ramaswami a case decided by Natesan J. in 1967.

5. The only other decision which now remains to be considered in support of the Bombay view is a decision rendered by a Full Bench of Allahabad High Court in *Sakhawat Ali v. Ali Husain*¹³, The Nagpur and Calcutta decisions were cited before the learned Judges constituting the Full Bench, but the reasoning unfolded therein did not appeal to them. They endorsed the view of the Bombay High Court in Khanderao's case propounded in the earlier judgment on the subject rendered by the Bombay High Court in 1922. The Full Bench also overruled an earlier decision rendered by a learned single Judge of the same High Court in *Rukmi Sewak v. Munesari*, AIR 1953 Allahabad 332. Though apparently it would appear that the Full Bench has subscribed to the Bombay view, on a close analysis of the decision it is evident that by and large the Full Bench has differed from the Bombay view and has in fact endorsed the Calcutta and Nagpur view subject to a rider. The rider added to the Calcutta view appears to be that the right under Section 4 cannot be availed of in a suit where a stranger transferee is arraigned as a defendant if he has not in terms claimed a share therein in his capacity as a defendant. We will examine the scope of the rider in due course. For the present we wish to emphasize that by and large the Full Bench has subscribed to the Calcutta view which is not in accord with the Bombay view though at first blush it might appear that the Full Bench has endorsed the Bombay view. This will become evident from the following passage extracted from paragraph (8) of the judgment :-

"It is a well established principle that a party to a partition suit, whether plaintiff or defendant, is for many purposes at the same time a plaintiff as well as a defendant; and it has been held that if a defendant transferee in a suit for partition claims a share in the dwelling house he can be treated as a plaintiff for the purposes of

¹³ AIR 1957 All 356

Section 4. In 1956 All LJ 508 , this principle was affirmed by this Court, but it was held that a defendant transferee who had neither entered into possession of the dwelling house nor had claimed a share therein was not and could not be deemed to be a transferee who sues for possession within the meaning of Section 4. The correctness of that decision is not challenged in this reference."

what emerges from the statement of law contained in the aforesaid extract is that the Full Bench recognizes (1) that it is a well established principle that in a partition suit even a defendant is for many purposes at the same time a plaintiff and a defendant and (2) that even if the stranger transferee is arraigned as a defendant in a suit for partition, if he claims a share in a dwelling house, he can be treated as a plaintiff for the purposes of Section 4. It is, therefore, abundantly clear that according to the Full Bench there can be no doubt or dispute about the proposition that it is not essential that a stranger transferee is arraigned as the plaintiff in a suit in order to enable a member of the undivided family to compel him to sell his right on a valuation in enforcement of the right conferred by Section 4. In other words, when a defendant does assert his claim for separation of a share from the dwelling house even in his capacity as a defendant, the right under Section 4 can be availed of by the members of the undivided family. The rider which is added by

the Full Bench has been necessitated on the facts of that case which require to be stated for the purpose of understanding the point. In that case the transferee defendant was not in possession of any part of the dwelling house. Nor had he made any claim for separation of his interest by partition in his capacity as a defendant. It was in the background of the situation that the question came to be examined from that limited perspective by the Full Bench as is evident from the following passage extracted from paragraph (12) of the judgment :-

"The principal question to be decided is the meaning which must be given to the words such transferee sues for partition in Section 4. *Prima facie* these words imply that in order to come within the ambit of the Section the suit must be filed by the transferee, and such appears to be the view of the Bombay High Court, see *Balshet v. Miransaheb*¹⁴, and *Khanderao Dattatraya v. Balkrishna Mahadev*¹⁵, The object of the Section is however to prevent the intrusion of strangers into the dwelling house of an undivided family, and it has been held by other High Courts that the Section should on equitable grounds be so interpreted that it may cover those cases also in which the stranger, although defendant in the suit for partition, claims to be allotted his share, as by making such claim he may legitimately be deemed to be suing for partition. Suppose however that the transferee defendant makes no such claim can the plaintiff obtain the benefit of Section 4 ? In our opinion he cannot do as and we think it makes no difference whether the transferee defendant be in possession of the dwelling house (or part thereof) or not."

(Emphasis added).

The underlined portion from the aforesaid extract makes it clear that the question has been examined from the standpoint of a transferee defendant who does not claim partition or allotment of his share in his capacity as a defendant and the opinion expressed by the Full Bench is in the context of the problem posed from the aforesaid limited perspective.

¹⁴ ILR 23 Bom 77

¹⁵ ILR 46 Bom 341

It is in this light that the conclusion of the full Bench reflected in paragraph (15) of its judgment must be understood. Says the Full Bench :-

"It was not strictly necessary for this court in 1966 All LJ 508 to overrule the earlier decision of 1953 All LJ 13 , the latter case was distinguishable on facts, but in view of what we have said the decision in Rukmi Sewak's case cannot be held to be correct. In that case the defendant was in possession of share in a dwelling house which he had acquired from one of the co-owners. A suit was filed against him for partition by one of the other co-owners, and although the defendant made no claim for the separation of his share, Mushtaq Ahmad, J. granted the plaintiff the benefit of Section 4 of the Partition Act on the ground that that in applied irrespective of whether the transferee of a share is the plaintiff or the defendant. For the reasons we have given, we think that that case was not rightly decided." (Emphasis added).

It will be seen that the Full Bench has reversed the view of Mushtaq Ahmad J. in AIR 1953 Allahabad 332 to the effect that the benefit of Section 4 can be claimed irrespective of whether the transferee is arraigned as a plaintiff or a defendant in the context of a case (1) where the defendant was in possession of a share in the dwelling house and (2) where he had not made any claim for separation of his share. Thus, what emerges is that the Full Bench has taken the view that where a transferee defendant does not in term claim for the separation at his share (regardless of whether he is in possession of the property or a part thereof, or otherwise), the right conferred by Section 4 of the partition Act cannot be availed of by a member of the undivided family. But subject to this rider such a right can be successfully claimed regardless of whether he is arraigned in his capacity as a plaintiff or a defendant which according to the Full Bench is well-established principle. For the sake of record it may be stated that in paragraph (13) a reference is made by the Full Bench to *Assan v. Pathumma*¹⁶, presumably on account of some misconception. Assan's case does not deal with this question at all. We may add that the following passage from the judgment also would support the ratio culled out by us from paragraph 13 of the judgment of the Full bench :

"Where however a word or phrase has more than one meaning, that which is to be attributed to it in a particular case must depend on the context in which it is used. In the context in which the word 'sues' is used in Section 4(1) we do not think that the legislature intended this word to mean also 'or is a defendant in a suit. In our opinion it was clearly the intention of the legislature that the right conferred by Section 4 should accrue to the member of the undivided family only in the events of the transferee seeking to obtain partition of his share in the dwelling house, and we hold therefore that the provisions of Section 4(1) will not apply to a suit for partition in which the stranger defendant does not himself claim the separation of his share. It may be that the construction which in our view should be placed on this Sub- Section well in some instances deprive a plaintiff of a relief to which under a wider interpretation he would be entitled, but as has been pointed out in *Butchi Ramayya v. Venkata Subbarao*¹⁷, a decision with which we respectfully agree, the equity of the statute cannot override its plain meaning."

¹⁶ (1899) ILR 22 Mad 494

¹⁷ AIR 1950 Mad 214

(Emphasis added).

It will be seen that according to the Full Bench the right conferred by Section 4 cannot be availed of when the stranger defendant does not himself claim the separation of his share. As disclosed by the underlined portion the Full Bench has laid stress and learned heavily on the circumstance that the 'stranger defendant does not himself claim the separation of his share'. With due respect to the learned Judge constituting the Full Bench, in our opinion the aspect whether or not the stranger defendant in terms claims the separation of his share cannot be considered as a decisive factor. What difference does it make whether or not he in terms claims the separation of his share ? To attach importance to this circumstance is to attach importance to 'form' rather than to the 'substance'. It virtually amounts to saying that the stranger defendant must use the expression my share may be separated and possession thereof may be made over to me. It is a matter of no

consequence whether or not such a prayer is in terms made by a defendant in his pleading for the very good reason that even if he keeps complete silence the Court is bound to separate his share from the property in question. Surely no Court will allow the exportation of the share of the stranger defendant or make a gift of the share of the stranger defendant in favour of the members of the undivided family. Whether or not such a prayer is in terms made, the Court is bound to pass a suitable order to protect his right in the property. We are, therefore, unable to agree with the view propounded by the Full Bench of the Allahabad High Court in *Sakhawat Ali v. Ali Husain*¹⁸,

6. The resultant position is that in our opinion the four basic reasons which have found favour with a majority of the High Courts, namely, (1) the object will be wholly fulfilled if the Nagpur view is adopted whereas it will be partly defeated if the Bombay view prevails, (2) the protection afforded by Section 44 of the Transfer of 'Property Act' would be rendered meaningless if the Bombay view were to prevail, (3) the expression 'to sue' is capable of being applied even to a defendant in a partition suit who claims an interest in the property and (4) in a partition suit a party is both in the position of a plaintiff as also a defendant are unassailable. As discussed earlier, none of these four strong reasons was flashed on the radar screen when the Bombay High Court viewed the problem way back in 1922. There is no good or effective answer to the aforesaid four strong reasons which impel us to the conclusion that the Calcutta and the Nagpur view is the correct view and that nothing turns on the circumstance whether or not the stranger transferee is arraigned as a plaintiff or a defendant and nothing turns on whether or not he in terms claims the separation of his share, Apart from the aforesaid four reasons which provide a solid basis for the Calcutta and the Nagpur view with which we are inclined to agree, there are some reasons which we can add on our own for reversing the view taken by the then High Court of Bombay in *Khanderao's* a case, namely :-

(1) When a stranger transferee purchases the right, title and interest, of one of the members of the undivided family in a dwelling house, he does it, with full awareness that having regard to the provision contained in Section 44 of the Transfer of property Act he will not be entitled to joint possession or common enjoyment of the house. He must be attributed with notice in this behalf having regard to the express provision purposefully made by the Legislature in Section 44 of the Transfer of Property Act.

(2) If the Bombay view is accepted the right to compel the stranger transferee to

¹⁸ AIR 1957 All 356

sell his interest at a fair valuation can be defeated by a simple device, namely, by refraining from filing a suit for partition and by refraining from making an express demand in terms for separation of his share. He can then hold the other members of the dwelling house to ransom.

(3) The stranger transferee is not put to any loss, damage or disadvantage inasmuch as Section 4 in terms provides for compensation at a fair valuation even if the view which

commends to us is accepted. If on the other hand the Bombay view prevails, he can virtually blackmail the other members of the joint family having interest in the property by obliging them to pay the price quoted by him in order to get rid of him.

(4) Since a majority of the High Court in India have taken the view which is contrary to the Bombay view, for the sake of uniform application of the identical provision of law vis-a-vis all the citizens India, irrespective of the place where they happen to reside, the other view must prevail.

7. In our opinion, therefore, the view taken by the Bombay High Court in Khanderao's case must be overruled and we must fall in line with the majority of the High Courts in India. The question referred to the Full Bench is accordingly answered as under :-

8. On a true interpretation of Section 4 of the Partition Act, 1893, we hold that the right conferred thereunder to compel a transferee of a share of a member of an undivided family in a dwelling house when such a transferee is not himself a member of the family, to sell his share at a valuation, can be availed of by a member of the undivided family having a share in the said dwelling house irrespective of whether the suit has been instituted by such transferee as a plaintiff. The right can be availed of even if the suit has been instituted by a member of the undivided family as plaintiff and the stranger transferee is arraigned as a defendant, and even if such stranger transferee does not in terms claim the separation of his share in the property.

9. And time is now ripe for the epilogue we promised at the outset. We confer we are unaware of any judicial system which tolerates a situation where the same law having no geographical nexus confers a right on a citizen or deprives him thereof depending on the capricious circumstance in which part of the State the citizen happens to breathe the national air. Take the case we have dealt with just now. A member of an undivided family has been able to avail of the right conferred by Section 4 of the Partition Act, even when arraigned as a plaintiff, in Bengal since 1929 whereas he has been denied this right in Bombay and Gujarat till now. Thus, the right conferred by the same All India statute is meaningful to a citizen in Calcutta and meaningless in Bombay and Gujarat. The identical provision means one thing in one part of the State and just the contrary in another part of the State. It attends the concept of one Nation, as also the concept of equality before law which our Constitution has proclaimed in 1950. An unfortunate widow will be able to claim compensation for the loss of her husband in a motor car accident in one State but not in another depending on how the law is interpreted in the different States. Which is her greater misfortune ? Loss of husband in accident or belonging to a different State of the same Nation which promises equality before law but fails to ensure that the promise is kept ?

10. An equally chaotic situation prevails in the context of the Central Excises and Salt Act, 1914, fiscal Statutes like the Income-tax, Wealth Tax, Estate Duty Act etc. till the law is finally settled by the Supreme Court years later. By the very nature of the system it sometimes takes 10 or 15 years before the question is finally settled. If the provision of a fiscal Statute attracts tax liability in one State and not in another, if the same provision exempts an article from duty in one State and not in another, it can result in havoc and anarchy. A manufacturer in one State can be driven

out of business by his rival from another State by the time the question is finally settled 10 or 15 years later. A consumer in one State would have to pay more till the question is finally resolved. And when it is so resolved, even if the assessee succeeds, the consumer who has paid more and suffered for 15 years will not get relief. What the consumer was made to pay will be refunded, not to him, but to the trader or manufacturer who collected from him, and will result in a windfall to the latter by way of 'unjust enrichment'. One who suffers injustice is not rewarded compensation. Compensation is awarded to one who has suffered no injustice. X who has not suffered the wrong is awarded compensation for the wrong done to Y. And all this happens as there is no mechanism to administer the very same law in a uniform manner. It will not do to give way to despondency, raise one's hands in desperation, and say the problem defies solution. A solution must be found and will have to be found. Even so it would not be proper for us to suggest any solution as 'the ideal solution'. We cannot do so because the time and resources available to us at present along with the limitations imposed by our office, and the occasion, will not permit us to undertake an in-depth study which can lead to a well considered formula for solving the problem. It will be for the Law Ministry, which can seek the guidance of the Law Commission, if so advised initial a search for the solution. On our part we can do no more than hint at a formula which occurs to us in passing. An agency created with the sole purpose of overseeing the implementation of laws can be created. Such an agency can keep abreast of the controversies having far-reaching impact on Revenue Laws and laws having a socioeconomic dimension and other beneficent legislation etc. raised in different High Courts, or forums, and decisions rendered by Courts or Tribunals in the context of such laws. Such an agency can suggest an annual or biennial legislation which makes the legislative intent explicit and clears the mist of uncertainty with an eye on efficacious and uniform enforcement of the concerned laws. So also, we do not see why an internal agency can not be created by the Finance Ministry for the uniform and non-discriminatory administration of the laws concerning revenue. It would not be unfair or unrewarding to ensure that the same interpretation is placed by all Collectorates irrespective of their geographical locations in order to collect revenue, and to grant refund, and the machinery is set in motion with the same object, every where, or nowhere. This course, if adopted, will not mar the image of the department or diminish respect for it. On the contrary, it will allay the charge that, at times, discriminatory implementation is made with same ulterior motive or for some oblique reason.

11. We now conclude this epilogue with the hope that authorities that be will take the necessary steps at the earliest. We express this hope not because of any serious concern left by us for the earlier mentioned atheist who may or may not turn to God in desperation. We do so on account of the anxiety felt by us for those who have immense faith in the judicial establishment and are firm believers in the system, lest they become atheists in desperation.

Question answered accordingly.